

**Exploring the legal complexities of the reparations
mandate of the International Criminal Court under
Article 75(1) and (2) of the Rome Statute: A
jurisprudential critique**

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For my late father, Mr Pascal Kwanje and my late adopted father, Mr Yaw Fosu-Amoah.

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ABSTRACT

The traditional approach to ensuring justice for victims of serious crimes has always been about the prosecution and punishment of perpetrators. The adoption of the *Rome Statute of the International Criminal Court* in 1998 set the stage for bringing justice to victims as individuals and collectives of communities that suffered harm. The *Rome Statute* portrays an inherently unique framework for the protection and participation of victims. This framework includes reparations in their favour. As such, reparations in the *Rome Statute* signifies progress with regards to 'repairing' harm suffered by victims. It transcends the predominantly retributive approach, and by including reparations, it takes a restorative and inclusive process that can be described as victim-centric justice.

One of the central mandates of the *Rome Statute* is to provide reparations, as articulated in article 75(1) and (2). Article 75(1) and (2) expounds on the mandate given to the International Criminal Court (hereafter ICC or the Court) to develop principles governing the award for reparations. It also bestows discretionary power on the Court to make orders for reparations against convicted individuals. The Court's reparations mandate, as provided in the *Rome Statute*, remains novel and unprecedented in the domain of international criminal justice: the reparations mandate is the first explicit provision on the imposition of reparations against individual perpetrators.

However, the Court's reparations mandate causes friction between, on one hand, the prosecution and punishment of perpetrators of serious crimes, and the civil dimension of reparations for victims, on the other hand. This friction arises from a doctrinal blurriness in the practical divide between the civil dimension of reparations and the criminal dimension of punishing individual perpetrators. The reparations mandate puts the Court in a situation in which it must provide retributive justice, and reparation measures that appropriately address the harm done to victims (both natural and juristic persons). These two conceptions have sparked interesting debates in legal scholarship, particularly because retributive justice is a fundamental element of international criminal justice. The challenges presented by civil and criminal aspects

of the Court's reparations mandate interest legal scholars, although there is limited literature on the legal complexities pertaining to the fulfilment of this developing mandate of the Court.

This thesis examines the legal complexities that arise in the implementation of the reparations mandate by the Court. It investigates the provisions as articulated in article 75(1) and (2) of the *Rome Statute*, and how they practically provide reparations for victims. In this context, the thesis analyses the principles of reparations developed in the jurisprudence of the Court through case law. These cases include: *The Prosecutor v Thomas Lubanga Dyilo*, *The Prosecutor v Germain Katanga*; *The Prosecutor v Ahmad Al Faqi Al Mahdi*; and *The Prosecutor v Bosco Ntaganda*.

Further, the thesis submits an analysis drawn from the implementation of reparation principles in the above-mentioned cases. It also explores the ensuing legal complexities, which include the implications of reparation orders against convicted individuals, the definition of harm and causation in relation to reparations, and the relationship between the Trust Fund for Victims and the Court in cases where convicted persons are indigent.

This thesis unpacks both procedural and substantive legal complexities arising from the execution of the reparations mandate by the Court. It also explores how the Court gradually shaped and developed principles on reparations on a case-by-case basis and the central role that the Trust Fund for Victims has played in the implementation of reparation orders. It is expected that findings derived at the end of the thesis will make a crucial contribution to legal scholarship with reference to holding individual perpetrators accountable by, *inter alia*, providing reparations for victims.

LIST OF ABBREVIATIONS AND ACRONYMS

ACHR	American Convention on Human Rights
Cardozo L Rev	Cardozo Law Review
Case W Res J Int'l L	Case Western Reserve Journal of International Law
CERD	Convention on the Elimination of All Forms of Racial Discrimination
COVID-19	Corona Virus Disease 2019
CPPED	International Convention for the Protection of All Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
Crim L Forum	Criminal Law Forum
CUP	Cambridge University Press
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Fordham Int'l LJ	Fordham International Law Journal
FPLC	Patriotic Forces for the Liberation of Congo
IACtHR	Inter-American Court of Human Rights
IAEHR	Inter-American and European Human Rights Journal
ICC	International Criminal Court

ICCPR	International Covenant on Civil and Political Rights
ICGJ	Oxford Reports on International Courts of General Jurisdiction
ICJ	International Court of Justice
ICL	International Criminal Law Reports
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IER	Independent Expert Review
IHRR	International Human Rights Reports
ILC	International Law Commission
IMT	International Military Tribunal, Nuremberg
IMTFE	International Military Tribunal for the Far East
J Int'l L & Int'l Rel	Journal of International Law & International Relations
LSE	London School of Economics
Md L Rev	Maryland Law Review
Mich J Int'l L	Michigan Journal of International Law
OUP	Oxford University Press
Pace Int'l L Rev	Pace International Law Review
PCIJ	Permanent Court of International Justice
PELJ	Potchefstroom Electronic Law Journal
PTC	Pre-Trial Chamber

San Diego L Rev	San Diego Law Review
SGBV	Sexual and Gender-Based Violence
Sup Ct Rev	Supreme Court Review
T Jefferson L Rev	Thomas Jefferson Law Review
Tul J Int'l & Comp	Tulane Journal of International and Comparative Law
UDHR	Universal Declaration of Human Rights
UN	United Nations
UPC	United Patriots of the Congo
US	United States of America
VPRS	Victims Participation and Reparations Section
Wash U Global Stud L Rev	Washington University Global Studies Law Review

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Chapter 1

Introduction and Problem Statement

1.1 Background to the study

Acts of genocide and other crimes in international law perpetrated in Africa and beyond illustrate the importance of ending impunity.¹ Since these criminal acts also amount to human rights violations, they invoke the rights of victims to pursue effective remedies for the harm suffered. To this, Shelton opines that the right to an effective remedy is a customary principle found in international law and in all legal systems that place the responsibility to redress the harm suffered by another on the one who caused it.² At the time of writing this thesis, more than 150 individuals have been camping outside the Constitutional Court of South Africa seeking reparations for apartheid crimes for over 100 000 victims and their families.³ This shows that remedying harm caused to victims is an essential element of justice. International law recognises the right to an effective remedy through its treaties and soft law, which make use of the term reparations.⁴ Although both remedies and reparations provide redress for harm and other injuries suffered by victims, the two should not be confused. The term remedy has a double meaning in that, on the one hand, it refers to access to justice, which entails the availability of judicial, administrative, or other bodies that can redress the injury caused by the perpetrator.⁵ On the other hand, it

¹ States that have experienced genocide and other serious international crimes include Germany, Rwanda, the former Yugoslavia, Guatemala, Sudan, the Democratic Republic of Congo, Uganda, Central African Republic and Mali – see Contreras-Garduno *Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations* 2. It is worth stating that at the time of the commission of crimes in Germany, the word 'genocide' was not used / not in existence. It was only codified as an independent crime in *the Convention of the Prevention and Punishment of the Crime of Genocide* (1948).

² Shelton 2007 *Torture* 96.

³ Mutandiro 2022 <https://www.groundup.org.za/article/protesters-sleep-outside-the-constitutional-court-demanding-apartheid-reparations/>.

⁴ These include Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (hereafter *Draft Statute on State Responsibility*) and 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 (2005) (hereafter *Basic Principles and Guidelines on the Right to a Remedy*).

⁵ A 5 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) (hereafter *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*).

refers to measures undertaken to "make good the damages caused."⁶ As Cohen puts it, "A common purpose of reparations is that of remedial justice, in order to correct the wrong done and rectify injustice by restoring the *status quo ante*".⁷ To take this position further, the underlying attribute of reparation is to restore the victim to the position they were before the commission of the crime. Thus, correcting the harm done remains intricate for reparations to be meaningful to victims.

Remedies are procedural and depend on availability and procedure, while reparations are concerned with the outcome of those procedures. As such, reparations are substantive.⁸ Also, reparations depend on the availability of recourses for addressing the harm suffered and are often ordered by independent and impartial bodies.⁹

It is a general rule of both the civil and the common law that every invasion of a private right imports an injury and that for every injury the law gives a remedy.¹⁰

Reparations have a substantive component which refers to measures available for addressing the harm committed against victims.¹¹ Hence, reparations are broader than remedies. The main concept behind reparations is to enhance the rights of victims and their interests in both domestic and international legal systems. Moffett says the following regarding reparations:

Reparations as a vehicle of remedy are victim-centred measures of redress to vindicate victims' rights. As such victims are in the front passenger seat giving directions on what reparations are appropriate in redressing their harm, with judges steering the process.¹²

⁶ Tomuschat 2002 *Tul J Int'l & Comp L* 167-168.

⁷ Cohen *Reparations for International Crimes and the Development of a Civil Dimension of International Criminal Justice* 46.

⁸ See Shelton *Remedies in International Human Rights Law* 7-9.

⁹ International Commission of Jurists *The Right to a Remedy and Reparation for Gross Human Rights Violations* 52.

¹⁰ *Opinion in the Lusitania Cases* 1923 Vol VII 32-44 (Reports of International Arbitration Awards) at 35.

¹¹ For instance, A 9(5) International Covenant on Civil and Political Rights (1966) (hereafter *ICCPR*) provides that:

Anyone who has been the victim of unlawful arrest or detention shall have an *enforceable* right to compensation." This submits the inference that compensation as a kind of reparation can be made for victims of unlawful arrests and detention.

¹² Moffett 2017 *International Journal of Human Rights* 1213.

I concur with Moffett's explanation above and add that specific forms of reparations include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.¹³ They may be awarded to direct and indirect victims who have suffered harm as a result of wrongful acts. This makes reparations a "part of justice that provides redress for the consequences of human rights and humanitarian law violations."¹⁴ This thesis aligns with this proposition in the context of the nature of reparations in the *Rome Statute of the International Criminal Court*.¹⁵ However, the only drawback of the *Rome Statute* is that it excludes satisfaction and guarantees of non-repetition in its reparation framework. Isn't there any literature holding different views? Or you selected only the ones that you consider are in support of your argument?

To further justify the above and to best construe the reparations framework of the International Criminal Court,¹⁶ two important questions need to be asked: first, who is legally obligated to make reparations and second, who will benefit from these reparations? Cohen submits that reparations serve to punish the offender and discourage future wrongdoing.¹⁷ In this situation, the nature and scope of reparations operate as a deterrence in addition to creating a bridge between the sanctions for the crimes and the repair for such crimes.¹⁸ Bearing this in mind, it makes conceptual sense to consider reparations as stressing the synergy of criminal prosecution of the individual perpetrator, repairing the harm caused, and restoration of the victim in the position prior the harm was committed.

In international criminal justice, reparations present a novel advancement towards protecting victims and their interests. However, reparations are under-explored in the

¹³ Principles 19-23 of 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* (2005). Also see A 34 of the *Responsibilities of States for Internationally Wrongful Acts* (2001).

¹⁴ Shelton *Remedies in International Human Rights Law* 18 (emphasis added).

¹⁵ Rome Statute of the International Criminal Court (1998) (hereafter *Rome Statute*).

¹⁶ Such references will only be limited to the Pre-Trial Chamber, the Trial Chamber, and the Appeal Chamber.

¹⁷ Cohen *Reparations for International Crimes and the Development of a Civil Dimension of International Criminal Justice* 46-47.

¹⁸ Cohen *Reparations for International Crimes and the Development of a Civil Dimension of International Criminal Justice* 46-47.

literature on ending impunity for serious crimes in international law. Before the adoption of the *Rome Statute*, no international criminal tribunal had the mandate to deal with the issue of reparations for victims of international crimes which constitute serious human rights violations.¹⁹ Article 75 of the *Rome Statute* introduced reparations for victims. Article 75(1) and (2) make it possible for victims to claim reparations against convicted individuals. The reparations element is a unique feature which fosters the success of the Court.²⁰ In addition, the extension of individual criminal responsibility to reparations enables victims of serious crimes to seek redress through an international criminal mechanism. Arguably, this is an unprecedented and much needed feature of international criminal justice, as it ensures that in addition to the imposition of individual criminal responsibility, perpetrators are held liable for reparations. This makes international criminal justice victim-centric. However, the implementation of the provisions of article 75(1) and (2) of the *Rome Statute* has met legal complexities, which are explained below.

It must be noted first that in all civilised legal systems, it is trite law that victims of human rights violations have a right to an effective remedy to repair the harm suffered as a result of violations.²¹ Since every human rights violation constitutes a breach of an international obligation, states in breach of such obligations have a responsibility to provide a remedy²² in line with numerous international human rights instruments which recognise the right to a remedy. The first instrument that recognises the right to a remedy is the Universal Declaration of Human Rights (*UDHR*), whose article 8 states that:

¹⁹ Prior to the *Rome Statute*, some international tribunals dealt with retributive aspects of international crimes. Examples of instruments which established tribunals for international crimes include the Charter of the International Military Tribunal, Nuremberg (1945) (hereafter *Charter of the Nuremberg Tribunal*), the Charter of the International Military Tribunal for the Far East (1946) (hereafter *Charter of the IMTFE*); the Statute of the International Criminal Tribunal for the Former Yugoslavia (1993) (hereafter *Statute of the ICTY*); the Statute of the International Tribunal for Rwanda (1994) (hereafter *Statute of the ICTR*); and the Statute of the Special Court of Sierra Leone (2000) (hereafter *Statute of the Special Court of Sierra Leone*).

²⁰ *The Prosecutor v Thomas Lubanga Dyilo, Decision on the Prosecutor's Application for a Warrant of Arrest* ICC, Case No. ICC-01/04-01/06 (hereafter *Lubanga case, Decision on the Prosecutor's Application for a Warrant of Arrest*) para 136.

²¹ A 8 of the Universal Declaration of Human Rights (1948) (hereafter *UDHR*).

²² A 1 of the *UDHR; Draft Statute on State Responsibility*.

Everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.²³

However, the *UDHR* constitutes soft law, as it does not impose binding obligations for the simple reason that it is a declaration. Notwithstanding, the substantive provisions of the *UDHR* formed the cornerstone upon which subsequent international human rights instruments were developed with respect to the right to an effective remedy. These instruments include the *ICCPR*,²⁴ and the *Convention against Torture*.²⁵

Regional human rights instruments also recognise the right to an effective remedy. These include the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,²⁶ the *Inter-American Convention on Human Rights*,²⁷ and the *African Charter on Human and Peoples' Rights*.²⁸ The *Malabo Protocol*, which is yet to come into force, provides that:

The Court shall establish in the Rules of Court principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitations.²⁹

The above regional instruments provide the substantive content of the right to an effective remedy. States must fulfil this right by availing remedial measures for wrongful acts. In addition, State Parties must adopt measures aimed at spearheading the promotion and protection of the right to an effective remedy.³⁰ This will guarantee victims an opportunity to pursue an effective remedy for human rights violations and validate the *ubi jus ibi remedium* principle, which essentially means that "a right can

²³ A 8 of the *UDHR*. Also see A 2 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) (hereafter *Convention against Torture*), which considers any act of torture or other cruel, inhuman or degrading treatment or punishment as a violation of the human rights and fundamental freedoms proclaimed in the *UDHR*.

²⁴ A 2(3)(a) of the *ICCPR*.

²⁵ A 14(1) of the *Convention against Torture*.

²⁶ A 13 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) (hereafter *European Convention on Human Rights*).

²⁷ A 25(1) of the *American Convention on Human Rights* (1969) (hereafter *American Convention on Human Rights*).

²⁸ A 7(1) of the *African Charter on Human and Peoples' Rights* (1981) (hereafter *Banjul Charter*).

²⁹ A 45(1) of the *Malabo Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (2014) (hereafter *Malabo Protocol*). Even though the *Malabo Protocol* is yet to come into force, some of its provisions make it worthy to state.

³⁰ Agbor 2017 *PELJ* 4.

only protect a person insofar as that person has access to a remedy following a violation of that right."³¹

In the *Factory at Chorzów* case, the Permanent Court of International Justice (PCIJ) endorsed the view that a person who bears responsibility for an injury should be made to repair it:

The essential principle is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.³²

This reasoning is corroborated by the current United Nations' soft law regime on the right to a remedy for human rights violations. The soft law regime is predominantly shaped by the *Basic Principles and Guidelines*, which outline various kinds of reparations, including restitution, rehabilitation, compensation, satisfaction, and guarantees of non-repetition. The *Basic Principles and Guidelines* further provide a conceptual framework for providing victims with a prompt, proportionate, adequate, and effective remedy for harm suffered as a result of human rights violations.³³ The *Basic Principles* state that:

It is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights and international humanitarian law.³⁴

The right to an effective remedy can only be invoked if there is an international obligation requiring a standard that ought to be observed and when that standard has been breached, "taking into account the object and purpose and the facts of the case."³⁵ In this regard, Agbor opines that:

The right to an effective remedy has a direct bearing on every other substantive human right. This relationship is founded on the fact that these instruments recognise that every victim whose rights have been violated is legally entitled to an effective remedy by the competent national tribunals.

³¹ Contreras GD *Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations* 35; Thomas 2004 *San Diego L Rev* 1633.

³² *Germany v Poland Factory at Chorzów* 1928 PCIJ (ser A) No 17 (Sept 13) (hereafter *Germany v Poland Factory at Chorzów*).

³³ Principle 15 of the *Basic Principles and Guidelines on the Right to a Remedy*.

³⁴ Principle 26 of the *Basic Principles and Guidelines on the Right to a Remedy*.

³⁵ Shelton "Remedies and Reparation" 368.

In short, the justiciability of any human rights violation is directly related to the right to an effective remedy.³⁶

From the above view posited by Agbor, it can be said that reparations have the protection of international human rights as an undertone in ensuring its implementation. Thus, one cannot separate reparations from human rights because both are considered to work 'hand-in-glove'.

International instruments that make use of the term 'remedy' do not define what it means and do not provide clues on the kind of remedies that may be awarded. Within the context of international human rights law, the term remedies is construed broadly to include restitution, rehabilitation, satisfaction, compensation and guarantees of non-repetition.³⁷ The purpose of these remedies is to repair the harm caused by human rights violations. These measures are reparative and entail financial compensation, restitution of the victim to the position in which he/she was prior to the commission of the violation, rehabilitation and ensuring that there are guarantees of non-repetition through measures that ensure that such violations do not reoccur.³⁸

The foregoing discussion illustrates that remedies and reparations are synonymous. In this thesis, the term reparation refers to the substantive meaning of reparation in article 75 of the *Rome Statute*. According to Moffett, reparations consist of procedural and substantive elements.³⁹ In this vein, procedurally, reparations refer to processes that enable victims to participate, claim and appeal decisions. Substantive elements of reparations involve measures for redressing the harm suffered by victims.⁴⁰ In addition, reparations seek to redress violations and promote human rights. This is because, in international criminal justice, crimes stipulated under articles 5 to 8 of the *Rome Statute* have human rights connotations.⁴¹ For instance, genocide, crimes against humanity, and war crimes involve violations of human rights. Similarly,

³⁶ Agbor 2017 *PELJ* 4.

³⁷ See Principles 15 and Principle 22 of the *Basic Principles and Guidelines on the Right to a Remedy*.

³⁸ Principle 19- 23 of the *Basic Principles and Guidelines on the Right to a Remedy*; Agbor 2017 *PELJ* 3-4.

³⁹ Moffett 2017 *International Journal of Human Rights* 369.

⁴⁰ Moffett 2017 *International Journal of Human Rights* 369.

⁴¹ According to A 5 – A 8 of *Rome Statute*, the crimes listed and falling within the jurisdiction of the Court are genocide, crimes against humanity, war crimes, and the crime of aggression.

genocide, war crimes and murders perpetrated as part of crimes against humanity violate the right to life. When committed as a crime against humanity, genocide or war crime, rape violates the victim's right to physical integrity and liberty. The same applies to torture, persecution and extermination. When one considers the nature of crimes over which the ICC has jurisdiction, it is important not to lose sight of the human rights violations that are triggered by the commission of such crimes, including injuries and, direct and indirect harm that are suffered by the victims as a result of their commission. Although this thesis is focused on reparations in the light of international criminal justice, the impact of international human rights on reparations cannot be ignored. In the *Lubanga* case, the Appeal Chamber held that:

Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights.⁴²

As previously indicated, there were no provisions for reparations in international criminal justice prior to the adoption of the *Rome Statute*. Thus, the question arises of how the *Rome Statute* fills this void in international criminal justice. In accordance with the reparation provisions outlined in article 75 of the *Rome Statute*, victims may advance claims for reparations against persons who have been found guilty in international criminal proceedings.⁴³

Article 75 of the *Rome Statute* implies that the right to reparations under international law is satisfied in the framework of international criminal proceedings through the Court.⁴⁴ This makes the Court a forum for not only ensuring justice for victims of the crimes but also one in which the harm suffered during the commission of such crimes is repaired through reparations. Arguably, the reparations mandate of the Court is unprecedented and, thus, attracts keen interest from legal scholars who seek to

⁴² *Prosecutor (on the Application of Victims) v Lubanga Dyilo (Thomas), Judgment on the appeal of Mr Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006* ICL 1509 (ICC 2006) (hereafter *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court*) para 37.

⁴³ The *Draft Statute on State Responsibility* did not contain any provision on reparations to victims – see ICJ "Report of the International Law Commission on the Work of its Forty-Sixth Session."

⁴⁴ Zappalà *Human Rights in International Criminal Proceedings* 159 – 160.

understand the legal complexities that may affect its implementation presently and in future.

The few cases that have already reached the reparations phase show that the Court has already made some commendable progress regarding the development of Principles and Guidelines for reparations. The cases have given the Court an opportunity to elaborate its work in accordance with the mandate set in article 75(1) and (2) of the *Rome Statute*. The Court's reparations mandate mirrors a change from a prosecutorial approach which champions retributive justice and deterrence through punitive measures, to one that is victim-centric and that seeks to repair the harm suffered by victims.⁴⁵ This broad victim-centric perspective did not subsist during the Nuremberg Trials and successive international criminal justice mechanisms that were put in place. A victim-centred perspective not only seeks to restore the victims but also aims to reconcile the convicted person with the victims.⁴⁶ Therefore, the Court's reparation mandate is the first international justice mechanism to move away from the exclusive accused-oriented model that focuses on deterrence and punishment to a model that addresses and centres their victims.⁴⁷

At the time of writing, four cases serve as the Court's jurisprudence in relation to reparations. These are *The Prosecutor v Thomas Lubanga Dyilo*,⁴⁸ *The Prosecutor v Germain Katanga*,⁴⁹ *The Prosecutor v Ahmad Al Faqi Al Mahdi*,⁵⁰ and *The Prosecutor v*

⁴⁵ Bassiouni 2006 *Human Rights Law Review* 203-279. This is also articulated in A 68 para 3 of the *Rome Statute*, which stipulates that:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the *Rules of Procedure and Evidence*."

⁴⁶ *Katanga case, Prosecutor (on the Application of Victims) v Katanga (Germain), Order for Reparations Pursuant to Article 75 of the Statute* ICL 1774 (ICC 2017) (hereafter *Katanga case, Order for Reparations*) para 268.

⁴⁷ Balta, Bax and Letschert 2019 *International Criminal Justice Review* 2.

⁴⁸ *Situation in the Democratic Republic of the Congo, Prosecutor (on Behalf of Legal Representatives of the Victims) v Dyilo (Thomas, Lubanga), Decision Establishing the Principles and Procedures to be Applied to Reparations* ICL 1552 (ICC 2012) (hereafter *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations*).

⁴⁹ *Katanga case, Order for Reparations*.

⁵⁰ *Situation in Mali, Prosecutor (on the application of Victims) v Al Mahdi (Ahmad Al Faqi), Reparations Order* ICL 1813 (ICC 2017) (hereafter *Mahdi case, Reparations Order*).

Bosco Ntaganda.⁵¹ In addition, the Court's jurisprudence is expressed in the *Ntaganda Appeal Decision*.⁵² The *Lubanga* case was the first opportunity for the Court to develop principles for the award of reparations. In the three subsequent cases, the Court applied its principles consistently, as will be shown in this thesis.

1.2 The preparatory road to the inclusion of reparations in the *Rome Statute*

In *Aloeboetoe v Suriname*, it was HELD that:

Every human act produces diverse consequences, some proximate and others remote... Thus, it is that all human actions cause remote and distant effects.⁵³

This view fits the context of international criminal justice and the framework in which it provides justice for human rights violations. However, there has always been criticism that the available structures did not give individual victims a right to reparation.⁵⁴ Although compensation and restitution were provided in previous *ad hoc* criminal tribunals, reparation orders were never made. The *ad hoc* criminal tribunals were faced with challenges such as who should receive reparations and, where possible, from where the funding for settling reparation orders would come.⁵⁵ Previous international courts and *ad hoc* tribunals failed to provide significant progress in recognition of the rights of victims in this context because they were devoid of a direct referral to reparations other than retribution and deterrence.⁵⁶ These issues were eminent before the Court. However, the approach taken by the Court presents a

⁵¹ *Situation in the Democratic Republic of the Congo, Ntaganda (Bosco) (on the application of Victims) v Prosecutor, Reparations Order* ICL 2033 (ICC 2021) (hereafter *Ntaganda case, Reparations Order*).

⁵² *Situation in the Democratic Republic of the Congo, Prosecutor (on the Application of Victims) v Ntaganda (Bosco), Judgment on Mr Bosco Ntaganda's Appeal Against the Decision Reviewing Restrictions on Contacts of 7 September 2016* ICL 1775 (ICC 2017) (hereafter *Ntaganda case, Appeal Against the Decision Reviewing Restrictions*).

⁵³ *Aloeboetoe v Suriname* 1993 Series C No15 IACHR (hereafter *Aloeboetoe v Suriname*) para 48.

⁵⁴ Moffett *Justice for Victims Before the International Criminal Court* 150.

⁵⁵ Moffett 2017 *International Journal of Human Rights* 371.

⁵⁶ A 24(3) of the *Statute of the ICTY*; A 23 (3) of *Statute of the ICTR*. See also, *Prosecutor v Tadic* IT-96- 21-Y Judgement 1998 ICTY (hereafter *Prosecutor v Tadic*) para 21; *The Prosecutor v Akayesu* ICTR-96-4-T Sentence 1998 ICTR (hereafter *Prosecutor v Akayesu*) para 19.

unique way of prosecuting while also repairing harm.⁵⁷ The ICC has moved beyond this rhetoric.

The Preparatory Committee tasked with the drafting of the *Rome Statute* was faced with two issues, mainly state responsibility for reparations and direct orders for reparations against individuals.⁵⁸ Consideration had to be made on the appropriateness of including reparations in criminal matters, particularly because of their complexity and the mass victims involved in serious international crimes.⁵⁹ Thus, the 1993 draft of the *Rome Statute* specifically stated in article 73(b) that the Court could make a reparation order against the state provided that the convicted person who committed the offence was acting in his/her official capacity on behalf of the state in question and within his/her authority.⁶⁰ If the crime was committed by a non-state actor, the Court could recommend that such a state grant appropriate relief in terms of article 73(c).⁶¹ In other words, the state would be responsible if the accused was indigent.⁶² However, these provisions did not satisfy the needs of the victims. Article 75 of the final draft of the *Rome Statute* specifically embodied a significant shift from the traditional approach of prosecuting states to placing that responsibility on individuals. This is a different approach to redressing the harm suffered by victims.⁶³ As such, the purpose of criminal proceedings is individual accountability for crimes⁶⁴ and their punishment.⁶⁵ Therefore, individuals are not seen as abstract entities through which the provisions of international law can be enforced.⁶⁶

⁵⁷ Moffett 2017 *International Journal of Human Rights* 371.

⁵⁸ United Nations "Report of the Preparatory Committee on the Establishment of an International Criminal Court"; Moffett *Justice for Victims Before the International Criminal Court* 152.

⁵⁹ ICJ "Report of the International Law Commission on the Work of its Forty-Fourth Session" paras 88-92.

⁶⁰ United Nations "Report of the Preparatory Committee on the Establishment of an International Criminal Court" 116-118.

⁶¹ United Nations "Report of the Preparatory Committee on the Establishment of an International Criminal Court" 116-118.

⁶² Principle 6 of the *Basic Principles and Guidelines on the Right to a Remedy*.

⁶³ McCarthy 2012 *Journal of International Criminal Justice* 351.

⁶⁴ *The Prosecutor v Dragan Obrenovic, Sentencing Judgement* IT-02-60/2-S 2003 ICTY (hereafter *Prosecutor v Dragan Obrenovic*) para 46.

⁶⁵ McCarthy 2012 *Journal of International Criminal Justice* 352.

⁶⁶ International Military Tribunal *Trial of the Major War Criminals before the International Military Tribunal Nuremberg* 223.

The foregoing analysis shows that punishing individual perpetrators through retributive justice does not suffice in providing justice for victims and that, instead, reparations are necessary.⁶⁷ Individual criminal responsibility, as opposed to state responsibility, provides access for victims to claim reparations through the Court.⁶⁸

1.3 Problem statement

Article 75 of the *Rome Statute* set a novel path in international criminal justice by providing reparations for victims against individual perpetrators. As noted earlier, it is a key feature of the Court's success in executing its mandate to ensure justice for international crimes.⁶⁹ Rule 98 of the Court's *Rules of Procedure and Evidence*⁷⁰ and the creation of a Trust Fund for Victims advance international criminal justice.⁷¹ They reaffirm the right to reparations against convicted individuals. As shown by its wording, article 75 reflects a victim's right to reparations within the framework of international criminal justice.

In discussing the right to reparations in the *Rome Statute*, the starting point is article 75(1) and (2), from which the Court obtains a specific mandate:

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss or injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.⁷²

Hence, individual responsibility is a key component of the Court's reparative mandate. In other words, the wrongful conduct of an individual perpetrator is a prerequisite for claiming reparations for victims who have suffered harm arising from that wrongful

⁶⁷ Muttukumaru "Reparations to Victims" 264.

⁶⁸ Muttukumaru "Reparations to Victims" 268.

⁶⁹ *The Prosecutor v Lubanga ICC Corrigendum of Decision on the Prosecutor's Application for a Warrant of Arrest Article 58* 2006 ICC-01/04-01/06-1 Pre-Trial Chamber (hereafter *The Prosecutor v Lubanga ICC Corrigendum of Decision on the Prosecutor's Application for a Warrant of Arrest Article 58*) para 150.

⁷⁰ Rules of Procedure and Evidence (2002) (hereafter *Rules of Procedure and Evidence (ICC)*).

⁷¹ Rule 97 of the *Rules of Procedure and Evidence (ICC)*; A 79 of the *Rome Statute*.

⁷² A 75(1) and (2) of the *Rome Statute*.

conduct. Article 75(2) stipulates that an order for reparations is against the convicted person and not the accused person. As discussed below, this presents complexities.⁷³ It should also be noted that the reparations mandate of the Court is not intended to punish perpetrators but to compensate victims for harm committed against them. For this reason, the reparations awarded by the Court against a convicted individual should not be punitive but should ensure that convicted persons make amends for harm inflicted on victims by repairing such harm.⁷⁴

The *Rome Statute* advanced a reparative justice theory in international criminal justice. To sum what this theory means, it seeks to atone for the suffering victims endured as a result of the abuses of their human rights, reparative justice measures. As a result, such acts must by definition consider both the pertinent context and the actual experiences of the victims. For instance, parties who are victims have the right to express their views and concerns under article 68(3) of the *Rome Statute* when their own personal interests are at risk. The word "shall" in the text of article 68(3) suggests that the victims' right to voice their views and concerns is not subject to the Court's exercise of any permissive discretion when the various prerequisites of the provision are satisfied. Thus, victims are not placed as mere witnesses in criminal proceedings as is custom in national jurisdictions but participate in such proceedings as potential beneficiaries of reparations which are due to them by virtue of harm suffered. This point was stressed in the *Katanga* case in which the Court stated that:

The Court must strive [...] to ensure that reparations are meaningful to the victims and that, to the extent possible, they receive reparations which are appropriate, adequate and prompt.⁷⁵

The Appeals Chamber established five essential elements that, at a minimum, must be contained in a reparations order.⁷⁶ These elements comprise the principles that are

⁷³ Shelton *Remedies in International Human Rights Law* 12.

⁷⁴ A 75(2) of the *Rome Statute*.

⁷⁵ *Katanga case, Order for Reparations* para 15.

⁷⁶ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* paras 32; 118.

appropriate in each context and which are different from the Court's power to interpret and apply the law as it is.⁷⁷ These principles are:

- (i) The order must be directed against a convicted person.⁷⁸
- (ii) The order for reparations must establish and inform the convicted person of the scope of his/her liability with respect to the reparations awarded in the order.⁷⁹
- (iii) The order must specify and provide reasons for the type of reparations ordered (whether collective, individual or both) pursuant to rules 97(1) and 98 of the *Rules of Procedure and Evidence*.⁸⁰
- (iv) The order must define the harm caused to both direct and indirect victims as a result of the crimes for which the person was convicted. It must also identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case.⁸¹
- (v) The order must identify victims eligible to benefit from the awards or reparations. It must set out the criteria for measuring the harm suffered by the victims and the crimes for which the person was convicted.⁸²

In the *Katanga, Mahdi and Ntaganda* cases, these five principles were applied without modification despite the fact that in each of them, specific legal complexities arose with regard to the interpretation and application of these principles. Based on an interpretation of these principles and a critical analysis derived from these four cases,

⁷⁷ McCarthy 2012 *Journal of International Criminal Justice* 131.

⁷⁸ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 65, para 76.

⁷⁹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 32, para 118.

⁸⁰ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 32.

⁸¹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 32, para 181.

⁸² *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 32, para 205, para 214.

one can identify some possible legal complexities arising from their procedural and substantive characters. The following discussion draws attention to these complexities.

The first complexity that arises pertains to the fluidity of the implementation of these principles. In the *Lubanga* case, the Appeals Chamber stressed that the five principles are:

[G]eneral concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers⁸³

In other words, the Appeals Chamber was saying that the principles are not cast in stone, are not definite and do not set binding standards. This contradicts the need for certainty in the application of the principles so that they become a true reflection of the spirit and purpose of article 75(1) of the *Rome Statute*.⁸⁴ On one hand, there is a view that these principles are applied on a case-by-case basis, as seen in the *Lubanga* case.⁸⁵ A call for pre-established principles on reparations has been rejected, while the case-by-case approach was highlighted by the Trial Chamber in the *Lubanga* case.⁸⁶ However, the case-by-case approach has been criticised because it raises some legal issues, such as its erosion of legal certainty due to its flexibility.⁸⁷ This flexibility may result in some inconsistencies. Thus, it is worth exploring the uncertainty surrounding these principles to establish whether they should have a homogenous methodology of application.

The second complexity relates to blurriness in the definition of harm and its limitation. Article 75(1) mentions damage, loss and injury but does not clarify whether these terms carry the same definition. It also lacks clarity on the extent and limit of harm required to become eligible for reparations.⁸⁸ The *Lubanga* case alludes that harm

⁸³ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 3.

⁸⁴ Reparations (2011).

⁸⁵ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 181.

⁸⁶ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 181

⁸⁷ Redress Trust "Board of Trustees' Report and Financial Statements for the Year Ended 31st March 2011."

⁸⁸ A 75 of the *Rome Statute*; War Crimes Research Office "The Case-Based Reparations Scheme at the International Criminal Court" 36.

denotes hurt, injury or damage, which is not necessarily direct. However, the harm should be personal to the victim. The *Mahdi* case extended harm to economic loss. The inference drawn from these cases is that damage, loss and injury are synonymous to harm. This can be confusing. Clarity on the definition of terms is essential for reparations to be appropriate, adequate and prompt.

Despite the fact that the terms "damage, loss, or injury" are explicitly addressed in the context of reparations in article 75, it is not evident from the *Rome Statute* and *Rules of Procedure and Evidence*⁸⁹ whether there is a limitation on the types of harm that may be sought for reparations. This ambiguity implies that the Court's jurisprudence is still underdeveloped in examining the extent of harm. As such, it leaves room for an inconsistent approach when, for example, one Chamber disapproves of moral injury while another approves it. This indicates that the Court does not explicitly apply the same expansive definition of harm for purposes of reparations as it did for participation for victims in article 68(3) of the *Rome Statute*.

The third complexity pertains to the appropriate test to be used to establish causation for reparation. In this regard, Agbor opines that:

The harm suffered by the victim must be attributable to the offence for which the accused is convicted. Put simply, harm suffered is limited to the offences for which there has been a conviction, and not for all the offences for which the accused was indicted.⁹⁰

When inferring from Agbor's submission, there has to be an established link between the crime, the conviction of such crimes and the reparation award provide. As such, the harm suffered by the victim must be specifically connected to the crime for which the accused is found guilty. Harm suffered only relates to the crimes for which the accused was found guilty, not to all of the offences for which they were charged. The *Lubanga* case set two standards for proving causation. It established the proximate cause and the 'but for' test.⁹¹ It should be mentioned that the proximate cause test and the 'but for' test coexist in relation to the crime and the harm in question because

⁸⁹ *Rules of Procedure and Evidence (ICC)*.

⁹⁰ Agbor 2018 *African Yearbook on International Humanitarian Law* 115.

⁹¹ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 250.

conviction must be the proximate cause for seeking reparations.⁹² However, the Trial Chamber in the *Lubanga* case did not submit any definition of what constitutes proximate cause or the "but for" test. Inevitably, this led to the vagueness of these standards.⁹³

Article 75(2) of the *Rome Statute* stipulates that a reparations order can only be made against a convicted person. It requires individuals accountable for serious crimes to make amends to victims for the harm they caused and gives the Court the ability to ensure that perpetrators are held responsible for their actions.⁹⁴ In other words, if there is no conviction, which establishes individual criminal responsibility, there is no basis for reparations.⁹⁵ This conviction-centred approach to reparations is problematic because it essentially means that reparations will be made after the accused has been found guilty. This, in turn, denotes accountability through reparations by making the convicted person account for the wrongful acts.⁹⁶ However, making reparations conditional upon convictions is problematic because it leaves some victims without reparations.

The fourth complexity pertains to the appropriateness of the modality of reparations to victims. Article 75(1) refers to modalities of reparations such as restitution, compensation and rehabilitation. These are not limited as the Court can grant reparations with symbolic, preventative or transformative value.⁹⁷ In the *Lubanga* case, the Appeals Chamber stressed that appropriate modalities for reparations must ensure that victims obtain redress for the harm they have suffered.⁹⁸ In light of this, the issue is that in cases of community victimisation, there is uncertainty on the appropriate modality for repairing harm suffered by victims. This raises questions such

⁹² *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 250.

⁹³ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 9.

⁹⁴ *Mahdi case, Reparations Order* para 27.

⁹⁵ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 65; *Katanga case, Order for Reparations* paras 15, 251.

⁹⁶ See also A 76(3) of the *Rome Statute*.

⁹⁷ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 222.

⁹⁸ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* paras 211–212.

as, what is the appropriate modality for harm suffered in non-monetary terms for mass victimisation? Should harm be of a recoverable nature? In the *Lubanga* case, the Appeals Chamber noted that some damages suffered by victims are unquantifiable in monetary terms. Leaving this unresolved may hamper the Court's reparative mandate in future cases.

Arguably, making an award for reparations against a convicted individual will be unfavourable to all victims who have suffered harm arising from the unlawful actions of the perpetrator because, in some cases, victims are excluded. For instance, in the *Lubanga* case, victims of sexual violence and rape were not covered. In the *Katanga* case, victims of violations that occurred before 24 February 2004 were not eligible for reparations, while in the *Mahdi* case, the focus was placed on victims who suffered harm from the destruction of cultural property in Timbuktu. In the *Ntaganda* case, victims of sexual violence, torture and murder were excluded. Article 75(1) requires weighing victimhood against the conviction of individual perpetrators. This brings about a hierarchy of victim eligibility or victim selectivity. Victim eligibility denotes that reparations are add-ons founded on the identification, prosecution and conviction of the accused in a criminal trial. This contradicts the victim-centred vision of the *Rome Statute*.⁹⁹

The fifth complexity is related to the indigency of convicted persons as far as their liability for reparations is concerned. This was seen in the *Lubanga* case, where the convicted person was ordered to make reparations even though he was indigent. One may then ask: what are the implications of the Court ordering monetary reparations in cases where the convicted individual is indigent? To this question, Trial Chamber I in the *Lubanga* case held that:

The convicted person has been declared indigent and no assets or property have been identified that can be used for the purposes of reparations. The Chamber is, therefore, of the view that Mr Lubanga is only able to contribute to non-monetary reparations. Any participation on his part in symbolic reparations, such as a public or private apology to the victims, is only

⁹⁹ Moffett 2017 *International Journal of Human Rights* 1207.

appropriate with his agreement. Accordingly, these measures will not form part of any Court order.¹⁰⁰

This approach leads to another question: where does responsibility lie in providing monetary reparations? In the *Lubanga* case, the Court relied on Rule 146(2) of the *Rules of Procedure and Evidence* to consider the financial capacity of the convicted person but rejected that defence in the *Bemba* case. On the face of it, one can argue that the indigence of a convicted person exonerates him from paying monetary reparations. In such circumstances, the Court will draw from other resources "that the Trust Fund for Victims has made reasonable efforts to make available."¹⁰¹ Be that as it may, there is no set precedent on how the Court should resolve matters of monetary reparations in the case of an indigent convicted individual.

Kabalira¹⁰² says that the Court needs to motivate its decision and show how indigence would not stand in the way of an order of monetary reparations. Two debates emanate from this proposition. On one hand, legal scholars such as Muttukumaru state that "[w]hatever form the reparations may take, they must be sufficiently practicable, clear and precise to be capable of enforcement" and that they must "take account of the offender's means."¹⁰³ Ashworth, on the other hand, argues that:

Imposing large financial burdens on impecunious offenders may increase the probability that the offender will commit further offences, thereby victimising more citizens.¹⁰⁴

I concur with the above views and state that indigence of the convicted person remains intricate in guaranteeing reparation awards especially for compensation provided to victims. These different views also reveal two issues, the first of which is the convicted person's obligation to provide reparations. The second is their (in)capacity to pay for such reparations due to indigence. This invokes the role of the Trust Fund for Victims in article 79 of the *Rome Statute*, read with article 75(2). One

¹⁰⁰ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 269.

¹⁰¹ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 271.

¹⁰² Kabalira *The Right to Reparations Under the Rome Statute of the International Criminal Court (ICC)* 10.

¹⁰³ Muttukumaru "Reparations to Victims" 307.

¹⁰⁴ Ashworth 1986 *Oxford Journal of Legal Studies* 110.

of the mandates of the Trust Fund for Victims is to transfer money or property derived from collected fines and forfeitures from the convicted person through an order of the Court. In addition, the Trust Fund for Victims plays the role of a supplementary funder for reparation orders where the convicted person is indigent, and their resources are insufficient to meet their obligations in terms of a reparation order.¹⁰⁵

Although the Trust Fund for Victims provides compensatory reparation, it is fully responsible in circumstances when the convicted accused is indigent. The following observation in the *Bemba* acquittal is worth mentioning:

It is emphatically not the responsibility of the International Criminal Court to ensure compensation to all those who suffer harm as a result of international crimes. We do not have the mandate, let alone the capacity and the resources, to provide this to all potential victims in cases and situations within our jurisdiction.¹⁰⁶

What, then, are the implications on the role of the Trust Fund for Victims in cases where the convicted individual is indigent, and how does this affect the modalities for reparations? This issue lies at the heart of the fact that the Court is not primarily a reparations court and does not have the capacity and resources to provide compensation to all victims in cases falling within its jurisdiction.

The sixth complexity is that the Court faces a challenge as a result of the procedural complexity of handling a reparation matter during a criminal prosecution. The Court consolidates trials that include reparations hearings based on the precedent set by the four reparative cases. This raises a problem because if the Court wants to make reparations effective for victims, it may not be possible to combine the trial and hearing evidence for convicting the accused person on the one hand and reparations on the other. The view in this thesis is that the Court cannot currently afford the procedural challenge that could result from not having a separate trial for reparations.

¹⁰⁵ Reg 56 of the Regulations of the Trust Fund for Victims (2005) (hereafter *Regulations of the Trust Fund for Victims*).

¹⁰⁶ *The Prosecutor v Jean-Pierre Bemba Gombo Separate Opinion Judge Christine Van den Wyngaert and Judge Howard* 2018 ICC-01/05-01/08-3636-Anx2 Appeals Chamber (hereafter *Prosecutor v Jean-Pierre Bemba (Separate Opinion)*).

Given the foregoing analysis, this thesis will further investigate the legal complexities arising from the Court's reparation mandate.

The last complexity is that of: who is considered to be a victim eligible for reparations? The Court has not provided a precise definition on this. Following this, it can be argued that victims in a trial are different from victims who are entitled to claim reparation. Article 75(1) of the *Rome Statute* mandates that reparations be made "to, or in respect of, victims." A sizable number of victims are typically involved in reparations. However, it is challenging to pinpoint the precise number of victims due to the passage of time and the pervasive and organised nature of the crimes committed. Furthermore, the substantive law on reparations does not precisely define what a victim is for reparations purposes. Instead of emphasising reparations, the *Rome Statute* includes allusions to and attaches itself to victim participation in legal procedures. Likewise, the four reparations cases do not offer any fresh insight to the understanding of this issue. This raises an array of challenging issues worthy of exploration such as, what/who constitutes a victim for the purpose of receiving reparation, and what is the substantive law that determines a victim's eligibility for reparations?

1.4 Research question

In view of the wording of Article 75 of the Rome Statute (mandating the Court to develop principles on the award of reparations) and the jurisprudence developed so far by the Court, what legal complexities arise in the determination of an award for reparations for serious crimes in international law?

1.5 Hypothesis and assumptions

1.5.1 Hypotheses

The central hypothesis behind this thesis is that legal complexities that arise in the application of article 75(1) and (2) of the *Rome Statute* may, in the long run, affect the award for reparations. A pre-emptive disquisition that will guide the Court in future reparative cases and potentially solve these complexities, in the long run, is crucial for future developments of the reparations mandate. Other hypotheses that inform this thesis are as follows:

- (i) The Court's approach of adapting and modifying the principles established in terms of article 75(1) may create fluidity and inconsistency, as it signals that these principles are amendable and should be applied on a case-by-case basis.
- (ii) An order for reparations against convicted persons in accordance with article 75(2) give rise to a hierarchy in victimhood which is evident in the narrowing down of charges for which the accused can be convicted.
- (iii) Establishing the harm suffered by victims and linking that to the conviction of the accused may be difficult and leaves a grey area concerning the type(s) of reparations to be awarded to victims.
- (iv) The role of the Trust Fund for Victims in fulfilling reparations orders does not exonerate the convicted individual from monetary reparations.

1.5.2 Assumptions

This thesis is informed by the following assumptions:

- (i) A large proportion of victims of serious crimes do not receive reparations due to a reparations order not covering for the conviction of such atrocities.
- (ii) Establishing harm for reparations is essential in the award for reparations for victims.
- (iii) In the reparations discourse, too much focus is given to monetary reparations to the exclusion of other vital reparations.
- (iv) It has been necessary for the TFV to act in its assistance capacity in reparative cases because all individual perpetrators have been indigent at the time of the making of orders for reparations against them.

1.6 Aim and objectives

Given the novelty of reparations in the Court's mandate, the aim of this thesis is to explore the legal complexities that arise in the application of the established principles

on reparations. To achieve the above aim, the thesis sets to achieve the following objectives:

- (i) To investigate legal complexities that arise in the implementation of the principles of reparations formulated by the Court in terms of article 75(1) of the *Rome Statute*.
- (ii) To examine the implications of a reparations order against a convicted person and its impact on victims who are not covered by such an order.
- (iii) To assess the appropriateness of defining harm for reparations purposes and the difficulties emanating from such a definition.
- (iv) To analyse the implications of making a reparations order against a convicted person who is indigent and to explore how it affects monetary reparations for victims.

1.7 Structure

Chapter 1: Introduction and problem statement

This is the present chapter, which provides the context of the thesis, the problem statement, scope and objectives. It establishes the framework for the Court's reparations mandate and sheds light on the procedural and substantive complexities that may arise in the future when the Court makes orders for reparations.

Chapter 2: The evolution of reparations for victims in international criminal justice

The second chapter analyses the jurisprudence on justice for victims prior to the inclusion of reparations in the *Rome Statute*. It traces the main contentions regarding the question of reparations in international criminal tribunals established prior to the ICC. This analysis will inform the inclusion of reparation orders against convicted individuals in the *Rome Statute*. This discussion will aid understanding of article 75(1) of the *Rome Statute*, which deals with principles of reparations, and article 75(2) of the same, which regulates orders for reparations.

Chapter 3: The reparation principles through the jurisprudence of the Court

The third chapter discusses the four reparation cases and how they applied established principles of reparations set down in the *Lubanga* case. The purpose of this chapter is to contextualise the reparation principles and how each of them was applied in the respective cases. The third chapter will also briefly highlight the procedural and substantial complexities arising from the implementation of the principles and orders for reparations as outlined in the *Lubanga*, *Katanga*, *Mahdi* and *Ntaganda* cases.

Chapter 4: Procedural complexities

The fourth chapter expands the analysis of procedural complexities arising from the Court's reparation mandate with regard to the implementation of article 75(1) and (2) of the *Rome Statute*. The procedural complexities derive from the four reparative cases that will be analysed in chapter 3. The fourth chapter will also investigate how procedural complexities may possibly arise in the implementation of the ICC's reparative mandate in future.

Chapter 5: Substantive complexities

The fifth chapter will examine substantive complexities arising from the construction and application of reparation principles and their possible implications on future reparative cases.

Chapter 6: Findings and recommendations

The sixth chapter will provide a concise summary of the thesis and draw conclusions from the discussion in previous chapters. It will also make recommendations for enhancing the Court's reparation mandate in the interests of advancing the aims of international criminal justice as envisaged by the *Rome Statute*.

1.8 Research methodology

Since the thesis relies heavily on jurisprudence developed in the four reparation cases, it extensively utilises primary sources of law, which include international instruments and case law. The jurisprudential critique on the interpretation and systemisation of

norms regulating the legal framework of the ICC reparative mandate draws from principles of international criminal law from decided case law, in addition to secondary sources of law such as books and periodicals. These sources aid in creating dialogue and highlighting the various grey areas that need development to address issues faced by the ICC in its reparations mandate under article 75(1) and (2) of the *Rome Statute*.

The analysis of the jurisprudence of the Court through primary and secondary sources gives this thesis a qualitative character. Therefore, ethical issues that often arise in research which require contact with participants do not apply. The primary and secondary sources on the Court's reparative mandate are analysed at arm's length to protect the integrity of the analysis and to ensure that, where applicable, both sides of the argument are advanced and unpacked. This will protect the soundness of the findings and recommendations in Chapter 6 of this thesis.

Chapter 2

Evolution of Reparations in International Criminal Justice

2.1 Introduction

The end of the Second World War necessitated the establishment of international criminal tribunals to extradite and try perpetrators of crimes against humanity committed on a global scale never seen before.¹⁰⁷ Since national courts were unable and, at times, unwilling to hold individuals accused of atrocities accountable, it was crucial to establish international criminal tribunals. The lack of impartiality within states required international tribunals to ensure that victims of atrocities received justice.¹⁰⁸ This is because State sovereignty thrived in terms of reparations for victims: if a victim made a claim for reparations, the sovereign State was to "represent" their interests and claim reparations for international crimes. In other words, a State-based approach was to be used.¹⁰⁹ This functioned as an underlying principle of international law.

However, the notion of justice at the time was centred on retribution through criminal prosecution, conviction and punishment of perpetrators.¹¹⁰ The concept of individual criminal responsibility for punishment developed to the extent that 'justice for victims' was restricted to conventional and customary international criminal law, which limited it to retribution and punishment of perpetrators.¹¹¹ The interpretation of who was a 'victim' of atrocities "lost the very attention of [the] international judicial system" because the position of victims was limited to their newly found statuses as victim-witnesses.¹¹² This begged the question of how victims would participate in the trials and receive reparation.

The Nuremberg and Tokyo trials, the international criminal tribunals for Rwanda and the former Yugoslavia, and the hybrid tribunals for Lebanon, Sierra Leone and

¹⁰⁷ Moffett *Justice for Victims Before the International Criminal Court* 60.

¹⁰⁸ Garkawe "The Role and Rights of Victims at the Nuremberg International Military Tribunal" 86.

¹⁰⁹ Colonomos A and Armstrong A "German Reparations to the Jews after World War II: A Turning Point in the History of Reparations" 390.

¹¹⁰ Zegveld 2010 *Journal of International Criminal Justice* 254.

¹¹¹ Gagneja 2019 *ILI Law Review* 218-219.

¹¹² Gagneja 2019 *ILI Law Review* 219.

Cambodia, contributed to the creation of an image of victim-witnesses whose role was to help secure the criminal conviction of the accused. As a result, victims who were entitled to reparations for losses resulting from violations of international human rights law received little attention.¹¹³ A strict retributive system for crimes and punishment of specific criminals, which focused on holding perpetrators criminally accountable, overshadowed the possibility of reparations.

As such, there was no reparations framework in international criminal justice prior to the implementation of the *Rome Statute*. Hence, article 75 of the *Rome Statute* is unique in that it provides for reparations in favour of victims. It takes the concept of individual criminal responsibility a step further by including reparations in addition to the retributive aspects of international criminal justice. The victim-centric perspective on the right to reparations under the *Rome Statute* places victims at the centre of international criminal proceedings. It is a laudable change in the development of a victim-oriented international justice system.¹¹⁴ It is based on the simple reason that repairing victims for harm suffered is an essential component of ending serious international crimes.¹¹⁵

In the context of the foregoing, this chapter analyses the evolution of reparations in international criminal justice. It begins with a review of human rights perspectives on the right to reparations as understood in international and regional law. This illustrates the interconnectedness of international criminal law and international human rights law in the provision of reparations for victims. The second part of this chapter examines the approach to victims and reparations in the wake of the Nuremberg and Tokyo criminal trials, as well as the *ad hoc* criminal tribunals of the former Yugoslavia and Rwanda, and the hybrid tribunals of Lebanon, Sierra Leone and Cambodia. The third section explores the paradigm shift in international criminal law on reparations and emphasises the reparation framework provided in article 75(1) and (2) of the

¹¹³ See A 6 of the *Charter of the Nuremberg Tribunal*; Proclamation Defining Terms for Japanese Surrender (1945) (hereafter *Potsdam Declaration*) para 10; A 20(1) of the *Statute of the ICTY*, which mirrors A 20(1) of the *Statute of the ICTR*. See Shelton *Remedies in International Human Rights Law* 2.

¹¹⁴ A 19(3), A 68(3) of the *Rome Statute*. See also, Muttukumaru "Reparations to Victims" 264.

¹¹⁵ Leyh 2012 *International Criminal Law Review* 376.

Rome Statute. The purpose of this chapter is to present an analysis of how reparations have evolved in international criminal law. The chapter identifies issues that have remained constant over time and discusses the transformation brought by the adoption of the *Rome Statute*. This analysis is essential for comprehending the Court's reparative jurisprudence and the legal complexities that arise from implementing the reparation mandate.

2.2 A human rights perspective on reparations

2.2.1 Recognition of reparations in international law

The severity of crimes committed during the First and Second World Wars gave victims legal standing to seek reparation from their states for the infringement of their human rights on an international level.¹¹⁶ This promoted the acceptance and growth of the right to reparations. In this regard, international human rights law placed emphasis on the civil dimension of reparations through state responsibility than on individual perpetrators.¹¹⁷ Although inadequate, this international human rights law approach continues to be relevant because it offers precedents that could be adapted to specific circumstances in international criminal law. This seeks out peace among people, groups, and the entire community in order to re-establish some degree of social cohesion, which is important.¹¹⁸ This intertwines international human rights law and international criminal law on the understanding that victims are the intended recipients of reparations for violations of human rights.¹¹⁹ As a result, obtaining victim justice requires the right to reparations, among other things.¹²⁰

The *UDHR* is the cornerstone of international law relating to human rights. It provides everyone with the right to an effective remedy through relevant national tribunals for

¹¹⁶ A 8 of the *UDHR*; A 2(3), A 9(5) of the *ICCPR*; and A 14(6) International Convention on the Elimination of All Forms of Racial Discrimination (1965) (hereafter *ICERD*); A 39 of the Convention on the Rights of the Child (1989) (hereafter *Convention on the Rights of the Child*); A 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987) (hereafter *Convention against Torture*).

¹¹⁷ Cohen *Reparations for International Crimes and the Development of a Civil Dimension of International Criminal Justice* 52 -53.

¹¹⁸ Parmentier 2009 *Promotio Iustitiae* 65.

¹¹⁹ Bassiouni 2006 *Human Rights Law Review* 209.

¹²⁰ Bassiouni 2006 *Human Rights Law Review* 231.

acts that violate the fundamental rights granted by each state's constitution and other laws.¹²¹ The right to reparations is a crucial component for providing an effective remedy.¹²² Reparations which comprise the substantiveness of the right to an effective remedy, refer to, among other things, placing a victim back in the position they were in prior to the human rights violation that occurred, i.e., restitution. It also entails compensating the victim for the loss suffered as a result of the violation. Importantly, it entails admission of wrongdoing by perpetrators, apologies, symbolic acts such as the erection of memorials and guarantees of non-repetition.¹²³

The Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power¹²⁴ follows the approach of the *UDHR*. It defines victims as:

[p]ersons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.¹²⁵

This definition provides a constructive direction for international criminal law in its adjudication of the entitlements of victims emanating from harm committed against them. The *UN Victims' Declaration* further calls for measures to strengthen access to justice for the victim, fair treatment, restitution and compensation, treatment with respect and dignity, and provision of general assistance to victims.¹²⁶

Another instrument worth mentioning is the *Basic Principles and Guidelines*, which set the right to adequate, effective, and prompt reparation for the harm suffered.¹²⁷ Guideline 15 provides that adequate, prompt and effective reparation must be granted

¹²¹ A 8 of the *UDHR*.

¹²² *Silver v United Kingdom* IHRL 41 (ECHR 1983) (hereafter *Silver v UK case*) para 113; Principle C(a) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) (hereafter *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*).

¹²³ For a detailed discussion of remedies, see United Nations *Rule-of-Law Tools for Post-Conflict States*.

¹²⁴ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

¹²⁵ Principles 1 and 18 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

¹²⁶ Principles 1-17 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

¹²⁷ Principles 19-23 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

in proportion to the gravity of violations and harm suffered and that states are responsible for ensuring enforcement.¹²⁸

Adequate reparations are reparations that are proportional and equitable to the harm suffered.¹²⁹ The *Basic Principles* foster a dual mandate for repairing harm by requiring access to justice on one hand and the provision of reparations on the other. Yogendra says that in this context, reparations must address and ameliorate the harm suffered by victims by providing material benefits, financial compensation, and collective, individual and symbolic reparations - which include the erection of memorials and public apologies by perpetrators.¹³⁰

The *Basic Principles and Guidelines* outline five types of reparations, which are restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹³¹ Restitution refers to re-establishing the victim's status *quo ante* and depends on the circumstances of each victim. For instance, it may entail re-establishing the victim's social situation and family life.¹³² Compensation refers to reparations for quantifiable harm suffered as a result of economic, mental and moral injuries.¹³³ Rehabilitation deals with the provision of medical and psychological care.¹³⁴ Satisfaction and guarantees of non-repetition are geared towards the cessation of violations, making official apologies and judicial rulings that restore the dignity and reputation of victims.¹³⁵

The above reparations are provided to individual and collective victims of gross violations of international human rights law.¹³⁶ However, the *Basic Principles and Guidelines* are soft law which is not binding on states, notwithstanding that they

¹²⁸ Principle 15 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. Also see A 2(3)(a)-(c) of the *ICCPR*.

¹²⁹ *Case of Loayza Tamayo v Peru* (IACtHR 1998) (hereafter *Loayza Tamayo v Peru*) para 86.

¹³⁰ Yogendra 2017 Amsterdam Law Forum 68. See *Bulacio v Argentina (Separate Opinion of Judge Cançado Trindade)* IHRL 1483 (IACHR 2003) (hereafter *Bulacio v Argentina*); *Loayza Tamayo v Peru* para 90.

¹³¹ See further principles 19-23 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

¹³² De Greiff "Justice and Reparations" 3.

¹³³ De Greiff "Justice and Reparations" 3.

¹³⁴ De Greiff "Justice and Reparations" 3.

¹³⁵ De Greiff "Justice and Reparations" 3.

¹³⁶ Principle 8 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

crystallise the standards of international law that encourage access to equal and effective justice and reparation for human rights abuses.¹³⁷ This proposition finds support in the *UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, which provides that the right to reparations shall encompass individual measures addressing the right to restitution, compensation and rehabilitation, and general measures of satisfaction that are established by international law.¹³⁸

The foregoing analysis illustrates that the violation of human rights cannot be separated from the enforcement of criminal law. This reinforces support for the right to reparations. The right to reparations can only be activated when a primary right has been violated.¹³⁹ Agbor argues in favour of this position and alludes to the fact that there must first be a human rights violation, after which repair through reparations must follow.¹⁴⁰ This means that before a right to reparations can be invoked, there must be a violation of a human right.¹⁴¹ In fact, the Court uses human rights law to inform its interpretation of reparations. In the *Lubanga* case, the Appeals Chamber said that:

Human rights underpin the Statute; every aspect of it ... Its provisions must be interpreted, and more importantly applied in accordance with internationally recognized human rights [...].¹⁴²

To support the above assertion, the Court further inferred and affirmed the content of human rights as stated in article 21(3) of the *Rome Statute*. This article supports the recognition of international human rights through the "application and interpretation of law... [which] must be consistent with internationally recognised human rights."¹⁴³

¹³⁷ Principle 11(c) of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*; Rusten *The Right to Truth and Reparation for Victims of Gross Human Rights Violations* 13.

¹³⁸ Principle 34 of the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (2005) (hereafter *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*).

¹³⁹ Zegveld 2010 *Journal of International Criminal Justice* 503.

¹⁴⁰ Agbor 2017 *PELJ* 10.

¹⁴¹ Agbor 2017 *PELJ* 10.

¹⁴² *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 37.

¹⁴³ A 21(3) of the *Rome Statute* (emphasis added).

The Court's approach is informed by the view that it is endowed with jurisdiction pertaining to serious crimes that concern the international community, such as genocide, war crimes¹⁴⁴ and crimes against humanity,¹⁴⁵ all of which are criminalised by the *Rome Statute*. To strengthen the protection of victims' human rights, international criminal law highlights the criminal responsibility of the convicted perpetrator towards victims who are beneficiaries of reparations.¹⁴⁶

It is necessary to ponder how article 75 relates to article 21(3) of the *Rome Statute* regarding the promotion and protection of internationally recognised human rights. The response to this question is projected in the legal framework of the Court, which provides victims with a voice and enables them to receive reparations for human rights violations originating from serious crimes.¹⁴⁷ Among other reasons, the Court's narrowly focused reparations mandate helps to achieve this. Since the Court derives its reparations precedents from principles of international human rights law, it imposes reparations against convicted individuals to the extent of their individual criminal liability and in favour of victims whom the Court recognises.¹⁴⁸

Given that reparations are considered a response to human rights violations, it can be inferred that the retributive approach remains ironic. The emphasis on retribution may result in the absence of reparations and failure to adequately fulfil the needs of victims, which are essentially intended to repair the harm suffered. This is significant because reparations put victims back in the position they were in prior to the violation of international obligations.¹⁴⁹ Thus, there is a possibility that the likelihood of victims receiving reparations is remote, notwithstanding that they are influenced by human rights law.

However, making reparations contingent on the conviction of individual perpetrators differs from international human rights law, which awards reparations against states

¹⁴⁴ A 8 of the *Rome Statute*.

¹⁴⁵ A 7 of the *Rome Statute*.

¹⁴⁶ Monageng and Heinze 2016 *International Criminal Court and Africa* 71.

¹⁴⁷ Monageng and Heinze 2016 *International Criminal Court and Africa* 68.

¹⁴⁸ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 27; *Mahdi case, Reparations Order* para 27.

¹⁴⁹ *Germany v Poland Factory at Chorzów* at 21; See Shelton *Remedies in International Human Rights Law* 30-31, 38.

even in the absence of prosecution and conviction of persons for such crimes.¹⁵⁰ It should be noted, nonetheless, that the Court was not established as an international human rights court and that its pursuit of justice should be viewed as a component of a broader legal framework that promotes the respect of human rights for victims.¹⁵¹ Nevertheless, the international human rights mandate of the Court seeks to treat victims humanely, respect their dignity and human rights.¹⁵²

2.2.2 *Hard law instruments: precepts from international law*

To understand the theoretical underpinnings that guided the construction of the doctrinal foundations of reparations in international criminal justice, one must place it within the larger context of international law. At the wake of the end of the Second World War, it became apparent that the crimes against humanity perpetrated during the war needed to be held accountable and that punishing those responsible helped restore the international system of justice. It was no longer desirable to hold only the state, an abstract body, exclusively accountable without prosecuting individual perpetrators who committed mass atrocities.¹⁵³ It would have been difficult for individuals to be treated as subjects of international law, appear in court, and be punished under that system as inter-State conflicts were the sole focus of international law.¹⁵⁴ Article 34 of the *Responsibility of States for Internationally Wrongful Acts* lays out the fundamentals of a state's obligation to make reparations arising from a breach of an international obligation. As it succinctly states

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.¹⁵⁵

¹⁵⁰ *Case of Velásquez Rodríguez v Honduras, Interpretation of the Judgment of Reparations and Costs* IHRL 1390 (IACHR 1990) (hereafter *Rodríguez v Honduras*) para 134; *Pueblo Bello Massacre v Colombia* Serie C No. 140, Inter-American Court of Human Rights (IACrHR), 31 January 2006 (hereafter *Pueblo Bello Massacre v Colombia*) paras 91, 112; Also see Moffett and Sandoval 2021 *Leiden Journal of International Law* 3-4.

¹⁵¹ Monageng and Heinze 2016 *International Criminal Court and Africa* 68-69.

¹⁵² *Katanga case, Order for Reparations* para 30.

¹⁵³ Cohen *Reparations for International Crimes and the Development of a Civil Dimension of International Criminal Justice* 40.

¹⁵⁴ Cohen *Reparations for International Crimes and the Development of a Civil Dimension of International Criminal Justice* 41.

¹⁵⁵ A 34 of the *Responsibility of States for Internationally Wrongful Acts* (2001).

The above indicates that reparations are grounded on state responsibility in international law. The protection of human rights, which requires states to investigate and protect victims of human rights violations, is intrinsic to this understanding.¹⁵⁶ States must provide victims of human rights violations with access to reparations, in addition to prosecuting and holding perpetrators responsible for violations. Hence, the right to reparations cannot be eschewed even if victims waive it. This makes every state obligated to ensure that its legal system protects all rights and freedoms from international breaches.¹⁵⁷

Considering the aforementioned, the approach to reparations in international criminal law has progressively been influenced by international law, giving rise to reparations being sought against an individual perpetrator in a criminal proceeding. This interpretation, however, cannot be separated from state responsibility and the provision for reparations under international law.¹⁵⁸ Furthermore, article 31 of the *Responsibility of States for Internationally Wrongful Acts* establishes that "the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".¹⁵⁹ In the interpretation of international law emerged other avenues for victims to seek reparations at the level of international human rights law. This comes as a result of human rights treaties and avenues that draw foundation from international law have defined victims' rights to obtain reparations. This has been explained under 2.2.1. As will be shown further below, regional law also makes possible for the prospect of providing reparation for infringements of a right either provided for in a treaty or convention. As the Appeals Chamber in the *Katanga case* stated, the purpose of reparations which is to repair the harm that was inflicted by the victims corresponds with the general principle of public international law that reparations should, where possible, attempt to restore the *status*

¹⁵⁶ International Commission of Jurists *The Right to a Remedy and Reparation for Gross Human Rights Violations* 23.

¹⁵⁷ *Garrido v Baigorria v Argentina (Reparations)* I/ACtHR, Judgment of 27 August 1998, Series C No. 39 (hereafter *Garrido v Baigorria v Argentina (Reparations)*) para 72.

¹⁵⁸ See A 36(2)(d) of the *Statute of the International Court of Justice* (1945).

¹⁵⁹ A 31 of the *Responsibility of States for Internationally Wrongful Acts*

quo ante.¹⁶⁰ This is the Court's "raison d'être" which is to provide reparation to those who have been most injured by serious crimes.

Other international instruments uphold the importance of reparations. For instance, the *Convention against Torture* imposes an obligation on each state party to:

[E]nsure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.¹⁶¹

The right to reparations is further corroborated in article 6 of the *Convention on the Elimination of All Forms of Racial Discrimination*,¹⁶² article 39 of the *Convention of the Rights of the Child*¹⁶³ and article 24(4) of the *International Convention for the Protection of All Persons from Enforced Disappearance*.¹⁶⁴

2.2.3 Hard law instruments: precepts from regional law

It is important to note that the language of regional law regarding reparations clearly refers to an effective remedy rather than the legal entitlement to reparations. This is important for the debate that follows and because reparations are a crucial substantial component of the right to an effective remedy. Articles 13 and 41 of the European Convention on Human Rights provide the right to an effective remedy from a European

¹⁶⁰ *The Prosecutor v Germain Katanga Judgment on the Appeals Against the Order of Trial Chamber II Of 24 March 2017 Entitled "Order For Reparations Pursuant To Article 75 Of The Statute" Icc-01/04-01/07 A3 A4 A5 (ICC 2018) Para 178. (hereafter *Katanga case, Appeals Chamber Decision*)*

¹⁶¹ A 14 of the *Convention against Torture*.

¹⁶² A 6 states of the *ICERD* says that:

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

¹⁶³ A 39 of the *Convention on the Rights of the Child* says that:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

¹⁶⁴ A 24(4) of the *International Convention for the Protection of All Persons from Enforced Disappearance* (2007) (hereafter *CPPED*) states that:

Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation."

point of view.¹⁶⁵ The concept of an effective remedy includes, where necessary, the payment of compensation, the complainant's right of access to the investigative process, and an efficient inquiry that helps identify and punish perpetrators.¹⁶⁶ However, these provisions have drawn criticism for their limited application in the context of reparations.¹⁶⁷ For example, article 41 indicates that the European Court of Human Rights (ECtHR) shall afford satisfaction 'if necessary.' However, in a dissenting opinion in *Nikolova v Bulgaria*, Bonello J said:

I consider it wholly inadequate and unacceptable that a court of justice should "satisfy" the victim of a breach of fundamental rights with a mere handout of legal idiom.¹⁶⁸

Article 9 of the *Inter-American Convention to Prevent and Punish Torture* obligates parties to "undertake to incorporate into their national laws regulations guaranteeing suitable compensation for victims of torture." In the *Caracazo* case, the Inter-American Court of Human Rights reiterated that any person who believes that they have been a victim of abuse has the right to use the judicial process to force the state to uphold its obligations for both their own benefit and the good of society.¹⁶⁹ Article 10 of the American Convention on Human Rights (*ACHR*) states that:

Every person has the right to be compensated in accordance with the law in the event that he has been sentenced by a final judgment through a miscarriage of justice.

The Inter-American Court of Human Rights provides that victims have a right to a rapid remedy. This is one of the fundamental tenets of the *ACHR* and the rule of law,

¹⁶⁵ A 13 of the *European Convention on Human Rights* states that:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

A 41 of this convention further states that:

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

¹⁶⁶ *Case of Aksoy v Turkey* (ECHR 1996) (hereafter *Aksoy v Turkey*) para 98.

¹⁶⁷ Shelton *Remedies in International Human Rights Law* 197.

¹⁶⁸ Judge Bonello in *Nikolova v Bulgaria*, *Judgment, Merits and Just Satisfaction* IHRL 3095 (ECHR 1999) (hereafter *Nikolova v Bulgaria*) cited in Mowbray *Cases, Materials, and Commentary on the European Convention on Human Rights* 730–732.

¹⁶⁹ *Case of the Caracazo v Venezuela, Aguilera La Rosa and ors v Venezuela, Reparations and Costs* IHRL 1478 (IACHR 2002) (hereafter *Case of the Caracazo v Venezuela*) para 115.

as observed in a democratic society. The *ACHR* enshrines the right of every person to a simple and rapid remedy or to any other effective remedy before competent judges or courts to protect them against acts that violate their fundamental rights.¹⁷⁰ Article 63(1) specifically speaks to the right to compensation:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied, and that fair compensation be paid to the injured party.

However, the jurisprudence of the Inter-American Court of Human Rights carries a different perspective on reparations. According to *Rodríguez v Honduras*, states must prevent, investigate and punish any violations of rights recognised by the *ACHR*. In addition, they must make efforts to restore any rights that have been violated and pay for the damages, if necessary, that result from such violations.¹⁷¹ Full restitution includes the restoration of the previous situation and is a necessary component of reparations in international obligation.¹⁷²

In Africa, the right to an effective remedy is couched in the following terms:

Everyone has the right to an effective remedy by *competent national tribunals* for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity.¹⁷³

Several deductions can be made from the above stipulations on the right to a remedy. First, the legal entitlement of victims to reparations is weighed against each state party's obligation in international and regional treaties. These treaties set directives on the awarding of reparations. Second, the right to reparations grants victims the

¹⁷⁰ *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua, Mayagna (Sumo) Awas Tingni Community v Nicaragua, Merits, Reparations and Costs* IHRL 1462 (IACHR 2001) (hereafter *Case of the Mayagna (Sumo) Awas Tingni Community*) para 112.

¹⁷¹ *Rodríguez v Honduras* para 166 – para 167.

¹⁷² *Rodríguez v Honduras* paras 166-167.

¹⁷³ Principles C(a) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.

primary status as parties against alleged defendant states.¹⁷⁴ In essence, the proceedings from these regional courts are, to an extent, attributed to restoring the victims and providing fair compensation for harm suffered.

Thus, international human rights treaties and international criminal law offer the legal foundation necessary for allocating responsibility and punishing perpetrators – whether states or individuals. Regarding liability for reparations, the shift from state responsibility to individual criminal responsibility remains crucial. This prompts a further investigation into who should receive reparations and from whom. These questions were paramount in the criminal trials discussed below.

2.3 Precedents on victims and reparations in international criminal justice prior to the ICC

2.3.1 Nuremberg and Tokyo tribunals

The end of the Second World War led to the establishment of the International Military Tribunal at Nuremberg (IMT) in 1945. Following the IMT, the allies established the International Military Tribunal for the Far East (IMTFE) in 1946. The IMTFE indicted 28 senior Japanese leaders and officers. The victors of the Second World War claimed reparations from the defendant states in accordance with international law. They sought reparation for victims under the guise of state responsibility, with the result that states, and not individuals, were beneficiaries of reparations. Arguably, this approach was detrimental to victims from the onset, given that international criminal law is primarily focused on punishing individual perpetrators and enforcing the application of international law itself.¹⁷⁵ Both tribunals viewed victims through the prism of the criminal court system, which had as its main objective—and probably its sole objective—holding both Japanese and Nazi criminals accountable. The tribunals were guided by the concept of state sovereignty, which accords states the freedom to

¹⁷⁴ A 34 of the *European Convention on Human Rights*; A 2 of the Rules of Procedure of the Inter-American Court of Human Rights (2009) (hereafter *Rules of Procedure of the Inter-American Court of Human Rights*); A 5 (3) and A 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998) (hereafter; A 1 and A 2 of the Optional Protocol to the International Covenant on Civil and Political Rights (1966) (hereafter *Optional Protocol to the ICCPR*); A 22 of *Convention against Torture*.

¹⁷⁵ McCarthy *Reparations and Victim Support in the International Criminal Court* 43.

define and pursue their interests, including giving reparation to harmed victims. It may be argued that this approach was questionable because international criminal law is largely focused on punishing individual perpetrators and enforcing the implementation of international law itself.

However, the IMT and IMTFE did not offer reparations for victims due to the complexities of determining who is a victim, jurisdictional issues and victim selectivity. Both tribunals viewed victims through the lens of the criminal justice system whose aim was to punish Nazis and Japanese perpetrators.¹⁷⁶ This is supported by the fact that, in international law, it was customary to interpret individuals as not much more than the state's possession. As a result, injury to the individuals of a particular state was considered as injury to the state rather than harm to the specific individual in question.¹⁷⁷ This influenced the process of reparations. According to Cohen, these tribunals did not establish a framework for individual civil responsibility of international crimes and therefore state responsibility was a requirement in order to obtain reparation.¹⁷⁸ This is further illustrated by the fact that the word victim was excluded from the founding statutes of these criminal tribunals, making reparations impossible for them.¹⁷⁹ The tribunals were guided by the notion of state sovereignty,¹⁸⁰ which gives states discretion to articulate and pursue their interests, including providing reparations to their citizens who suffer harm.¹⁸¹ The Nuremberg Trials marked the establishment of the first international court as well as the first time state officials were accused of crimes against humanity and crimes against peace.¹⁸²

¹⁷⁶ Garkawe "The Role and Rights of Victims at the Nuremberg International Military Tribunal" 86.

¹⁷⁷ Cohen *Reparations for International Crimes and the Development of a Civil Dimension of International Criminal Justice* 103.

¹⁷⁸ Cohen *Reparations for International Crimes and the Development of a Civil Dimension of International Criminal Justice* 103.

¹⁷⁹ See Evans "Reparations for Victims in International Criminal Law" 2; Gagneja 2019 *ILI Law Review* 223. Also see Zappalà *Human Rights in International Criminal Proceedings* 220.

¹⁸⁰ Danieli 2005 *Cardozo L Rev* 1633; Ferencz 1999 *Pace Int'l L Rev* 203.

¹⁸¹ Colonosmos and Armstrong "German Reparations to the Jews after World War II" 390.

¹⁸² See A 1 of the *Charter of the International Military Tribunal, Nuremberg* (1945). A similar content can be seen under A 1 of the *Charter of the International Military Tribunal for the Far East* (1946).

In addition, both tribunals did not establish a legal framework based on individual criminal responsibility for reparations. For example, article 28 of the *Charter of the International Military Tribunal, Nuremberg*¹⁸³ stated that:

In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council of Germany.

This provision was the closest to reparation. Even if one were to argue that civil redress is outside the purview of international criminal law, the IMT and IMTFE's mechanisms for establishing state responsibility for reparation remained fundamentally inadequate.¹⁸⁴ In both tribunals, prosecutions were brought under international criminal law against individual perpetrators who served as the main 'machinery' behind the commission of international crimes. The prosecutions were not brought against states. Therefore, reparations for victims were not feasible due to state responsibility that was invoked in both tribunals. Also, the civil element of justice through reparations was not incorporated at the outset of these trials, which distinguished them from traditional approaches to international criminal law.

Although individuals were tried for the crimes they committed, the dependence on state responsibility remained prominent and paradoxical.¹⁸⁵ This made reparations on state responsibility inevitable.¹⁸⁶ According to Cançado J, these international criminal tribunals lacked the authority and the legal foundation to decide state responsibility and thus eroded the foundation to end impunity for serious crimes in international law.¹⁸⁷

The IMT and IMTFE trials introduced individual criminal responsibility. Despite this admirable attempt, victim selectivity occurred and caused a chasm between individual criminal accountability and victim reparations. The IMT's draft of the *Moscow Declaration on German Atrocities*, which referred to the victim as "outraged people," provides a striking illustration. In fact, the direct wording stated that persons

¹⁸³ *Charter of the International Military Tribunal, Nuremberg.*

¹⁸⁴ Cohen 2014 *Revista do Instituto Brasileiro de Direitos Humanos* 311.

¹⁸⁵ Nollkaemper 2003 *International & Comparative Law Quarterly* 615-640.

¹⁸⁶ Nollkaemper 2003 *International & Comparative Law Quarterly* 615-640.

¹⁸⁷ Augusto and Trindade "Conceptual Constructions" 371.

responsible for atrocities will be "brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged."¹⁸⁸ However, this did not mean that the victims would receive reparations.¹⁸⁹

Despite giving the appearance that it was a victims' court, the *Charter of the IMTFE* did not mention any procedures for granting reparation for victims. At the time, Japan was more inclined to pay military pensions than compensation for victims.¹⁹⁰ The *Potsdam Declaration*, which mentioned restitution in kind, was never implemented.¹⁹¹ Procedural interests were focused on a retributive form of justice for victims, which was undoubtedly limited in repairing the harm suffered by victims. As previously said, the statutes establishing the Nuremberg and Tokyo tribunals undermined the ability of victims to receive reparations from individual perpetrators for their sufferings. This is one of the reasons victim-witnesses, who merely served as witnesses to support the prosecution's case against the individual perpetrators at Nuremberg, did not receive protection and fair treatment.¹⁹² Individual perpetrators were held accountable, but reparations for wrongs were made through agreements among states. These agreements required defendant states to make up for all harm suffered by their counterparts.¹⁹³

Given these shortcomings, neither the IMT nor the IMTFE offered reparations to victims.¹⁹⁴ Notwithstanding, possibilities to pursue reparations in international criminal cases were made available in other ways, primarily through lump-sum settlements, which were civil redress.¹⁹⁵ This made reparations that had been granted in favour of victims eventually seem impossible. Despite these flaws, the IMT and IMTFE trials continue to serve as the cornerstone for the implementation of two guiding principles in international criminal justice. First, those who violate international law must be held

¹⁸⁸ Moscow Declaration on German Atrocities of 30 October 1943 (1943) (hereafter *Moscow Declaration on German Atrocities*) 88.

¹⁸⁹ A 6 of the *Charter of the Nuremberg Tribunal*.

¹⁹⁰ Moffett 2012 *International Criminal Law Review* 267.

¹⁹¹ Paragraph 11 of the *Potsdam Declaration*.

¹⁹² Moffett 2012 *International Criminal Law Review* 255.

¹⁹³ Colonomos and Armstrong "German Reparations to the Jews after World War II" 390.

¹⁹⁴ Danieli 2005 *Cardozo L Rev* 1633.

¹⁹⁵ Colonomos and Armstrong "German Reparations to the Jews after World War II" 390-419.

accountable for their actions other than being viewed as abstract entities.¹⁹⁶ Second, that individual perpetrators should be tried through fair trials, which safeguard the rights of the accused persons.¹⁹⁷

2.3.2 *Ad hoc tribunals for the former Yugoslavia and Rwanda*

The International Criminal Tribunal for the former Yugoslavia (ICTY)¹⁹⁸ and the International Criminal Tribunal for Rwanda (ICTR)¹⁹⁹ lacked the authority to provide reparations to victims. The legal framework that governed these tribunals, like their predecessors, did not provide for reparations for victims. Hence, there was no independent legal basis for victims to request reparations in the ICTY and ICTR proceedings. However, a prominent aspect was that any form of reparation, including compensation and restitution, could be sought at domestic court based on the perpetrator's conviction.²⁰⁰ In other words, receiving reparations was contingent upon the conviction of the perpetrators.²⁰¹

The *Rules of Procedure and Evidence* for both the ICTY and the ICTR directed victims to seek compensation through national courts and other competent bodies.²⁰² However, there is contention over whether rerouting compensation to domestic courts was viable and appropriate, given that they had to be linked to judgements from these tribunals. Both *ad hoc* tribunals made the intentional choice to forego restitution and restricted their jurisdiction to the punishment of individual perpetrators. A report conducted in 2000 stated that judges of these tribunals did not want to exercise authority in awarding reparations for victims.²⁰³ This was understandable, to a certain extent, as it would have significantly increased the burden of these tribunals, and

¹⁹⁶ Kirsch 2007 *Wash U Global Stud L Rev* 3.

¹⁹⁷ Kirsch 2007 *Wash U Global Stud L Rev* 3.

¹⁹⁸ Resolution 808 (1993) para 1.

¹⁹⁹ Resolution 955 (1994) para 1.

²⁰⁰ Rule 106 of the Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia Since 1991 (1996) (hereafter *Rules of Procedure and Evidence (ICTY)*); Rule 106 of the International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence (1995) (hereafter *Rules of Procedure and Evidence (ICTR)*).

²⁰¹ Rule 106 of the *Rules of Procedure and Evidence (ICTY)*; Rule 106 of the *Rules of Procedure and Evidence (ICTR)*.

²⁰² Rule 106 of the *Rules of Procedure and Evidence (ICTY)*; Rule 106 of the *Rules of Procedure and Evidence (ICTR)*.

²⁰³ President of the ICTY "Victims' Compensation and Participation" 1.

lengthened and complicated their cases.²⁰⁴ The judges further questioned whether the two tribunals could get sufficient funding for any reparations awards.²⁰⁵ Additionally, they believed that it would be unfair for victims of crimes perpetrated by persons who were not charged or acquitted of crimes.²⁰⁶ Article 24(3) of the *Statute of the ICTR* and article 23(3) of the *Statute of the ICTY* specified that:

In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.²⁰⁷

This provision was meant to ensure that these tribunals would make orders for restitution.²⁰⁸ Once this has been done, the tribunal would schedule special hearings at the Prosecutor's request.²⁰⁹ However, restitution was reliant on the fact that it had to be linked to crimes covered by the statute of each tribunal.²¹⁰

The two statutes further provided that restitution had to be the object of specific findings in judgement at the end of each trial in which it had been dealt with.²¹¹ Both tribunals could award victims monetary compensation for damage to their property, where applicable.²¹² Even though compensation and restitution could be obtained from domestic courts, there were challenges, such as that the ICTY lacked the authority to set compensation amounts. This omission created ambiguity and provided States with authority to make determinations at their discretion.²¹³

Another observation is that both tribunals had no jurisdiction to make reparation orders because victims lacked the status of reparations claimants. The inability of these *ad hoc* tribunals to effectively award reparations for the benefit of individual

²⁰⁴ President of the ICTY "Victims' Compensation and Participation" 1.

²⁰⁵ President of the ICTY "Victims' Compensation and Participation" 1.

²⁰⁶ President of the ICTY "Victims' Compensation and Participation" 1.

²⁰⁷ A 24(3) of the *Statute of the ICTR*; A 23(3) of the *Statute of the ICTY*.

²⁰⁸ Rule 98 *ter*(B) of the *Rules of Procedure and Evidence (ICTY)*; Rule 88 (B) of the *Rules of Procedure and Evidence (ICTR)*.

²⁰⁹ Rule 105 of the *Rules of Procedure and Evidence (ICTY)*.

²¹⁰ Rule 105 of the *Rules of Procedure and Evidence (ICTY)*; *Rules of Procedure and Evidence (ICTR)*. Also see Rule 106(c) of the *Rules of Procedure and Evidence (ICTY)*.

²¹¹ Rule 105 of the *Rules of Procedure and Evidence (ICTY)*; Rule 105 of the *Rules of Procedure and Evidence (ICTR)*.

²¹² A 23(3) of the *Statute of the ICTY*; A 24(3) of the *Statute of the ICTR*.

²¹³ Rule 106 of the *Rules of Procedure and Evidence (ICTY)*.

victims attests to failure in meeting the needs of victims. The issue in this light is not whether victims deserve to be awarded reparations in the form of restitution or compensation. The contention is whether redirecting reparations to domestic courts was satisfactory and attainable. This could be further explained by the fact that the trial proceedings reveal that the ICTY and ICTR lacked the authority to issue restitution orders since the victims lacked the legal standing to file claims for reparations.²¹⁴

This incapacity of the two *ad hoc* tribunals to deliver reparations for the benefit of victims is evidence of their inadequacy in addressing the needs of victims and their quest for justice through reparation. In this context, it is irrelevant whether victims merited reparations in the form of restitution or compensation. Only victims who were covered by the conviction of perpetrators who had caused them harm could access restitution and compensation. This was indicative of the idea of victim selectivity.²¹⁵ In the context of the ICTY, Jorda J confirmed that:

Only those [victims] considered useful towards the establishment of the truth are invited to testify and even they cannot claim compensation for the harm they suffered.²¹⁶

Article 20(1) of the *Statute of the ICTY* mirrored article 20(1) of the *Statute of the ICTR* on "full respect for the rights of the accused and due regard for the protection of victims and witnesses." Proper consideration should have been given to the victims' rights to receive reparation from these trials if the harm suffered by them were to serve as the basis for holding individual perpetrators criminally accountable and convicting them. Due to this discrepancy, there was a conflict between the rights of individual perpetrators and the protection of the interests of victims and witnesses. As a result, these tribunals have faced criticism for not paying enough attention to victims on the question of reparations.²¹⁷

In short, the ICTY and the ICTR neglected to take victims into account as independent parties to their proceedings. They saw victims as no more than witnesses whose

²¹⁴ President of the ICTY "Victims' Compensation and Participation" para 24.

²¹⁵ President of the ICTY "Victims' Compensation and Participation" para 27.

²¹⁶ ICTY 2001 <https://www.icty.org/en/press/icty-and-truth-and-reconciliation-commission-bosnia-and-herzegovina>.

²¹⁷ Trumbull 2007 *Mich J Int'l L* 787.

evidence was necessary for conviction. The sole form of reparation available to victims was compensation and restitution claims made against their respective states in accordance with domestic legal rulings and decisions of the tribunals. Despite their neglect of the reparations aspect of ensuring justice for victims, both tribunals successfully executed their mandates to exert retribution on individual perpetrators.

2.3.3 Hybrid criminal trials in Lebanon, Sierra Leone and Cambodia

In addition to the Nuremberg and Tokyo trials and the *ad hoc* tribunals for the former Yugoslavia and Rwanda discussed above, the international criminal justice system has seen the establishment of hybrid criminal trials in the form of the Special Tribunal of Lebanon, the Special Court of Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia. However, these special courts did not possess the mandate to make reparations orders for victims and to admit them as claimants for such reparations. They followed the precedent set by previous tribunals to only hold perpetrators criminally liable and not responsible for reparations caused by their actions. Article 25(1) of the *Statute of the Special Court of Lebanon* states that

The Special Tribunal may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal.²¹⁸

Further to note, these special courts had authority regarding the restitution of property. The *Statute of the Special Court of Sierra Leone*, for instance, provided that:

The Trial Chamber may order the forfeiture of the property proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.²¹⁹

The *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia* provided that the enforcement of reparations would be done by appropriate national authorities in accordance with Cambodian law.²²⁰ However, the trials of the Extraordinary Chambers in the Courts of Cambodia (ECCC) shied from providing guiding principles and clarity regarding the reparation framework. Also, there were no means for

²¹⁸ A 25(1) of the Statute of the Special Tribunal for Lebanon (2007) (hereafter *Statute of the Special Tribunal for Lebanon*).

²¹⁹ A 19(3) of the *Statute of the Special Court of Sierra Leone*.

²²⁰ Rule 113(1) of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (2011) (hereafter *Internal Rules ECCC*).

awarding reparations to meet the needs of victims. For example, in the final conviction of case 001, some requests for reparations were rejected "because of the lack of financial means to ensure their implementation."²²¹

Interestingly, the *ECCC* trials included a *partie civile* system which is a concept giving victims a fully-fledged legal party status in proceedings in French law. According to Rule 23(3) of the *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia*, civil parties were allowed to be represented as a "single, consolidated group" and to present submissions on reparations in a "single claim for collective and moral reparations" but only upon the conviction of the perpetrator.

2.4 The paradigm shift in reparations under the *Rome Statute*

2.4.1 Overview of the Court's reparation mandate

In contrast to *ad hoc* tribunals discussed above, the Court is victim-centric. It grants victims access to take part in its criminal proceedings and to receive reparations. Individual and collective victims can receive awards of reparations against convicted individuals under the Court's powers in article 75 of the *Rome Statute*. Extending the pre-existing retribution paradigm gives the concept of justice for victims more depth.²²² This change in dynamics presents an innovation that mixes a civil dimension of reparations with the legal framework of an international criminal procedure. When compared to international criminal tribunals that existed prior to it, the Court's role is striking.

The reparative evolution that saw the adoption of the *Rome Statute* bridges the gap between a retributive model of justice that prioritises individual criminal responsibility and a reparative model of justice that considers the interests of victims, their concerns, and the need for reparations to repair the harm occasioned on them during the commission of serious international crimes.²²³ Consequently, individual criminal

²²¹ *Prosecutor v Kaing Guek Eav alias Duch*, Case File/Dossier No. 001/18-07-2007-ECCC/SC, Case 001 Appeal Judgment, 3 February 2012 (hereafter *Prosecutor v Kaing Guek Eav alias Duch*).

²²² Zegveld 2019 *International Criminal Law Review* 322.

²²³ A 68 of the *Rome Statute* provides for the protection of victims and witnesses and their participation in the proceedings.

responsibility is related to the restoration of victims through awards and orders for reparations. The awarding of reparations in the form of restitution, compensation and rehabilitation goes beyond the precedent set by earlier international criminal courts and tribunals.²²⁴ As a result, the ICC is the first international court of its kind to exclusively ensure reparations for victims while also holding perpetrators accountable for serious crimes.

The first reparation decision was delivered in the *Lubanga* case, which set a precedent in two ways. First, it established the ICC as the first permanent International Criminal Court to render a decision on reparations against an individual perpetrator who had been convicted of serious international crimes. The Court showed that it could foster constructive interaction with victims through a legal procedure that includes reparations to enhance the victims' perceptions of justice.²²⁵ Second, the *Lubanga* case showed that working through the Trust Fund for Victims, the Court has the jurisdiction to issue a reparations order against a convicted person. The Court will have to strike a balance between the rights of the accused and the innovative goal of delivering justice to victims through reparations. This balance must be understood in the context of Rule 97 of the *Rules of Procedure and Evidence*, which states that reparations may be awarded to an individual, a collective or jointly.²²⁶

However, it must be noted that reparation was not the outcome of some overarching grand plan but was a compromise during the discussion of the Court's mandate.²²⁷ The Court acknowledges the unspeakable horrors suffered by children, women and men and that often, international crimes horrify and shake the conscience of humanity.²²⁸ Article 68 of the *Rules of Procedure and Evidence* stipulates that the Court must consider all needs of victims in executing its mandate in accordance with the *Rome Statute* and the *Rules of Procedure and Evidence*.²²⁹

²²⁴ A 75 of the *Rome Statute*; See Zegveld 2010 *Journal of International Criminal Justice* 88.

²²⁵ Balta, Bax and Letschert 2019 *International Criminal Justice Review* 222

²²⁶ Rule 97 of the *Rules of Procedure and Evidence (ICC)* stipulates that when assessing reparations, the scope and extent of any damage, loss or injury are to be considered.

²²⁷ McCarthy *Reparations and Victim Support in the International Criminal Court* 36.

²²⁸ Preamble of the *Rome Statute*.

²²⁹ A 68 of the *Rome Statute*.

The recognition of the interests of victims is another implication of the Court's reparative jurisprudence. The *Rome Statute* provides that:

Where the personal interests of the victims are affected, this Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court.²³⁰

This raises the issue of which interests the provision refers. Arguably, interests refer to the sensitivity that must inform any process designed to address the victimisation of victims. Therefore, the first step is to determine whether the crimes for which the individual perpetrator has been charged caused harm to the victims in question. The destructive impacts of the perpetrator's actions, which manifest under the garb of procedural and substantive justice, must be addressed through reparations.²³¹ Hence, both procedural and substantive justice refer to the fairness of the outcomes of cases during the Court's proceedings and include reparations to repair the harm suffered by victims.²³²

Addressing the interests of victims faces obstacles such as selectivity in victimisation. The Court determines which interests of victims were harmed and at what stage victims should voice their opinions and concerns. Both a good and negative interpretation can be made on the identification of victim interests. Positively, when victim interests are acknowledged, it gives them a right to take part in the proceedings once the 'interests' criteria have been satisfied. In the negative, victim participation is prohibited when victim interests are not under consideration. Whether a victim will take part in proceedings or not depends on whether their interests have been affected.²³³ This fosters victim selectivity. The problem is compounded by the fact that neither the *Rules of Procedure and Evidence* nor the *Rome Statute* provides much on what constitutes interests and how to interpret them.

Prosecutorial discretion on which charges to prosecute leads to victim selectivity. It has affected international tribunals for a long time, including the Court. Often, political

²³⁰ A 68(3) of the *Rome Statute*.

²³¹ Moffett 2015 *Crim L Forum* 2.

²³² Moffett 2015 *Crim L Forum* 2.

²³³ A 68(3) of the *Rome Statute*.

choices determine which charges to level against an accused. In the long run, it affects the consideration of which victims will receive reparations.²³⁴ For a victim to be eligible for reparation, the Prosecutor must have chosen charges emanating from the conduct of the accused, which caused harm to the victim in question. This selectivity impairs the efficacy of the reparations regime and does not guarantee that individual perpetrators would be convicted for all the crimes for which they are indicted. Depending on the charges selected by the prosecutor, a victim may be qualified or disqualified from receiving reparations.

Additionally, there is no assurance that each of the accused will be found guilty of all the crimes for which they have been charged. As a result, a criminal justice system that convicts just a limited percentage of individuals who committed crimes will not, in the long term, adequately make up for the harm suffered by victims and will not be able to issue reparations to all of them. The selection of charges for which to indict an accused may not effectively fit the harm suffered by the victim. The probability of the harm suffered by victims falling outside of such charges and thereby excluding them from benefitting from reparations is considerable. Although victims may still play a third-party role in accordance with the practice stemming from the IMT and IMTFE, this limits the participation of victims in criminal proceedings. It leaves victims without justice, as they have no control to initiate or terminate such proceedings. The fact that victims do not have the opportunity to select charges erodes a sense of receiving justice for the harm endured.

Another hindrance to justice through reparation is that it is perceived by the Court as a humanitarian or charity effort. Zegveld notes that

[This] is only a weak relation between the claim(s) for reparations and the legal accountability of the convicted person towards one or more victims."²³⁵

This overshadows the victims' struggle to have their damage recognised and repaired through reparations. Victims are treated as persons who have suffered from impaired interests rather than persons who have rights.²³⁶ This thesis aligns with Zegveld's view

²³⁴ Zegveld 2019 *International Criminal Law Review* 330.

²³⁵ Zegveld 2019 *International Criminal Law Review* 340.

²³⁶ Zegveld 2019 *International Criminal Law Review* 344.

that this may foster the consideration of alternatives to the ICC's current legal framework and that it may require creating a victims' claims chamber with specialised judges²³⁷

2.4.2 *The civil dimension of reparations in the ICC's criminal proceedings*

The Court's proceedings reveal an unprecedented role for victims in criminal proceedings. This is similar to *partie civile* legal systems, which recognise a variety of victim participation rights. The *partie civile*, which was adapted from the French legal system, permitted victims to initiate procedures, take part in criminal trials, and bring claims for damages.²³⁸ As correctly stated by Lee,

One of the greatest innovations in the *Rome Statute* is the place it creates for victims to participate in the proceedings this new Court has been transformed from an instrument initially designed for punishing individual perpetrators of atrocious crimes to an international court administering restorative justice. Under this system reparations will be made to victims, and victims will also be able to take part in proceedings, with rights to privacy, representation, and to security of person.²³⁹

Article 75(1) of the *Rome Statute* stipulates that the Court shall establish principles of reparations in respect of victims and that such principles shall cover restitution, compensation and rehabilitation. The use of 'shall' denotes a mandatory power for the Court to establish such principles. Rule 98 of the *Rules of Procedure and Evidence*, which is internally linked to article 75(1), states that:

1. Individual awards for reparations shall be made directly against a convicted person.
2. The Court may order an award for reparations against a convicted person to be deposited with the Trust Fund for Victims where at the time of making the order, it is impossible or impracticable to make individual awards directly to each victim. The award for reparations deposited in the Trust Fund for Victims

²³⁷ Zegveld 2019 *International Criminal Law Review* 344.

²³⁸ See A 85– A91, A 371– A 375 and A418–A426 of the *French Code of Criminal Procedure*. This is also similar to the German legal system of Nebenklage which allows victims to appoint their own counsel, present their case before trial and question witnesses. See S397 and S403– S406 of the Strafprozessordnung of the *German Criminal Code*.

²³⁹ Mekjian and Varughese 2005 *Pace Int'l L Rev* 18.

shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.

3. The Court may order that an award for reparations against a convicted person should be made through the Trust Fund, where the number of victims and the scope, forms and modalities of reparations make a collective award more appropriate.

In the *Katanga* case, the Court said that the reparations phase proceedings represent a critical juncture in the administration of justice and are linked to the effectiveness of the Court's reparation system.²⁴⁰ The Trial Chamber added as follows:

The Court gives public acknowledgement to the suffering which the grave crimes committed by the convicted person caused to the victims...and delivers to them justice by alleviating, as far as possible, the consequences of the wrongful acts.²⁴¹

In the *Lubanga* case, the Appeals Chamber said that the principles contain five minimal and essential elements that are necessary for the Court to make an order for reparations.²⁴² It further said these must be applied, adapted and expanded in future cases.²⁴³

The necessity to ensure justice for victims goes beyond retribution as it also encompasses the conception and implementation of the principles of reparations.²⁴⁴ In the Court's precedents, the involvement of victims in criminal proceedings is crucial. The fact that victims have been acknowledged and transformed from being objects to subjects in international criminal trials adds credit to this observation.²⁴⁵ Placing victims at the centre of the Court's processes shows that the rules pertaining to reparations are built on an expansive view of victimisation. Hence, article 75 of the *Rome Statute* speaks to "reparations to, or in respect of, victims."

²⁴⁰ *Katanga case, Order for Reparations* para 14.

²⁴¹ *Katanga case, Order for Reparations* para 15.

²⁴² *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* paras 29;31.

²⁴³ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 5

²⁴⁴ Moffett 2015 *Crim L Forum* 6.

²⁴⁵ Moffett 2015 *Crim L Forum* 5.

The Court adopted the view that although reparations are civil in nature, they result from criminal cases prosecuted before it. As a result, conviction decisions reached during criminal trials are intimately related to orders and awards for reparations made in favour of victims.²⁴⁶ The obligation to repair harm to victims will not be imposed if the Court does not render convictions based on the concepts of individual criminal responsibility.²⁴⁷ Therefore, the basic aim of reparations is to enable perpetrators to repair the harm they caused to the victims and to enable the Court to guarantee that perpetrators account for their crimes.²⁴⁸

McCarthy argues that reparations are non-punitive in nature, although one may argue that the Court's reparations impose an obligation on convicted individuals to account for their crimes.²⁴⁹ The Court's reparative framework is focused on the conviction of accused persons. In cases where the accused are acquitted, victims are also at risk of losing the right to reparations because orders for reparations are contingent on the conviction of the accused. For instance, the acquittals in *Ruto* and *Sang* cases led to victims losing on reparations despite the fact that victims had suffered violence after the 2007 election.²⁵⁰ The Court made it clear that reparations against an individual or their government can only be made after a person has been found guilty.²⁵¹ This has drawn considerable criticism because victims would not receive reparation when the accused are acquitted. As a result, the Court's reparative mandate differs from other established systems like the *European Convention on the Compensation of Victims of Violent Crimes*, which allows victims of violent crimes to get compensation even if the perpetrators are acquitted.²⁵²

Reparations also represent the notion of accountability in favour of victims. In the *Lubanga* case, the Appeals Chamber noted that the notion of accountability is rooted

²⁴⁶ *Katanga case, Order for Reparations* paras 16-17.

²⁴⁷ *Katanga case, Order for Reparations* para 17.

²⁴⁸ *Katanga case, Order for Reparations* paras 15; 267.

²⁴⁹ McCarthy *Reparations and Victim Support in the International Criminal Court* 58.

²⁵⁰ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang, Decision on the Requests Regarding Reparations* ICC-01/09-01/11-2038 (hereafter *Ruto and Sang Case (Reparations)*) para 4.

²⁵¹ *Ruto and Sang Case (Reparations)* para 7.

²⁵² A 2(2) *European Convention on the Compensation of Victims of Violent Crimes* (1983) (hereafter *European Convention on the Compensation of Victims of Violent Crimes*).

in individual criminal responsibility.²⁵³ Rule 98 of the *Rules of Procedure and Evidence* stipulates that both individual and collective damages may be awarded against convicted persons. In the context of reparations, another crucial definition to note is one of 'principles' of reparations in article 75(1) of the *Rome Statute*. Principles mean the legal rules or theories to which the Court ought to refer in rationalising its decision and order.²⁵⁴ According to article 75(1) and (2) of the *Rome Statute*, these principles serve as the foundation for determining the breadth and extent of damage, loss and injury to the victim. In ordering reparations, the Court must ensure that the reparations are directed at repairing the damage, loss and injury.

When making orders for reparations, the Court must state the principles on which it bases its orders. This requirement is meant to guarantee neutrality and make sure that the Court makes its decisions objectively. The Court's reparations jurisprudence shows that these principles are court-wide and that it frames them to support the 2011 Resolution on reparations, which states that:

Court-wide coherent principles relating to reparations shall be established in accordance with article 75, paragraph 1, *based on which the Court may issue individual orders for reparations*.²⁵⁵

2.5 Conclusion

This chapter examines how the right of victims to reparations is recognised by international criminal law. The analysis draws on the treatment of victims and witnesses in international criminal justice, which, traditionally, has been seen as incidental to the objectives of criminal justice. Customary criminal law also shows a similar approach. In international criminal justice, reparations have always been controversial. Notwithstanding the controversy, reparations have gradually received attention and significant admiration due to the Court's precedents. In the past, statutes establishing international criminal tribunals from Nuremberg did not contain express provisions for reparations for victims because victims were not recognised beyond their testimonies as witnesses. This hampered efforts to rectify the harm

²⁵³ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* paras 99; 101.

²⁵⁴ Hornby and Cowie *Oxford Advanced Learner's Dictionary of Current English* 1153.

²⁵⁵ *Reparations* para 1 (emphasis added).

caused to them. Even though they performed a variety of functions, international criminal courts and tribunals fell short in terms of compensating victims. The issue of whether there is an enforceable right to reparations needs to be resolved.

Like their Nuremberg and Tokyo counterparts, the ICTY and ICTR did not make any reference to any laws on reparations other than merely mentioning that national courts were best suited to offer compensation and restitution. However, most national courts failed to provide compensation and restitution. On the contrary, many victims did not receive compensation and were not treated well as witnesses when they testified before tribunals. The rights of criminals received disproportionate attention following armed conflicts, while those of victims were largely ignored. This led to significant questions concerning the reliability and validity of the form of justice offered by international criminal law.

The adoption of the *Rome Statute* led to a paradigm shift in the treatment of victims by international criminal courts. This statute gives victims rights and provides a legal framework for their involvement in criminal proceedings against persons who caused them harm. The *Rome Statute* fully acknowledges their right to reparations, which it says entails, among others, restitution, compensation and rehabilitation. Unlike in the past, in which the IMT, IMTFE, ICTY and ICTR, and special tribunals for Sierra Leone, Lebanon and Cambodia, were inconsistent on the question of reparations, the Court works in an environment in which the law, as laid down by the *Rome Statute*, enables it to award reparations to ensure individual criminal accountability for the harm suffered by victims and to repair that harm through reparations. This benefits victims through the different forms of reparations.

This chapter reveals that through its jurisprudence, the Court attempts to balance two objectives, namely, ensuring justice for victims through reparations and holding individual perpetrators accountable and punishing them. These objectives have been praised for effectively incorporating a vision of victim justice, which will help the ICC overcome the drawbacks of earlier courts. Although the Court has made impressive strides in protecting the rights of victims, there are many complexities that arise, including the conflicting needs of victims, which often clash with the requirement for

speedy trials. It seems unlikely that international criminal processes would ever offer an acceptable venue for victims to convey their experiences, regardless of the recognition accorded to victim involvement. While some victims find closure after testifying, others come to the realisation that they are subordinate to the goals and interests of the Court. The questions that victims want to examine about institutional and state culpability cannot be fully answered by sentencing individuals, while extensive victim participation might delay trials. On this note, the following chapter provides an analysis of the legal framework for reparations as seen through the Court's reparation jurisprudence.

Chapter 3

Reparation Principles Through the Court's Jurisprudence

3.1 Introduction

Since its establishment, the Court has decided four cases of reparations, namely, the *Lubanga*, *Katanga*, *Mahdi*, and *Ntaganda* cases. It is important to keep in mind that the formulation of the reparation principles was still an open issue at the time the *Rome Statute* came to effect in 1998. Nevertheless, the reparation provision, i.e., article 75 of the *Rome Statute*, should not be viewed as a form of punishment but as a prioritisation of justice for victims in line with the reparative justice principle. Its provision of a broader involvement of victims in the judicial process recognises that, to some extent, the ineffectiveness of the retributive justice system does not fully redress the harm caused to victims. Consequently, article 75, read together with article 68(3) of the *Rome Statute*, critically reflects the concept of reparative justice. It gives victims a chance to speak at crucial stages during the proceedings. This makes the ICC the first international criminal court to actively support victim participation.¹

The *Rome Statute* endows the Court with the power to issue reparation orders against convicted persons.² The purpose of reparations is to make up for the harm caused to victims. In common usage, the word reparation does not denote a form of punishment for atrocities perpetrated. According to its general definition, examples of reparations include making amends for a wrong, making up for a loss or mending the damage. The *Rome Statute* makes a clear distinction between its reparation provisions (articles 62-76) and its punishment provisions (articles 77-80). The meaning of reparation principles and their establishment has been the subject of the Court's reparation jurisprudence. The *Lubanga* case gave the Court the possibility to establish reparation principles for the award of reparations. The three cases that followed provided the Court with the opportunity to confirm and further extend these principles in appropriate circumstances.

¹ A 68(3) of the *Rome Statute*.

² A 75(1) of the *Rome Statute*.

The main goal of this chapter is to examine the Court's reparative jurisprudence by analysing its decisions regarding reparations. The chapter begins by briefly discussing the meaning of the principles of reparation. The analysis situates the literature as a collection of reparation-related observations within the context of the broader theoretical interest of reparative justice that the Court must deliver. After this discussion, the chapter examines reparation principles applied in the *Lubanga* case and the five essential elements for reparations developed in that case. Lastly, the chapter deals with how subsequent cases applied, developed and elaborated on reparation principles propounded in the *Lubanga* case. The analysis in this chapter will lay the foundation for comprehending procedural and substantial complexities that arise from the Court's application of reparation principles.

3.2 Meaning and content of reparation principles

3.2.1 Overview of the reparation principles

The *Rome Statute* offers a fundamental conceptual basis for reparations. It says that the Court must establish principles of reparations:

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.³

This provision shows that the Court has a legal obligation to establish reparation principles. In fulfilment of this obligation, the *Lubanga* Appeals Chamber outlined five essential elements that make up the principles for reparations orders. These were unreservedly applied in the *Katanga* and *Mahdi* cases and further expanded in the *Ntaganda* case. They are as follows:

- the order must be directed against the convicted person, regardless of whether reparations are ordered through the Trust Fund, pursuant to article 75(2);⁴

³ A 75(1) of the *Rome Statute*.

⁴ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* Lubanga case Appeal Decision para 32, para 65.

- the order for reparations must establish and inform the convicted person of the scope of his or her liability;⁵
- the order "must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97(1) and 98";⁶
- the order must:
 - [d]efine the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it;⁷
- the order
 - [m]ust identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.⁸

The phrasing of article 75(1) gives the Court free latitude in creating and developing appropriate reparation principles within the Court's competence. Even though principles must adhere to the *Rome Statute*, article 75(1) grants the Court discretion to formulate reparations principles. In doing so, the Court can draw on concepts developed in international law and international human rights law, but it must consider the unique situation in which international criminal law applies.⁹

The language of article 75(1) leads to the question of whether these principles should be created on a case-by-case basis or as a more general and court-wide approach. The provision is potentially unclear on the function of reparation principles and the legal gap that they must fulfil. It is also unclear whether reparation principles should have defining characteristics or whether they must be framed in binding terms. Despite these areas of uncertainty, it appears that reparation principles are not

⁵ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* paras 32, 118.

⁶ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 32.

⁷ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* paras 32, 181.

⁸ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* paras 32; 205.

⁹ See A 21 of the *Rome Statute*.

directed at domestic processes that allow victims to seek reparation within domestic legal systems. They are also not directed at other impartial institutions like state courts and non-state actors. The flexibility of the Court's approach to reparations might provide answers to the underlying philosophical framework in which its functions may be enhanced through reparation principles. However, there is also the possibility that firmly defined principles could be useful in preventing ambiguity in the law.

The following discussion focuses on the five elements that inform principles for reparations. These elements are essential to the successful execution of reparations orders. They are analysed in this chapter to better understand the primary function of the Court as a criminal court and as a human rights court for reparations. The discussion proceeds from article 75(1) and (2), which outline the context of the legal reparation framework. It clarifies crucial components that must be included in a reparations order while taking into account the purpose motivated by article 75(1) and (2).

3.2.2 Reparation principles established in the Lubanga case

The principles for reparations were decided by Trial Chamber I in 2012.¹⁰ It outlined the basis for reparations and said that reparations must be implementation-focused, cover the breadth of victims who are to benefit, protect their dignity and ensure non-discrimination and facilitate consultation. The Trial Chamber also said that reparation principles must be informed by modes of reparations, rights of the defence and duties of other actors. As reiterated above, the word "shall" in article 75 creates a legal obligation on the Court to establish principles relating to reparations.¹¹ In the *Lubanga* case, the Court developed some general principles that may be particularly applicable to victims, taking into account their needs and interests, as well as age-specific harm and appropriate reparation modalities.¹²

¹⁰ See *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations*.

¹¹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 52.

¹² *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* paras 25; 28.

The Appeals Chamber also provided a definition of the "principles" that the Court must establish. It stated that principles refer to general concepts that, while formulated in light of the circumstances of a specific case, can be applied, adapted, expanded, or added to by future Trial Chambers.¹³ Following analysis of the relevant provisions in the legal texts of the Court, the Appeals Chamber held that an order for reparations under article 75 of the *Rome Statute* must contain, at a minimum, the following five essential elements.¹⁴

3.2.2.1 An order for reparations must be made against the convicted person

Article 75(2) of the *Rome Statute* says that the Court may make a reparation order against the convicted person. The implication of this is that reparation orders are inextricably linked to persons whose criminal responsibility is proven through conviction and whose guilt for the crimes is confirmed through sentencing.¹⁵ It is crucial to stress that a reparations order must reflect these underlying elements.¹⁶ According to the Appeals Chamber in the *Lubanga* case, the principle of accountability of the individual perpetrator and the essential portions in the legal texts of the Court support the imposition of a reparations order against the convicted person.¹⁷

When interpreting this provision through the jurisprudence of the Court, it is evident that reparations serve a dual purpose by holding individuals responsible for serious crimes under international criminal law accountable and ensuring that they repair the harm caused to direct and indirect victims.¹⁸ To this end, the Appeals Chamber in the *Lubanga* case succinctly stated that orders for reparations must be in line with the context from which they emanate, i.e., the legal framework for determining individual

¹³ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 55.

¹⁴ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 32.

¹⁵ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 65.

¹⁶ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 65.

¹⁷ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 69.

¹⁸ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 65.

criminal responsibility for crimes that are in breach of the contents of the *Rome Statute*.¹⁹

The liability of the convicted person for reparations has an impact on potential positive outcomes for victims.²⁰ This is because reparations orders will be made against the convicted person irrespective of his or her financial situation.²¹ This confirms the principle that individual perpetrators must account for their acts.²² As the Appeals Chamber said in the *Lubanga* case, the convicted person approach strongly suggests that reparation orders are intrinsically linked to individuals whose criminal liability is established by conviction and whose culpability for those criminal acts is determined by sentencing.²³ This reasoning has an implication for the role of the Trust Fund for Victims.

In the *Lubanga* case, the Appeals Chamber emphasised that the issuing of a reparations order through the Trust Fund for Victims does not supersede issuing a similar order against the convicted person. As such, the Trust Fund for Victims did not exonerate Lubanga's indigence:

The Appeals Chamber does not find this interpretation to be persuasive. First, in the view of the Appeals Chamber, issuing an order for reparations "against" the convicted person and acting "through" the Trust Fund are not mutually exclusive concepts. To the contrary, the Appeals Chamber finds that, even if reparations are ordered "through" the Trust Fund in accordance with the second sentence of article 75(2) of the Statute, the Trial Chamber must still direct the order "against" the convicted person.²⁴

This analysis suggests that the individual perpetrator is not only held accountable for serious crimes and punished for them but that reparative measures must also be put in place to repair the harm done to victims. Arguably, one may refer to this as the

¹⁹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 65.

²⁰ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 125.

²¹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 63.

²² *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 65.

²³ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 65.

²⁴ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 70.

reparative responsibility of the convicted person. On this note, two terms come into mind - individual and conviction. These terms apply to an individual whose criminal liability is established by conviction and whose responsibility for criminal conduct is assessed in reparation awards.²⁵ As further elucidated by the Trial Chamber in the *Lubanga case*, the reparation order is "confined to determining Mr Lubanga's individual liability for reparations".²⁶

3.2.2.2 The order must establish and inform the convicted person of their liability for reparations

This principle means that the Court must establish that the convicted person is liable for reparations and must inform them after conviction.²⁷ In other words, the convicted person must bear criminal responsibility for the crimes for which he/she was found guilty in order to atone for the harm done to victims. The indigence of the convicted person is not a defence against claims for reparations.²⁸ On this aspect, the Appeals Chamber concluded that the Trial Chamber erred by taking charge of "other resources" of the Trust Fund for Victims rather than holding Lubanga accountable.²⁹ In situations where the convicted person is unable to swiftly comply with a reparations order because of indigence, the Trust Fund for Victims may advance its "other resources" in accordance with regulation 56 of the *Trust Fund Regulations*.³⁰ However, this does not absolve the convicted person of financial responsibility for reparations. The Trust

²⁵ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 66.

²⁶ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 277.

²⁷ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 99.

²⁸ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* paras 102-105.

²⁹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 116.

³⁰ According to regulation 56 of the *Regulations of the Trust Fund for Victims*:

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

Fund for Victims must be reimbursed by the convicted person, who remains liable until the full amount is settled.³¹

The role of the Trust Fund for Victims is complementary in that it provides reparations for victims based on available resources and the parameters of its assistance mandate in meeting reparation awards.³² Therefore, the Trust Fund for Victims does not replace the obligation of the convicted person against whom the Court has made an order for reparations.³³ This view finds support in *Basic Principles and Guidelines*, which provide that:

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.³⁴

It is not immediately clear how an indigent convicted individual can pay for reparations. In the *Lubanga* case, the Appeals Chamber observed that:

No other provision ... provides for the possibility of replacing the convicted person's liability for reparations with the liability of a State or an entity was enacted.³⁵

This raises the question of whether the indigent convicted person is responsible for making reparations since the Trust Fund for Victims cannot be given the duty of harm assessment by the Trial Chamber.³⁶ In the *Lubanga* case, the Trial Chamber mentioned other resources of the Trust Fund for Victims but failed to elaborate on what is meant by "other resources." As noted by Trial Chamber;

The Trust Fund's resources collected through, *inter alia*, voluntary contributions, namely, the '*other resources*' referred to in rule 98(5) of the Rules of Procedure and Evidence, for the purposes of providing reparation

³¹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 5.

³² *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 141.

³³ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 141.

³⁴ Guideline 15 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

³⁵ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 105.

³⁶ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 184.

awards to victims, without establishing any liability of the convicted person to pay for these awards.³⁷

Although this complexity is dealt with in more depth in the following chapter, it suffices to say that there is doubt on whether the financial liability of the convicted person for reparations can be enforced where the person is indigent.³⁸

3.2.2.3 The order for reparations must specify the type of reparations

This principle denotes that when the Court issues an order for reparations, it must specify whether the reparations are for individuals, a collective, or both. In this regard, one must note the provisions of Rule 97(1) and Rule 98(3) of the *Rules of Procedure and Evidence*. Article 97(1) of the *Rome Statute* states that the Court must decide whether to award individual, collective, or both types of reparations, depending on the severity of the harm, the damage caused, and the injuries sustained by victims.³⁹ The Trial Chamber may order collective reparations "where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate."⁴⁰

Reparations for both individual and collective victims can be made by drawing on these two significant texts. This demonstrates that victims are entitled to reparation if it can be proven that they incurred harm, loss, or injury. This is also crucial for executing the reparations award because discretion rests on the Trial Chamber to determine whether harm was incurred on an individual or collective level. In this regard, it is essential to consider how victims would be eligible to receive reparations. The number of victims and the breadth, forms and modalities of reparations are key considerations for either individual, collective, or both types of reparations.⁴¹

If necessary, the Court may also impose symbolic or transformative reparations.⁴² According to the Trial Chamber, symbolic or transformative reparations include

³⁷ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 105 (emphasis added).

³⁸ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 79.

³⁹ A 97(1) of the *Rules of Procedure and Evidence (ICC)*.

⁴⁰ Rule 98(3) of the *Rules of Procedure and Evidence (ICC)*.

⁴¹ Agbor 2018 *African Yearbook on International Humanitarian Law* 112.

⁴² See Mégret 2009 *International Review of Victimology* 127.

campaigns, the issuance of certificates acknowledging that victims experienced harm, outreach and promotion efforts, and educational initiatives designed to lessen prejudice, stigmatisation, and marginalisation of the victims.⁴³

3.2.2.4 The order for reparations must define the harm caused to direct and indirect victims

This principle means that in its order for reparations, the Court must specify the crimes for which the person was convicted and which caused harm to both direct and indirect victims, as distinguished by the Appeal Chamber in the *Lubanga* case.⁴⁴ Examples of harm to direct victims include physical harm and trauma; psychological harm and the emergence of psychological disorders, including, but not limited to, suicidal tendencies, depression, and dissociative behaviour; interruption and loss of schooling; separation from families; exposure to a violent and fearful environment; difficulty relating to family and community members; difficulty controlling aggressive impulses; and lack of development of civilian literacies.⁴⁵

In relation to harm to indirect victims, the Court identified loss, injury, or damage sustained by intervening persons while attempting to stop the further infliction of harm on the victim and psychological and/or material sufferings as a result of aggressiveness on the part of the individual perpetrator to the victim's families and communities.⁴⁶ On this aspect, some questions come to mind, such as who is a victim? What constitutes harm? What is the necessary evidence to prove a connection between the crime the convicted person committed and the harm to victims? What is the required standard of proof for reparation purposes? The following discussion examines answers to these questions.

⁴³ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 239.

⁴⁴ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 191.

⁴⁵ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 191.

⁴⁶ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 191.

3.2.2.4.1 Who is a victim?

A request for reparations does not necessarily imply eligibility for compensation. The criteria for a victim's eligibility for reparations is further defined and streamlined from the general concept of a victim within the framework of core international crimes, even though the *Rome Statute* is unambiguous on who may apply to the Court for reparations.⁴⁷ Articles 68(3) and 75 of the *Rome Statute* apply when read together. In reference to the timing and mode of participation, article 68(3) states that victims may now take part in criminal proceedings at the judges' discretion.⁴⁸

Rule 85(a)-(b) defines victims. It states that;

- (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- (b) Victims may include organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

The *Lubanga* case identified two kinds of victims, i.e., direct and indirect victims. The Trial Chamber stated that

The harm suffered by these indirect victims may include the psychological suffering experienced as a result of the sudden loss of a family member or the material deprivation that accompanies the loss of his or her contributions.⁴⁹

A person qualifies as an indirect victim if a close personal link is proven. The Trial Chamber expanded the definition of an indirect victim to include anyone who steps in to prevent one of the acts that the convicted person is found guilty of committing. Regarding direct victims, the Trial Chamber noted that depending on the

⁴⁷ Adeyemo 2022 *International Review of Law and Jurisprudence* 70.

⁴⁸ A 68(3) of the *Rome Statutes* states that:

As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

⁴⁹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 190.

circumstances, it would be impermissible to subject a direct victim to psychological suffering when they learn that an effort is being made to actively use, conscript, or recruit them for hostilities.

A *nexus* between the intervenor's loss, injury or damage and the harm caused to the direct victim may prevent the child from incurring further harm as a result of a relevant crime.⁵⁰ As such, and depending on the complexity of the matter, if a direct victim is deemed to have suffered harm due to an attempt to recruit, conscript, or use them actively in conflicts, psychological trauma may be inflicted against them, thereby making them eligible for reparations. In some situations, the loss, harm or injury sustained by the victim may be connected to the harm done to the direct victim in their endeavour to stop them from suffering further harm as a result of a relevant crime.⁵¹ Identifying a direct victim entail using documentation and evidence in a request for reparations.⁵²

3.2.2.4.2 What is harm?

The concept of harm and how it is determined in reparation proceedings impacts a victim's eligibility for reparations as well as the scope and extent of the liability of the individual perpetrator. The Court distinguishes between harm that victims endured and the nature and level of harm in order to choose the form of a reparations award.⁵³ Loss, damage and injury are forms of harm under Rule 85(a) of the *Rules of Procedure and Evidence*. They encompass material, psychological, and physical injury.

The next inquiry is what constitutes harm for the purposes of granting reparation to a natural or legal person. In relation to direct victims, harm consists of psychological suffering brought by the unexpected death of a loved one, material hardship brought by the absence of a family member's contributions, loss, injury or damage incurred by the person stepping in to try to stop the victim from suffering additional harm as a

⁵⁰ *Situation in Democratic Republic of the Congo, Prosecutor (on the application of Office of Public Counsel for Victims) v Lubanga Dyilo (Thomas), Redacted Version of 'Decision on "Indirect Victims"'* ICL 777 (ICC 2009) (hereafter *Lubanga case, Decision on 'Indirect Victims'*) para 51.

⁵¹ *Lubanga case, Decision on 'Indirect Victims'* para 51.

⁵² *Katanga case, Order for Reparations* para 122.

⁵³ Adeyemo 2022. *International Review of Law and Jurisprudence* 72.

result of a related crime, and hostile behaviour on the side of former child soldiers who were relocating to their families and communities, resulting in psychological and/or material suffering.⁵⁴

Physical harm encompasses bodily injury that results in physical impairment. It is proven by medical and hospital records and forensic reports.⁵⁵ It is necessary to prove, on a balance of probabilities, a connection between the physical harm and the crime for which the perpetrator was found guilty.⁵⁶ *Sui generis* injury, which includes the loss of a certain level of living, a loss of opportunity and forced migration.⁵⁷ The Court frequently mentions harm that spans generations. Such harm is applicable to children and is sustained during attacks and affects children born after the attacks as a result of losing a parent or other close relatives.⁵⁸

The responsibility of the Trust Fund for Victims is to determine the harm. It does so during the consultative process in various communities.⁵⁹ Thus, the issuance of either individual, collective or both awards depend on the harm. Additionally, the Court considers it advantageous to order collective instead of individual awards for reparations.⁶⁰ Therefore, it is crucial to clearly characterise the harm for which an individual perpetrator is found guilty in order to determine the scope and type of reparations.⁶¹ Additionally, the Court will only order reparations if the crime committed falls under its jurisdiction.⁶² In deciding which reparations to issue, the Court considers all other issues pertaining to each case and makes inferences wherever applicable.⁶³

⁵⁴ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 191.

⁵⁵ *Katanga case, Order for Reparations* para 111.

⁵⁶ *Katanga case, Order for Reparations* para 110.

⁵⁷ *Katanga case, Order for Reparations* paras 136-139; Agbor 2018 *African Yearbook on International Humanitarian Law* 115.

⁵⁸ *Katanga case, Order for Reparations* para 133.

⁵⁹ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 283.

⁶⁰ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 140.

⁶¹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 184; Rule 98(3) of the *Rules of Procedure and Evidence (ICC)*.

⁶² *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 79.

⁶³ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 80.

3.2.2.4.3 The establishment of a causal link

In addition to other requirements discussed above, the Court will award reparations if there is a causal link between the crimes the individual perpetrator was convicted of and the harm suffered by the victim. In essence, the Court will not award reparations for all the crimes for which the individual perpetrator was convicted. In reparations proceedings, a victim's claim for reparation must be for harm brought by crimes for which the individual perpetrator has been found guilty. The burden of proof is on victims to prove a *nexus* between their injuries and the crimes committed by the individual perpetrator. When evaluating the connection between the harm claimed by victims and the crimes for which the individual perpetrator was convicted, the Court first relied on the actual and proximate source of the harm.⁶⁴ However, the Appeal Chamber ruled that each case's unique circumstances must be taken into account when evaluating the causal relationship between the crime that was committed and the harm for which the victims seek reparations.⁶⁵

The above discussion embodies the principle that reparations shall be awarded for a crime for which the victims suffered and if the harm is a result of a crime that falls under the jurisdiction of the Court.⁶⁶ In order to show a causal relationship between harm and crime, it is necessary to establish both the proximate cause of the harm and the crime.⁶⁷ This requires a 'but for' analysis, which the Trial Chamber says must be balanced with the proximate cause criterion.⁶⁸ In other words, a 'but for' test requires that the harm would not have materialised if the convicted persons did not commit the conduct. In cases where the individual perpetrator behaved independently, this is an easy test to use.

⁶⁴ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* paras 22; 65; *Mahdi case, Reparations Order* para 44.

⁶⁵ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* paras 80-81

⁶⁶ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 79.

⁶⁷ *Katanga case, Order for Reparations* para 162.

⁶⁸ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 247

When deciding on the appropriate standard of causation to be applied to reparations, particularly to the degree that they are ordered against the convicted person, the Chamber must take into account the conflicting interests of the rights of the victims and the convicted person.⁶⁹ The Court must, at a minimum, be convinced that there is a 'but for' test relationship between the harm and the crime and that the crimes for which the individual perpetrator was found guilty were the proximate cause of the harm for which reparations are requested.⁷⁰ Based on this assertion, it was held in the *Lubanga* case that the crimes of enrolling and conscripting children under the age of 15 years to actively participate in hostilities must have led to the damage, loss and injury that served as the basis for their reparations claim.⁷¹

In the *Lubanga* case, the Trial Chamber declared that the term proximate cause is only used to refer to actual harm or the consequences of the alleged crimes of the individual perpetrator.⁷² Resultantly, Lubanga was found guilty only of offences involving the conscription and enlistment of children under the age of 15, not of crimes involving sexual-based violence.

The proximate cause test is not explicitly defined in any of the Court's judgements. One must derive this meaning from tort law's *in iure non remota causa sed proxima spectator*, which refers to the idea of proximate cause and means that *in law, the near cause is looked to, not the remote one*.⁷³ The proximate cause test considers the legal cause of harm, which is the closest requirement (*causa proxima*).⁷⁴ However, there are complexities that might arise when interpreting this level of causation.

⁶⁹ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 247.

⁷⁰ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 247.

⁷¹ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 247.

⁷² *Katanga case, Order for Reparations* para 249.

⁷³ Kabalira *The Right to Reparations Under the Rome Statute of the International Criminal Court (ICC)* 106.

⁷⁴ Kabalira *The Right to Reparations under the Rome Statute of the International Criminal Court* 106.

3.2.2.4.4 The determination of the standard of proof

The standard of proof for determining eligibility for reparations is higher than the standard required for victim involvement in legal proceedings. The Court puts each reparations case into context and uses the particular facts of each case to determine eligibility for reparations. This makes the standard of proof at trial fundamentally different from that at the reparations phase.⁷⁵ And as a result, a lower standard other than one beyond reasonable doubt should be employed.⁷⁶ The Appeals Chambers endorsed the view of the Trial Chamber in the *Lubanga* case and said that the reparations phase is "fundamentally different from proceedings at trials [and that this necessitates that a] less exacting standard should apply."⁷⁷ Depending on the specific circumstances of each case, the applicant in reparation proceedings must produce sufficient proof of the causal relationship between the harm suffered and the crime. In this sense, the facts of each individual case will determine the acceptable standard of proof and the determination of what is sufficient for an applicant to satisfy the burden of proof. Thus, the Trial Chambers shall consider any problems arising from the facts of the case at hand in establishing what standard of proof is appropriate.⁷⁸

Victims bear the burden of providing the Court with all the facts required to decide whether to initiate a reparation proceeding. The burden of proof ultimately rests with the victim/applicant, as it does in any civil action where the standard of proof is based on the preponderance of probabilities in view of the evidence adduced by the victim and the defendant.⁷⁹ The Court prefers to consider each case on a balance of probabilities. This refers to determining whether it is more likely than not that the alleged victim(s) experienced the alleged harm and whether that harm was caused by one or more of the crimes that led to the conviction of the individual perpetrator.⁸⁰ As

⁷⁵ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 81.

⁷⁶ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 81.

⁷⁷ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 81.

⁷⁸ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 81.

⁷⁹ Adeyemo 2022 *International Review of Law and Jurisprudence* 72.

⁸⁰ *Katanga case, Order for Reparations* para 84.

a result, the Chamber will rely on presumptions that it makes as it sees fit, taking into account the circumstances and the documentary evidence before it.⁸¹ Where appropriate, such proof will indicate damage brought by the conduct of the convicted person and must be signed by the victim or the victim's representative as a true version of what transpired.⁸²

3.2.2.5 The order for reparations must identify victims who are eligible to benefit from reparations or set out the criteria for eligibility

There is no explicit definition of a victim in the *Rome Statute*. However, the Court uses the conventional definition of victims as natural or legal beings who have suffered injury as a result of the commission of any crime under the Court's jurisdiction.⁸³ As a result, a victim is defined as a person who experienced harm resulting from the commission of a serious crime by the defendant. Simply put, a victim is someone who suffered harm.⁸⁴ If an alleged victim cannot show that they were harmed by one of the crimes enumerated in the *Rome Statute*, the Court may not consider them as victims and may, therefore, not award them reparations. As a result, the concept of harm has a significant bearing on who is a victim.⁸⁵

The *Rules of Procedure and Evidence* and *Regulation of Trust Fund for Victims* define victims in the context of reparations.⁸⁶ Case law further demonstrates that victims are only eligible for reparations for harm brought on by crimes for which the perpetrator has already been found guilty.⁸⁷ In addition to proving that the crime was committed within the jurisdiction of the Court and that the victim had experienced harm as a result of the crime, it is also necessary to establish that the perpetrator of the crime

⁸¹ *Katanga case, Order for Reparations* para 84

⁸² *Katanga case, Order for Reparations* para 85.

⁸³ Rule 85 of the *Rules of Procedure and Evidence (ICC)*.

⁸⁴ Adeyemo 2022 *International Review of Law and Jurisprudence* 70.

⁸⁵ Adeyemo 2022 *International Review of Law and Jurisprudence* 70.

⁸⁶ Rule 85 (a) of the *Rules of Procedure and Evidence (ICC)* and reg 46 of the *Regulations of the Trust Fund for Victims*.

⁸⁷ *Katanga case, Order for Reparations* para 39.

in question has been found guilty by the Court.⁸⁸ Natural persons qualify as victims even though they may not have suffered personal harm.

The Court must correctly identify the victims in each case before it can decide whether they are eligible for reparations.⁸⁹ According to article 79, the Court may also issue an order to the Trust Fund for Victims to pay reparations. Such directives must specify that reparations are to be deposited with the Trust Fund. However, it is "difficult or impracticable to give individual awards directly to each victim"⁹⁰ at the time of the judgement. Hence, reparation amounts are deposited with the Trust Fund for Victims for distribution. In other words, even while resources may not be sufficient to compensate all victims, the Trust Fund for Victims is nonetheless permitted by article 79 to offer suitable redress derived from fines and forfeitures to identified victims.⁹¹

In addition to its main responsibilities, the Trust Fund for Victims is directly connected to the reparation procedures of the Court. Although it lacks the legal authority granted to the Court to decide applications for reparations, it may decide whether victims who had previously been ruled ineligible due to failure to meet eligibility requirements satisfy such requirements. The Trust Fund for Victims uses its funds from its general resources to effect prompt reparations for victims.⁹² Therefore, the Court must ensure that the Trust Fund for Victims has access to sufficient funds to comply with any

⁸⁸ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 8; *Mahdi case, Reparations Order* para 42.

⁸⁹ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 1; *Katanga case, Order for Reparations* para 31.

⁹⁰ Rule 98(2) of the *Rules of Procedure and Evidence (ICC)* states that:

The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.

⁹¹ Shelton *Remedies in International Human Rights Law* 170.

⁹² *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 139.

reparations orders the Court may issue in accordance with article 75(2).⁹³ The funds or resources stated in this context are primarily intended for collective awards.⁹⁴

The Trust Fund for Victims has a reparations plan for collective reparations, which has been affirmed by the Trial Chamber as a component of its role.⁹⁵ For the purposes of this thesis, the Trust Fund for Victims' involvement in the context of reparations is restricted to the interpretation of the convicted person's financial liability. The conviction of an indigent person means that they will be unable to compensate the victims financially. The *Lubanga* case is an example. In that case, the Trial Chamber was ambiguous about the amount that Lubanga was required to pay. The Appeals Chamber requested the Trust Fund for Victims to determine this amount as compensation for the harm that the crimes for which Lubanga was found guilty had caused.⁹⁶

The Trust Fund for Victims occasionally determines the monetary value of reparations. In the *Lubanga* case, the prosecution submitted that the Court had the authority to direct Lubanga to personally pay the victims for the crimes for which he was found guilty. However, the prosecution asserted that it would be unnecessarily stressful to heighten victims' expectations given his meagre resources and inability to make up for all the harm that was caused.⁹⁷ Each victim identified in that case received a symbolic nominal payment. The Court said that additional monies owned by the convicted person would be frozen to pay for outstanding reparations orders.⁹⁸

A question arises as to what will happen in the situation where the convicted individual is declared indigent? This question is relevant because the Trust Fund for Victims does

⁹³ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 140.

⁹⁴ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 141.

⁹⁵ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* paras 130; 168.

⁹⁶ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* paras 55; 129.

⁹⁷ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 131.

⁹⁸ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 132.

not absolve the individual perpetrator of liability. Also, the Trust Fund for Victims is not always in a position to satisfy all reparation demands due to its limited financial resources. Rule 97(1) of the *Rules of Procedure and Evidence* states that the "scope and extent of any damage, loss or injury" shall be taken into account but says very little about the convicted person's personal financial competency.⁹⁹ In the *Lubanga* case, the Trial Chamber stated that under Rule 96(1) of the *Rules of Procedure and Evidence*, the Chamber must notify states of the reparations procedures in question in order for voluntary contributions to be made. However, voluntary contributions are hard to come by and will not be as effective as desired in raising sufficient funds to compensate all victims meaningfully. In the *Mahdi* case, the Trial Chamber tried to allay these concerns by stating that

A convicted person's financial circumstances may affect how a reparations award is enforced – such as by affording an option to make reasonable payments in instalments – and the Chamber does not intend to impose hardships on Mr Al Mahdi that make it impossible for him to reintegrate into society upon his release.¹⁰⁰

In the *Lubanga* case, the Appeals Chamber rejected the claim that interpreting reparations orders made through the Trust Fund for Victims does not supplant the convicted person.¹⁰¹ The Appeals Chamber clarified that although article 75(2) permits the Court to issue a reparations order through the Trust Fund for Victims, this does not prevent it from issuing a reparations order against a convicted individual.¹⁰²

3.3 Applicability of the reparation principles after the Lubanga case

3.3.1 Reparation principles in the Katanga case

The submissions made in the *Katanga* case did not result in a significant expansion of reparation principles as set by the Appeals Chamber in the *Lubanga* case. The Court ruled that the principles outlined in the *Lubanga* case equally applied to the *Katanga*

⁹⁹ *Mahdi case, Reparations Order* para 114.

¹⁰⁰ *Mahdi case, Reparations Order* para 114.

¹⁰¹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 70.

¹⁰² *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 70.

case.¹⁰³ As a result, on the 24th of March 2017, Trial Chamber II issued a reparation order awarding both individual and collective reparations to victims of Germain Katanga. On 8 March 2018, the Appeals Chamber substantially upheld the reparations order.

In light of the Court's key reparations submissions, the definition of a victim was broadened to include organisations or institutions that suffered direct harm to their property dedicated to religion, education, art, science, or charitable purposes, as well as to their historical monuments, hospitals, and other places carrying humanitarian purposes and that had been damaged or destroyed through crimes that were subject to the Court's jurisdiction.

Regarding the question of harm, the Court recognised that the destruction of houses, outbuildings and business premises, destruction or pillaging of furniture, personal effects and wares, pillaging of livestock, destruction of fields and harvests, destruction of harvests, and destruction or pillaging of family property, were examples of material harm.¹⁰⁴

An important submission in the *Katanga case* was handed down by the Appeals Chamber in relation to the totality of harm allotted to the convicted person as thus:

[...] when determining the amount a convicted person is liable to pay for reparations, the primary consideration is the extent of the harm and cost it takes to repair that harm. Criteria such as the gravity of the crimes or mitigating factors such as characteristics personal to the convicted person are not relevant to this question. The goal of reparations is not to punish the person but indeed to repair the harm caused to others.¹⁰⁵

According to the above viewpoint, reparations are ultimately tied to the perpetrator's obligation to make repair on the harm they inflicted. I concur with the Court that

¹⁰³ *Katanga case, Order for Reparations* para 30.

¹⁰⁴ *Katanga case, Order for Reparations* paras 136-139; Agbor 2018 *African Yearbook on International Humanitarian Law* 115.

¹⁰⁵ *Katanga case, Appeals Chamber Decision* para 184.

attention should be paid to how the cost of repair is related to the extent of the harm than mitigating linked to the convicted person.

3.3.2 Reparation principles in the Mahdi case

In the *Madhi* case, the Trial Chamber specifically addressed reparation principles with regard to protected cultural property and heritage.¹⁰⁶ Trial Chamber VIII found that Mahdi was liable for €2.7 million for both individual and collective reparations for the victims of Timbuktu as a result of purposefully plotting attacks against cultural structures. This reparations order was issued on 17 August 2017.¹⁰⁷ The reparations order in the *Madhi* case was substantially sustained by the Appeals Chamber on 8 March 2018.¹⁰⁸

The *Madhi* case illustrates that reparation principles are equally applicable to victims who suffered harm as a result of the destruction of cultural heritage. The Trial Chamber emphasised the significance of collective reparations and said that they are the most appropriate in the case of the destruction of cultural property. Therefore, the Chamber decided that collective reparations were the most appropriate because harm was essentially collective and was suffered by the whole community of Timbuktu.¹⁰⁹ Individual reparations would only affect a limited number of victims, including those who suffered psychological harm because of damage to the tombs of their ancestors and those who suffered economic losses because their livelihoods were solely dependent on the buildings.¹¹⁰

The emphasising of the value of human rights laws as the cornerstone of the Court's reparations principles in the *Madhi* case is significant. The Chamber found that an appropriate framework for addressing reparations for crimes against cultural heritage

¹⁰⁶ *Mahdi case, Reparations Order* paras 51-108.

¹⁰⁷ *Mahdi case, Reparations Order* para 124.

¹⁰⁸ *Situation in Mali, Prosecutor (on the application of Victims) v Al Mahdi (Ahmad Al Faqi), Public redacted judgment on the appeal of victims against the 'Reparations Order' ICL 1815 (ICC 2018) (hereafter *Mahdi case, Appeal Against Reparations Order*).*

¹⁰⁹ *Mahdi case, Reparations Order* paras 67, 76, 82, 40.

¹¹⁰ *Mahdi case, Reparations Order* para 90.

is provided by the principles developed by the *Lubanga* case and that they aligned with the *Basic Principles and Guidelines*.¹¹¹

3.3.3 Reparation principles in the Ntaganda case

The *Ntaganda* case is the Court's most significant recent reparations case. On 8 March 2021, Trial Chamber VI issued its order on reparations to victims against Ntaganda, to be made through the Trust Fund for Victims. The Chamber set the total reparations award for which Ntaganda is liable at US\$30 million, which is the highest financial responsibility for reparations handed down by the Court. However, the judgement was reversed by the Appeals Chamber on 12 September 2022.¹¹² In light of the crimes for which Ntaganda was found guilty, eligible victims included direct and indirect victims of the attacks, victims of crimes against child soldiers, victims of rape and sexual slavery,¹¹³ and children born out of rape and sexual slavery.¹¹⁴ As such, victims are inclusive descendants of children born as a result of rape and sexual servitude. This category of victims experience transgenerational trauma that has a substantial practical impact on lives.¹¹⁵

The Court's jurisprudence in the *Ntaganda* case continued the Court's trajectory of favouring collective approaches to reparations. In that case, the Trial Chamber tailored collective reparations to facilitate restitution, compensation, rehabilitation, and satisfaction as some examples of reparations modalities.¹¹⁶ It said that where appropriate, collective reparations may also include acts of symbolic, preventative and transformative value.¹¹⁷

The *Ntaganda* case is significant for two main reasons. First, it shows that a reparation order can be issued before conviction. Second, it confirms that a reparation award can be made in favour of victims of rape. Concerning the first reason, it is trite that an order for reparations must be made against the convicted person, per the provisions

¹¹¹ *Mahdi case, Reparations Order* paras 25-26.

¹¹² *Ntaganda case, Appeal Against the Decision Reviewing Restrictions*.

¹¹³ *Ntaganda case, Reparations Order* para 46.

¹¹⁴ *Ntaganda case, Reparations Order* paras 108-123.

¹¹⁵ *Ntaganda case, Reparations Order* para 122.

¹¹⁶ *Ntaganda case, Reparations Order* paras 191-208.

¹¹⁷ *Ntaganda case, Reparations Order* paras 191-208.

of article 75(2) of the *Rome Statute*. However, nothing in the judicial framework of the Court requires that such a conviction be final. The Trial Chamber took the unusual and potentially problematic step of issuing an order for reparations while the conviction and sentence were on appeal. Even though the Court was within the bounds of the law in doing so, that approach could lead to complications were an accused wins an acquittal on appeal. What should then happen to the reparations already ordered since reparations may only be made against a convicted person? This raises the issue of what constitutes a conviction: the initial ruling by the Trial Chamber that the person is guilty or the final decision on the appeal of that conviction?

In justifying its reparations order while the judgement and sentence were on appeal, the Trial Chamber said that it had reasonable cause to issue a reparations order prior to the date set for the appeals judgement because two of its judges' terms were about to expire.¹¹⁸ It also stated that if a reparations order is issued earlier, it might aid in making the reparations process more efficient and expedient. This approach was a significant departure from the traditional reparation precedent. Prior to the decision, no Trial Chamber had issued an order for reparations prior to the Court's issuance of a final judgement on conviction and sentence.¹¹⁹

Expectedly, the Trial Chamber received a lot of criticism for moving towards a victim-centred approach to reparations while ignoring the principle of legality.¹²⁰ The Chamber held that when determining the convicted person's financial liability, the harm and the costs to rectify it should be considered. The total amount is fixed regardless of the degree of guilt, the gravity of the crimes, or any mitigating factors. The *Lubanga* case made it clear that reparations must be proportionate to the harm suffered by the victims, the participation of the guilty person in the commission of the crimes for which they are found guilty, and the particular circumstances of each case.¹²¹

¹¹⁸ *Ntaganda case, Reparations Order* para 5.

¹¹⁹ *Ntaganda case, Reparations Order* ft 10.

¹²⁰ Lostal 2021 <https://www.ejiltalk.org/the-ntaganda-reparations-order-a-marked-step-towards-a-victim-centred-reparations-legal-framework-at-the-icc/>.

¹²¹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 21.

The *Ntaganda* case emphasised that the Court's reparation orders, which are filled with references to victim-centric language but discourage too many reparation requests, can have major ramifications by excluding certain people from reparations. Although this may be acceptable, one can dispute the legitimacy and soundness of such collective awards as well as their fairness to convicted persons. The propensity for swift reparations runs the risk of ignoring individual reparations in favour of collective reparations.

3.4 Conclusion

This chapter explores the Court's reparation jurisprudence through the lens of the four reparative cases. The analysis demonstrates that the Court views reparations as the most appropriate way to assist in redressing the harm and injury suffered by victims of serious international crimes. The Court's role in ordering reparations is enhanced by the mandate of the Trust Fund for Victims, which also exercises its powers in terms of the *Rome Statute*.¹²² Although reparations procedures primarily depend on how each trial proceeds, they are different from trial proceedings¹²³ because cases involving reparations are often civil in nature.

However, there is no full agreement among scholars on whether the four reparative cases establish consistent jurisprudence on the reparation principles developed in the *Lubanga* case. These cases are a starting point for the Court to further develop its principles for reparations in subsequent cases.¹²⁴ It should also be noted that the Court's granting of reparations does not absolve respective State Parties of their responsibility to provide victims with reparations in accordance with international conventions and domestic legislation. Therefore, it is important to emphasise the domestic reparations provided by states to victims. In this context, one notes that the reparations mechanism of the Court is not designed to make up for all harm suffered by potential victims, especially considering how the four decided cases were resolved.

¹²² A 75(1) and (2) of the *Rome Statute*.

¹²³ *Katanga case, Order for Reparations* para 16.

¹²⁴ A 21(2) of the *Rome Statute* provides that "The Court may apply principles and rules of law as interpreted in its previous decisions."

It is essential for each state to adopt a complementary strategy that identifies excluded victims and provides them with reparations.

Although the Trial and Appeal Chambers have consistently applied the principles of reparations apart from those already established by the consistent jurisprudence of the Court, they have also adapted and expanded these principles in the *Ntaganda* case. Notwithstanding, it seems unlikely that any preceding reparative jurisprudence would disagree with the principles for reparation submitted by the Appeals Chamber in the *Lubanga* case.¹²⁵ However, the legal framework of the Court will not be able to provide reparation to every victim in every situation. The problem lies in that after going through gruelling trial and sentencing procedures as witnesses and participants, many victims have inflated expectations for the Court's reparations system. The sentencing of perpetrators of serious international crimes gives them hope for better things to come in the form of reparations. In addition to the inherent limitations of legal reparations, the novelty of a reparations system by an international criminal court has its own special complexities. The several procedural and substantive complexities that arise from the Court's reparation mandate are analysed in the following two chapters, starting with procedural complexities in Chapter 4.

¹²⁵ *Situation in Uganda, Ongwen (Dominic) (on the application of Victims) v Prosecutor, Trial Judgment* ICL 2038 (ICC 2021) (hereafter *Ongweni Case, Order for Submissions on Reparations*) para 5(i)(a).

Chapter 4

Procedural Complexities

4.1 Introduction

Establishing a legal framework for enabling victims who fall under the jurisdiction of the Court will enable victims to exercise their right to reparations and give it meaning and relevance. The right of victims to take part in a criminal trial is distinct from the right to seek reparations.¹ A request for reparations under Rule 94 of the *Rules of Procedure and Evidence (ICC)* is not contingent on either submitting an application for participation under Rule 89 of the same or having a right to take part in the proceedings relating to the accused person's guilt, innocence or sentence.²

Reparations are significant because they come at a crucial point in the delivery of justice to victims.³ Hence, the effectiveness of the Court's reparations system determines the victims' perception of receiving justice through it.⁴ In order to give reparations significance, recognition is given to a process that is fair to victims and which includes, among other things, procedural considerations that influence the timing and success of reparation orders within criminal proceedings. In other words, it is important to evaluate the potential procedural complexities that could occur during each trial.

Some of the complexities are connections between reparations and the conviction of the accused, the hierarchy and selectivity of victims in the definition of victimhood for reparations, and the procedural role of the Trust Fund for Victims in relation to the accused person. There are competing views regarding, on one hand, the right to a fair trial to establish guilt or innocence and allowing a swift and equitable process for victims to receive reparations on the other. While cognisant of the fact that the Court

¹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 69.

² *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 69.

³ *Ntaganda case, Reparations Order* para 1.

⁴ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 178.

does not separate reparation proceedings from its trial proceedings, an examination of these complexities is necessary.

Procedural complexities arise during reparation hearings. In determining these complexities, one asks which difficulties could occur if victims request reparations amidst a trial. Procedural complexity includes rules about jurisdiction, pleadings and practices, evidence, appeal, execution of judgements, and other issues. They prescribe which rights are enforced and which wrongs are rectified. This stands in mild contrast to the punishment of the individual perpetrator, which makes him or her accountable for reparations. In determining procedural complexities, one may also ask which potential procedural challenges emerge and impair the Court's ability to carry out its reparations mandate. This chapter addresses this question.

This chapter examines procedural complexities brought by the interpretation of article 75(1) and (2) of the *Rome Statute*. These provisions require the Court to establish principles of reparations against the convicted person. The unravelling of these procedural complexities must be seen in the light of trial proceedings that resulted in the order and award of reparations. It is crucial to mention the procedural complexities before venturing into an in-depth discussion. They include:

- Reparations are linked to the conviction of the accused person.
- Award of reparations linked to the crimes for which the accused is convicted (and the implication on victims of crimes that fall outside the conviction of the accused).
- How the link between reparations and conviction enhances victim hierarchy.
- The civil dimension of reparations in a criminal process.
- The perpetrator-centric versus victim-centric perspective in claiming reparations.
- Technicalities in the modalities of reparations and the determination of the appropriate reparations.

- The relationship between the Trust Fund for Victims and the indigency of the convicted person.

4.2 Overview of procedural law pertaining to reparations

4.2.1 *The mandate to establish principles as the foundation of procedural law*

Reparation proceedings are based on a victim-centred approach through which the Court endeavours to give victims prompt and relevant assistance.⁵ This narrative is strengthened by the fact that the Court is unquestionably the first international criminal court to give victims the legal means to file claims for reparations against convicted persons.⁶ In this context, the interpretation of article 75(1) of the *Rome Statute* serves as the foundation for procedural law pertaining to reparations. It states that

The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.⁷

The Court must establish principles for reparations since the use of 'shall' means it is mandatory. In the *Lubanga* case, the Appeals Chamber carried out this obligation by establishing five components that represent the principles that ought to be included in a reparation order. These elements have been discussed in the preceding chapter. Article 75(1) mandates the Court to provide the legal basis for the reparations. In this sense, there are two arguments. The first is a call for generally accepted pre-established principles. However, the Court rejected this reasoning on the grounds that the guiding principles ought to be established after a conviction has been rendered.⁸

⁵ International law and international human rights law serve as the foundation for reparations, further defining what "victim-centered" justice entails. Furthermore, under these two fields of law, individuals have the right to hold states accountable when their rights are infringed (under international human rights law), and states have a responsibility to compensate for any harm they have caused (under international humanitarian law). In the framework of the ICC, reparations contribute to the promotion of victim-centered justice by obligating an individual perpetrator to make reparations for the harm they have caused. This is significant because states frequently become parties to international crimes by their acts or inactions, making it difficult for victims to seek reparation through domestic courts. See Moffett *Justice for Victims Before the International Criminal Court* 155.

⁶ Only restitution of property was made as reflected under A 24(3) of the *Statute of the ICTY* and A 23(3) of the *Statute of the ICTR*; Di Giovanni 2005 *J Int'l L & Int'l Rel* 26.

⁷ A 75(1) of the *Rome Statute*.

⁸ Assembly of States Parties "Report of the Court on Principles Relating to Victims' Reparations" paras 3; 17-18.

The second subject of debate is the case-by-case strategy that the Trial Chamber and Appeals Chamber both adopted and endorsed in the *Lubanga* case.⁹

Although the Court advocates for a case-by-case approach, it is unclear how this will be put into practice because the same principles were used in the *Mahdi* and *Katanga* cases, implying a desire for consistency in their application. This contradicts the proposition that Trial Chambers "should articulate principles within the context of the circumstances of the specific case at hand."¹⁰ This also suggests that each Trial Chamber has the responsibility of developing reparations principles that are adapted particularly to each case. It is noteworthy that the principles formed in the *Lubanga* case were not meant to bind subsequent Trial Chambers but were open to modification and adaptation. However, case law shows that little was done to develop or contribute to these principles and that subsequent Trial Chambers copied and pasted them into the *Mahdi* and *Katanga* cases.

The *Ntaganda* case sheds new light on the application of reparation principles by including rape victims among persons eligible for reparations.¹¹ While the *Ntaganda* case introduced novel expansions to reparation principles, the *Lubanga* case continues to be a crucially important founding precedent of the Court's reparation approach. The *Ntaganda* reparation order of 2021 served as the court's first instance to expand on the reparation principles.¹² As the Trial Chamber put it:

At the outset, the Chamber notes that there may be some overlap between the principles below. That is due to their complementary nature, which requires that they are considered as a whole and not in isolation, in order to adequately assess and address the victims' harms in a holistic manner.¹³

However, the Court must strike a balance between applying consistent principles across the board and adapting them to the circumstances of the case to enhance justice. In the same line, an assertion made in the *Ntaganda* case indicates that the

⁹ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 181; *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 55.

¹⁰ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 55.

¹¹ *Ntaganda case* paras 41; 67.

¹² *Ntaganda case, Reparations Order* paras 28-103.

¹³ *Ntaganda case, Reparations Order* para 30.

established principles apply broadly.¹⁴ However, there are several problems in the Court's reasoning for using these principles in a broad sense. They include difficulties that could result from applying these principles generally to upcoming reparative cases. Hence, the debate remains on whether their application ought to be uniform, consistent and cohesive. The *Madhi* case elucidated that:

Reparations of crimes against cultural heritage are adequately addressed under the same framework and thus sees no reason to deviate from the relevant principles formulated by the Appeals Chamber in *Lubanga*.¹⁵

The point of contention is that if these principles are implemented uniformly in each case, the Court might overlook the merits that are obvious in the varied nature of the harm done to victims. This projection depicts a variety of victim sufferings, and that reparation will only be beneficial if they are constructed to meet their needs and expectations as individuals and as a collective. Gesase argues in favour of this point of view and says that the Court's reparation framework ought to be evaluated on the basis of how it responds to the requirements of diverse victims who fall under various categories of harm.¹⁶

The argument remains that a precedent of using established principles as a "general application" approach makes the Court run the risk of ignoring the varied types of harm suffered by victims in the context of the unique circumstances and merits of each case before it.¹⁷ In the *Lubanga* case, the Trial Chamber stated that:

Although [...] the Trial Chamber has established certain principles relating to reparations and the approach to be taken to their implementation, these are limited to the circumstances of the present case.¹⁸

The argument for limiting principles "to the circumstances of the present case" connotes a case-by-case approach to the application of the principles. The Appeals Chamber made a similar submission that the "Trial Chambers should articulate

¹⁴ *Ntaganda case, Reparations Order* para 29.

¹⁵ *Mahdi case, Reparations Order* para 26.

¹⁶ *Gesase Reparations in International Criminal Prosecutions* 149.

¹⁷ *Katanga case, Order for Reparations* paras 29-30; *Mahdi case, Reparations Order* para 26.

¹⁸ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 181.

principles within the context of the circumstances of the specific case at hand."¹⁹ This implies that the Trial Chamber has established certain general principles for reparations and how they should be applied to each case.²⁰ Promoting this approach begs the question of why the *Katanga* and *Mahdi* cases did not employ the same approach. The principles of reparations were not altered, modified, or augmented in any way in these subsequent cases. If there is a lesson to be drawn from this, it is that the established principles were modelled in light of the *Lubanga* case and that, as a result, they were not intended to be applied uniformly without modification in the *Katanga* and *Madhi* cases.

The *Katanga* and *Madhi* cases had their own merits. Therefore, it stands to reason that the reparation principles should have been followed in each case. But this was not done. The procedural application of the principles is further questioned by these issues. As such, formulating and giving meaning to reparation principles in the context of the "circumstances of the present case" or "circumstances of the specific case at hand" is blurry. Another area of contention relates to the stage of the trial proceedings during which reparation principles should be modified, expanded or adapted to the merits of each case. In the *Lubanga case*, the Appeals Chamber said that the principles "can nonetheless be applied, adapted, expanded upon or added to by future Trial Chambers."²¹ However, it gave no insight into how this was to be done. In the *Mahdi* case, for instance, which involved reparations for crimes pertaining to cultural heritage which fell within the Court's jurisdiction, there was no reason for not deviating from the *Lubanga* case, which was totally different.²²

The precedent established in the *Ntaganda* case demonstrates that principles for reparations could be developed and applied before a conviction is confirmed on appeal. On this note, one may ask, if the principles of reparation are to be expanded, on what basis and at which point in the procedures should such expansion happen?

¹⁹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 55.

²⁰ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 181.

²¹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 3.

²² *Mahdi case, Reparations Order* para 26.

Why should the Court depart from the aforementioned principles? The *Ntaganda* case shows that a reparations order can be issued before the finalisation of the appeal judgement if the terms of one or more judges are about to come to an end before the appeal on conviction and sentence is heard and decided.²³

Another reason for proceeding with a reparations order before a final decision on appeal of conviction and sentence is issued is that the issuance of a reparations order would help hasten the reparations process and make the pursuit of prompt reparations for victims meaningful. These explanations are still unclear because the appeals judgement was due 23 days after the reparation decision was issued.²⁴ This reality poses certain difficulties, such as, what happens to a reparations order obtained before a conviction if that conviction is reversed in an appeals judgement? What possible detrimental effects might the Trial Chamber's reparation order have on the victims if it is currently under implementation? I submit that this approach was a flaw and would be detrimental should it be practiced on future reparative cases.

The structure of a reparations order may be difficult to implement if these questions are unanswered. If the same approach is used in cases that come after *Ntaganda*, the foregoing complexities will arise and will need to be revisited by the Court. Presently, the precedent set in the *Ntaganda* case does not mention the implications of issuing a reparations order prior to conviction on the legitimacy of the reparation principles. The question arises on which procedural framework is appropriate when modifying these principles. If these principles are altered or expanded, a potential *ad hoc* method of action may result. Perhaps the lack of a legal framework to address such circumstances is the reason why the reparation principles were only developed in the *Ntaganda* case. It has been submitted that:

The current absence of guidance on a variety of issues related to the scheme, combined with the fact that the judges of the ICC hail from diverse backgrounds, leaves open the possibility for wide discrepancies in the

²³ *Ntaganda case, Reparations Order* para 5.

²⁴ *Ntaganda case, Reparations Order* para 5.

approach to reparations across cases, which may in turn lead to perceptions that the overall scheme is unfair or arbitrary.²⁵

The extent to which these reparations principles are to be applied, modified, expanded or added is another issue the Court is yet to address. It also has to determine how these principles can be constrained. There is concern that the Court is not applying these principles to victims who fall within the range of situations where reparation was ordered, but no award was granted. This is due to the fact that the applicable procedural law is still ambiguous.

Another question is which Chamber acts as the regulatory body for these principles. According to article 75(1), the Court must set principles in accordance with its judicial authority. The Court has been given the authority to make new laws rather than merely interpreting and applying current ones. However, the *Rome Statute* is silent on the regulation of these principles.²⁶ This shows that there is no procedural regulatory power and that no Chamber of the Court should be assigned the responsibility of policing these standards. In this regard, article 39(2) of the *Rome Statute* explains the distinct judicial standards that each Chamber must uphold. The procedural approach that needs to be taken in relation to these principles is complicated by the uncertainty surrounding this judicial function of the Court.

4.2.2 Reparations made upon request and out of the Court's own motion

The *Rome Statute* states that:

[I]n its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of victims and will state the principles on which it is acting.²⁷

This provides two instances when reparations might be triggered. The first is that reparation actions can be taken upon request by victims. The second is at the instance of the Court out of its own initiative, particularly in unusual circumstances. The concepts that guide reparations proceedings have a major role in determining whether

²⁵ War Crimes Research Office "The Case-Based Reparations Scheme at the International Criminal Court" 3.

²⁶ McCarthy *Reparations and Victim Support in the International Criminal Court* 131.

²⁷ A 75(1) of the *Rome Statute*.

the harm suffered by victims is sufficiently reparable. However, this is not always related to their participation in trial proceedings. A victim's rights to take part in trial and reparation proceedings are governed by distinct procedures. Although one may influence the other, the right of victims to participation and their right to reparations are independent but related. Hence, a request to participate in court proceedings is distinct from one for reparations.²⁸

4.2.2.1 Reparations made upon request

Article 75(1) does not specify who may obtain reparations from the Court. Its provisions find expansion in Rule 94 of the *Rules of Procedure and Evidence* under 'Procedure upon request'. This provision identifies the victim as the party who lodges a request for reparations. This raises a complexity regarding the victim's status in relation to reparations. In light of this, Rule 85 of the *Rules of Procedure and Evidence* states that participation, protection, information, representation and reparation apply in respect of victims.

The question arises whether victims who do not fit the requirements set by the *Rome Statute* and the *Rules of Procedure and Evidence* qualify to request and obtain reparations before the Court. To answer this question, a reference to the *Lubanga* case is necessary. In that case, the Appeals Chamber said that the Trial Chamber did not err in considering victims who did not submit applications for reparations and for also considering material beyond that which was submitted by victims.²⁹ This means that the identities and number of victims need to be identified prior to the finalisation of the reparations award.³⁰

4.2.2.2 Reparations requested in exceptional circumstances of the Court's own motion

The exceptional circumstances in which the Court may, out of its own volition, trigger reparation proceedings are unclear. Generally, the Court may "on its own motion in

²⁸ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 70.

²⁹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* paras 63; 92.

³⁰ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* paras 87-89; *Katanga case, Order for Reparations* para 147.

exceptional circumstances, determine the scope and extent of any harm, loss, and injury to, or in respect of, the victims."³¹ The term 'may' is permissive and gives the Court the authority to act in this respect. This highlights the Court's discretion to decide whether to consider a victim's request for reparations and to assess the depth and breadth of the suffering endured by the victim before deciding whether to grant the request.

Bearing in mind that the Court operates on an adversarial principle, it is not obliged to hear matters on reparations where there is no claim for reparations. This adversarial principle in international proceedings has been reaffirmed in other jurisdictions, particularly in the case of *Velasquez Rodriguez v Honduras*, where the IACtHR dismissed an application for compensatory damages because they were not argued timely.³² However, this principle does not preclude the Court from hearing pleas for reparations from victims who were unable to file them owing to exceptional circumstances.³³ One may infer that in the case of victims who are comparatively disadvantaged, the Court has the option to screen beneficiaries or assign that duty to the Trust Fund for Victims,³⁴ which will provide them with a forum to prove their claims and determine their eligibility for reparations.³⁵

4.3 Analysis of procedural complexities

4.3.1 Reparations linked to the conviction of the accused person

A reparations order is made against a person found guilty of crimes which fall within the Court's jurisdiction.³⁶ In other words, there is no basis for reparations if there is no conviction. This position aligns with international principles on exerting individual

³¹ A 75(1) and (2) of the *Rome Statute*.

³² *Rodríguez v Honduras* para 193.

³³ See Rule 95 of the *Rules of Procedure and Evidence (ICC)*; *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 219.

³⁴ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 138.

³⁵ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 170.

³⁶ A 75(2) of the *Rome Statute*.

criminal responsibility.³⁷ Where the guilt of the accused has been proven and announced by the Court, claimants for reparations become eligible to request reparations, provided that they meet all the other requirements. Making the convicted person accountable for the harm they committed signifies accountability through reparations.³⁸ The reparations judgement must not go beyond the crimes for which the person was convicted.³⁹ Due to ambiguities in the Court's reparations mandate, there is a conflict between the scope of liability for each convicted person and the thousands of victims who require reparation for harm committed against them.

In circumstances where the convicted person did not act alone, the Court's "convicted person" approach might not be the appropriate one. The question in this context is whether collective culpability is preferable to holding individual perpetrators personally accountable. The criterion of 'convicted person' leads to selective prosecution, which, as seen previously in this work, is problematic in the context of reparations. Selective prosecution leads to a narrow view of justice. Leaving responsibility for reparations to domestic judicial systems by selectively choosing who to give audience in the Court does not bode well for victims of serious international crimes.

In this regard, the *Lubanga* and *Ntaganda* cases can be used as references. In the two cases, the Court found individuals guilty in their personal capacities and also guilty as part of a collective of people who committed serious crimes to further the activities of an armed group. However, only two members of the Ituri UPC/FPLC militia were found guilty. The Court found Lubanga and Ntaganda jointly responsible for recruiting and employing child soldiers.⁴⁰ When few people are prosecuted for crimes, the intention of transformation and reconciliation is defeated. Controversy over whether reparations should be paid to the victim or the state that caused the harm arose during

³⁷ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 65; *Katanga case, Order for Reparations* paras 15; 251; *Mahdi case, Reparations Order* para 27.

³⁸ See also A 76(3) of the *Rome Statute*.

³⁹ *Situation in the Democratic Republic of the Congo, Prosecutor (on the application of Victims) v Lubanga Dyilo (Thomas), Judgment on the Appeals Against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for Which Thomas Lubanga Dyilo is Liable'* ICL 1952 (ICC 2019) (hereafter *Lubanga case, Appeal of Decision Setting the Size of the Reparations Award*) para 3. See the dissenting opinion by Judge Eboe-Osuji where he claims that 'reparation under the Statute need not depend entirely on conviction' (para 15).

⁴⁰ *Ntaganda case, Reparations Order* paras 219-221.

the development of the *Rome Statute*. Since the goal of international criminal law is to hold perpetrators of international crimes individually accountable, there was an agreement at the Rome Conference to order reparation against individuals, not states. However, the *Rome Statute* also states that;

No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.⁴¹

This indicates that holding the convicted party accountable for reparations does not absolve States from their obligations to uphold the treaties to which they are party under international law.⁴² This in no way affects the state's ability to carry out its domestic obligations to provide reparations to victims, where applicable.

The conflict between individual criminal responsibility and state responsibility is still present. According to Moffet, the approach of holding each individual perpetrator responsible for making reparations allows for impunity, rendering victims helpless, and encourages recurrent recidivism.⁴³ This is because both state officials and state institutions are involved in the commission of such crimes, although only those found guilty are held accountable. As a result, the objective of reparations is impeded because of shared blame and restrictions on justice given to victims. The challenge is that imposing responsibility for reparations simply on the convicted person is insufficient because those who conduct crimes of an international scale do not act alone; instead, they receive assistance from government entities, commercial entities and criminal organisations.⁴⁴

This issue arises because the Court does not bring charges against States even though there is a causal connection between the conduct committed by persons acting on behalf of their States and the suffering experienced by victims.⁴⁵ The evidence suggests that the majority of reparative cases involved individuals who participated in state-sponsored atrocities. The main issue here is that the Court will find it difficult to approach such a State for help in carrying out its reparation orders if these

⁴¹ A 25(4) of the *Rome Statute*.

⁴² Muttukumaru "Reparations to Victims" 262–268.

⁴³ Moffett 2013 *International Journal of Human Rights* 377.

⁴⁴ Navarro 2018 *International Criminal Law Review* 79- 81

⁴⁵ Kelly "The Status of Victims Under the *Rome Statute* of the International Criminal Court" 61.

persons behave in their official capacities as state officials, like military personnel.⁴⁶ Due to the likelihood that the States may have resources to supplement the little that may be obtained from a convicted person, it will be detrimental to victims if States are not ordered to provide reparations.⁴⁷ Although the foundation of international criminal law is the obligation to hold guilty individuals accountable, the Court contends that this obligation does not extend to the obligation to hold guilty States accountable. Therefore, closing this gap may be a challenge for the Court's reparative mandate. This brings the analysis to the next level of complexity, which is the issue of international responsibility and reparations.

It is indisputable that national jurisdictions must abide by reparation principles and orders of the court. In the same context, it is also trite that the Court has little or no authority over state institutions if such reparation orders are to be issued. The issue still exists that the Court does not have sufficient authority to enforce reparation rulings against national courts and state entities.⁴⁸ In order to enforce its reparation orders, the Court still needs the assistance of national court systems. The restitution of illegally acquired property held by convicted persons in the control of the State is one example.⁴⁹

To this end, it is important to note that according to article 75(5) of the *Rome Statute*, a state party must "give effect" to any decisions made in relation to article 109 of the *Rome Statute* regarding the application of fines and forfeiture measures. This may be difficult since applying the fundamental premise of individual criminal responsibility to this circumstance leads to some inequities, especially when mass crimes are involved. Due to the Court's limited resources and jurisdiction over national courts and governments, there is a possibility that the victims' expectations for receiving reparations run a risk of not being fulfilled.

⁴⁶ See A 130 of the Preparatory Committee on the Establishment of an International Criminal Court "Draft Statute of the International Criminal Court."

⁴⁷ Kelly "The Status of Victims Under the *Rome Statute* of the International Criminal Court" 61.

⁴⁸ Muttukumaru "Reparations to Victims" 264.

⁴⁹ Sperfeldt 2017 *International Criminal Law Review* 373.

Another procedural intricacy that is significant is the extent of the convicted person's liability. An order for reparations must establish and inform the convicted person of the extent of his or her liability in accordance with the first component of the principles for reparations.⁵⁰ However, if the convicted person is indigent, such an implementation may present issues. So far, the Court has declared all convicted persons in reparative cases indigent. One can argue that the convicted person should be relieved from financial responsibility due to their impoverishment. This owes to the fact that holding the convicted person responsible for making reparation in the form of compensation will be impractical if they are indigent.

However, the Appeals Chamber held that the convict's financial responsibility for reparations is unaffected by his or her indigence.⁵¹ The problem with this position is that it will be difficult to ensure that the reparation order is implemented if the financial responsibility of the convicted person is not carefully addressed. Additionally, it might not be possible to seize and freeze the assets of the convicted person. As stated in the *Mahdi* case, the financial position of the convicted person will have an impact on how the reparation order is executed, including whether compensation is paid in instalments or whether assets are frozen or seized. As a result, these may cause difficulty for the convict by preventing his ability to reintegrate into society after his release. However, it does not resolve the conflict between the desire of the victims to get reparations and the convicted person's desire to integrate back into society after release. With this in mind, one question that can be posed is whether the Court places more importance on the reintegration of the convicted person than the victims' right to receive reparation. The Court is yet to address this poser.

In *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, the Trial Chamber was faced with the question of whether reparations for victims could be requested,

⁵⁰ *Lubanga case, Appeal of Decision Setting the Size of the Reparations Award* paras 32; 118.

⁵¹ *Lubanga case, Appeal of Decision Setting the Size of the Reparations Award* para 269; *Katanga case, Order for Reparations* para 246; *Mahdi case, Reparations Order* para 223.

given the fact that the case against the individual perpetrator had been terminated.⁵²

In a dissent, Judge Eboe-Osuji opined that:

To conflate considerations of punitive justice with those of reparative justice - and say that this Court cannot entertain questions about reparation for victims when a case against the accused has been terminated – will create more confusion and anxiety about the administration of justice in this Court.⁵³

The Court treats reparations as an add-on to the legal process rather than as a separate hearing with the exclusive purpose of determining victim compensation. As Judge Eboe-Osuji further dissented,

There is a critical need to recall here that the role of the ICC as an instrument of justice - including reparative justice - is only complementary. In that regard, the ICC can only be a court of last resort. The primary responsibility for the administration of justice remains with the States- also possibly augmented by other complementary regional arrangements that do not in any way jeopardise the role of the ICC as a court of last resort. That being the case, the existence of the ICC should not result in a situation in which national Governments may feel free to abdicate their responsibility to attend to the needs of justice for their own citizens.⁵⁴

It is not clear whether it is possible for the Court to issue a reparation award or order in the absence of a conviction. This is the question that needs to be answered in light of the *Ntaganda* case, where reparations were awarded before the final appeal decision of the conviction. This approach differed from the *Ruto* case, in which Judge Eboe-Osuji submitted that:

I see no convincing basis in law for the idea that an ICC Trial Chamber may not entertain questions of reparation merely because the accused they tried was not found guilty. The reasoning is [...] inimical to the 'dictates of fundamental justice [...] In my view, such formalistic approach could never supply a convincing system of reasoning that prevents an ICC Trial Chamber from entertaining questions of reparation in the absence of conviction. And this is especially so in a case, as them Ruto and Sang trial, in which there was never a question that the victims suffered harm - to the contrary, all the parties and the Government of Kenya had accepted that the victims had suffered harm. Indeed, there is a solid basis in international law to reject

⁵² *Situation in the Republic of Kenya, Prosecutor (on the application of Victims) v Ruto (William Samoei) and Sang (Joshua Arap), Decision on Defence Applications for Judgments of Acquittal* ICL 1688 (ICC 2016) (hereafter *Ruto and Sang case, Decision on Defence Applications for Judgments of Acquittal*).

⁵³ *Ruto and Sang case, Decision on Defence Applications for Judgments of Acquittal* 8 para 26.

⁵⁴ *Ruto and Sang case, Decision on Defence Applications for Judgments of Acquittal* 9 para 28.

the no compensation without conviction thesis. International and transnational norms concerning criminal injuries compensation have completely rejected the idea.⁵⁵

According to article 75(2) of the *Rome Statute*, the reparation order shall be made against the convicted person. However, there is no evidence in the postulation that the reparation order must be final. This further creates some procedural confusion in the light of the *Ntaganda* case in which the reparations order was given while the verdict and sentence were under appeal. This indicates that reparation was given before a conviction. As such, future reparative cases may face difficulties as a result of this procedure. The parameters and legal basis for following the *Ntaganda* precedent are unclear due to the fact that the Court did not outline the legal requirements that must be fulfilled for such a precedent of reparation awards prior to conviction.

Prior to the *Ntaganda* case, the Trial Chamber had never issued an order for reparations before a conviction. The example led in the *Ntaganda* case pulls attention away from conviction before reparation.⁵⁶ What will happen to the reparation award if the conviction is overturned on appeal? The answer to this question is not clear. This is a pertinent question that remains unanswered. The *Ntaganda* case suggests that a conviction need not occur before an order for reparations. This runs parallel to the *Bemba* case, in which the Trial Chamber III delayed reparations payments until the Appeals Chamber issued a decision.

Following the acquittal in the *Bemba* case, Trial Chamber III concluded that no reparation order could be made against Bemba under article 75 of the *Rome Statute*. In addition, Trial Chamber III submitted that:

The Chamber agrees with the submissions made that no reparations order can be made against Mr Bemba under Article 75 of the Statute. The Chamber must respect the limitations of this Court and recalls that it can only address compensation for harm suffered as a result of crimes when the

⁵⁵ *Ruto and Sang case, Decision on Defence Applications for Judgments of Acquittal* 4 para 12.

⁵⁶ *Ntaganda case, Reparations Order* fn 10.

person standing trial for his or her participation in those crimes has been found guilty.⁵⁷

This was not the same procedure followed in the *Ntaganda* case, in which the Court submitted that:

Considering that the mandate of two of the Chamber's three Judges comes to an end on 10 March 2021, including that of the Judge who presided over the trial, the Chamber has decided to issue this Order prior to the issuance of the appeals judgment on the conviction and sentence. In that respect, the Chamber recalls (i) the victims' right to prompt reparations; (ii) that the crimes for which Mr Bosco Ntaganda ('Mr Ntaganda') was convicted took place almost two decades ago and most victims have received little to no assistance so far; and (iii) that, due to their particular vulnerability, some victims may require urgent assistance. The Chamber considers that issuing this Order now may contribute to more expeditious reparations proceedings.⁵⁸

The conflicting positions in the *Ntaganda* and *Bemba* cases show that the legal framework on conviction before reparation is a slippery slope, which, when applied retrospectively, renders the cases prior to the *Ntaganda* case procedurally unfair in the context of reparations. Similarly, the *Ntaganda* case portrays a problematic approach if the conviction is partially or completely reversed on appeal when reparations have already been ordered. It will impair the scope of harm for which the convicted person shall be found culpable. This will be damaging for victims at the very least, and in the worst case, halting any implementation work taken up.⁵⁹

The divergent stances taken in the *Ntaganda* and *Bemba* cases demonstrate the legal presumption of conviction before reparation, which, when examined and applied retrospectively, makes cases that came before the *Ntaganda* case procedurally unfair in the context of reparations. The *Ntaganda* case illustrates a challenging approach if the conviction is partially or entirely overturned. It will further limit the extent of the harm for which the convicted individual will be deemed responsible. The precedent established by the *Ntaganda* case demonstrates a lack of clarity on the justifications

⁵⁷ *Situation in the Central African Republic In The Case of The Prosecutor v Jean-Pierre Bemba Gombo, Final Decision on the Reparations Proceedings* 2018 ICC-01/05-01/08 Trial Chamber III (hereafter *Prosecutor v Bemba*) para 3.

⁵⁸ *Ntaganda case, Reparations Order* para 5.

⁵⁹ Lostal 2021 <https://www.ejiltalk.org/the-ntaganda-reparations-order-a-marked-step-towards-a-victim-centred-reparations-legal-framework-at-the-icc/>.

for departing from the Court's customary practice of issuing reparation orders after a conviction has been given.⁶⁰

4.3.2 Award of reparations tied to the crimes for which the accused is convicted

The fact that a reparations award can only be made against a convicted person raises complexities regarding the inclusion of victims of crimes falling outside the conviction of the accused. The following discussion elaborates on various aspects of this complexity.

4.3.2.1 Not all victims will receive reparation

The logical inference from the four reparative cases is that the individual perpetrator will be held accountable for the charges on which he has been found guilty rather than those for which he has been indicted. There is a challenge with this approach, as evident in the *Lubanga* case, where sexual violence was included in the indictment. In the *Lubanga* case, the accused person, Lubanga, was a member of the Ituri UPC/FPLC militia, which committed various offences. His indictment did not have all the charges pertaining to offences that he had actually committed. The victims of sexual assault were not included in the conviction, which only focused on Lubanga's contribution to the offences against child soldiers. As a result, victims who experienced sexual assault did not receive reparations. The *Lubanga* case noted that while all 129 victims claimed they had been harmed by the conscription or enlistment of minors under the age of 15 or by their use to actively take part in the fighting, many also alleged that they had been harmed by other crimes, such as sexual assault, torture, and other forms of cruel treatment, which are not the subject of charges against Lubanga.⁶¹

The selection of charges and how it led to the exclusion of some victims from reparations indicates a hierarchy in victimhood and how the legal process gives it legitimacy. Excluded victims can request reparation from the Court, but there is no certainty that they will receive it if the individual perpetrator is not found guilty of all

⁶⁰ As depicted both in the *Katanga case, Order for Reparations* and in the *Mahdi case, Reparations Order*.

⁶¹ *Situation in the Democratic Republic of the Congo, Prosecutor v Lubanga Dyilo (Thomas), Judgment pursuant to Article 74 of the Statute* ICL 910 (ICC 2012) (hereafter *Lubanga case, Judgment pursuant to Article 74 of the Statute*) para 1.

charges. Judge Fremr elaborated this point by opining that regardless of whether it will be unsatisfactory to victims, reparation for harm will be awarded if the individual perpetrator on trial has only been found guilty of having committed the crimes.⁶²

Judge Eboe-Osuji further added that while it is crucial to hold those responsible for atrocities accountable through reparations, this is not the only justification for reparations.⁶³ He further said that "there is no general principle of law that requires conviction as a prerequisite to reparation."⁶⁴ As such, victimhood status forms the basis on which reparations can be ordered, as opposed to the conviction of the individual perpetrator.⁶⁵ The question of the hierarchy in victimhood and how it affects eligibility to receive reparations has not been the subject of greater scrutiny in the jurisprudence of the Court. It appears that there is an inclination to accept that conviction is not the only requirement for receiving reparations. Because the convicted person is still the main emphasis rather than the victims, some victims are still in the uncomfortable situation of missing out on reparations.

4.3.2.2 Disparity in the prosecution of charges

If this argument can be pursued further, it would imply that the prosecutor alone is responsible for recommending to the Court which situations and cases to investigate.⁶⁶ This suggests that there is no autonomy for reparations independent of the conviction of the individual person, though the *Ntaganda* case has provided otherwise. Reparation does not stand on its own. The starting point is the conviction of the individual perpetrator. This may disappoint victims who are not covered by specific charges against the accused.

At the same time, a perpetrator may not reasonably be held responsible for every consequence of his or her illicit act. All legal systems recognise that there is a point at which losses become too remote or speculative to warrant a finding of liability. The

⁶² *Ruto and Sang case, Decision on Defence Applications for Judgments of Acquittal* para 149.

⁶³ *Ruto and Sang case, Decision on Defence Applications for Judgments of Acquittal* para 149.

⁶⁴ *Ruto and Sang case, Decision on Defence Applications for Judgments of Acquittal*, Reasons of Judge Eboe-Osuji para 201.

⁶⁵ *Ruto and Sang case, Decision on Defence Applications for Judgments of Acquittal*, Reasons of Judge Eboe-Osuji para 202.

⁶⁶ A 13(b), 14(1) and 15(3) of the *Rome Statute*.

effectiveness of reparations is inextricably tied to the criminal accountability of the person who has been found guilty and sentenced.⁶⁷ The *Lubanga* case provides that the background from which reparations emanate is part of the legal framework establishing individual criminal liability for crimes in violation of the *Rome Statute*.⁶⁸ The Appeals Chamber further considered that this background strongly implies that reparation orders are fundamentally connected to the individual perpetrator whose criminal responsibility is established by a conviction, and whose guilt for those criminal acts is established through a sentence.⁶⁹

This brings about certain questions, such as whether reparations should be interpreted with regard to the indictment or conviction. If the answer is tied to the conviction, will that be the appropriate approach to cater for victim reparations? What happens to victims who have suffered harm from the conduct of the convicted person but find themselves outside the scope of reparations emanating from his conviction?⁷⁰ It appears that the standard of "conviction" may hinder the goal of restorative justice for victims and limit the goal of reparations.

4.3.2.3 The narrowing of charges for prosecution affects the possibility of reparations

It is undeniable that in order for a successful award of reparations to be ordered, it is necessary to successfully prosecute one individual as well as other parties.⁷¹ Even though victims can bring claims of reparation before the Court, they do not have an active role in the framing and prosecution of charges.⁷² As a result, charges are more likely to be confined or targeted. This makes it prone for crimes to be either limited or narrowed down. As shown in the *Lubanga* case, the prosecutor framed the charges

⁶⁷ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* paras 65; 99.

⁶⁸ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 65.

⁶⁹ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 65.

⁷⁰ *The Prosecutor v Thomas Lubanga Dyilo, Prosecution's Submissions on the Principles and Procedures to be Applied in Reparations* ICC-01/04-01/06-2867 (hereafter *Lubanga case, Prosecution's Submissions on the principles and Procedures to be Applied in Reparations*) paras 18; 20.

⁷¹ Ferstman 2012 *International Journal of Human Rights* 796.

⁷² *Gesase Reparations in International Criminal Prosecutions* 167; *Ruto and Sang case, Decision on Defence Applications for Judgments of Acquittal*, Reasons of Judge Eboe-Osuji, Part IV Questions Concerning Reparations para 202.

narrowly that even new or additional criminality and evidence that sprung out during the trial process were left out.⁷³ This ultimately had an impact on victims who were likely to be eligible for reparations.

The above interpretation poses some complexities. If there are no thorough investigations concerning the crimes for which the accused should be indicted and sufficient evidence to support them, it is likely that the individual perpetrator will be only convicted for certain crimes. This does not wipe out the harm that victims suffered from the unlawful acts of the accused for which he was not indicted. Most victims fear the acquittal of the accused for crimes due to insufficient evidence. As restated in the *Bemba case*,

[t]he Chamber must respect the limitations of this Court and recalls that it can only address compensation for harm suffered as a result of crimes when the person standing trial ... has been found guilty.⁷⁴

The *Lubanga case* provides support to the above assertion. Lubanga was found guilty of enlisting and conscripting children under the age of 15 years into the *Force Patriotique pour la Liberation du Congo*. However, the narrowing down and limitation of charges excluded victims who suffered sexual violence, torture and other forms of ill-treatment.⁷⁵ The prosecutor also failed to amend the charges to include sexual violence and rape experienced by girl soldiers. The Trial Chamber further noted that "the judgment does not exceed the facts and circumstances described in the charges."⁷⁶ If this is the underlying premise from which the Court sees victims, those who do not meet these criteria will not be eligible for any kind of reparation from the Court. This demonstrates that victim suffering can be acknowledged but may not always warrant reparation. However, the retributive undertone associated with the approach for reparations fails to adequately address victims' expectations of obtaining reparation for their harm.

⁷³ Ferstman 2012 *International Journal of Human Rights* 796.

⁷⁴ *Prosecutor (on the Application of Victims) v Bemba Gombo (Jean-Pierre), Final Decision on the Reparations Proceedings* ICL 1865 (ICC 2018) (hereafter *Bemba case, Final Decision on the Reparations Proceedings*) para 3.

⁷⁵ *Lubanga case, Judgment pursuant to Article 74 of the Statute* para 1.

⁷⁶ *Lubanga case, Judgment pursuant to Article 74 of the Statute* para 36.

A cumulative charge process used by the ICC prosecutor could be another concern. In the *Lubanga* case, the Trial Chamber noted that it had "not made any finding of fact on the subject, particularly as to whether responsibility is to be attributed to the accused."⁷⁷ Ferstman claims that rather than emphasising distinctions in the underlying facts of the crimes, the Court concentrates on variations in the legal definitions of the criminal offences.⁷⁸ This is because prosecutors do not have complete discretion over the cases they choose and are not in complete control over the charges they lodge.⁷⁹

This brings up the next procedural complexity, which is the legal basis for and classification of charges. Charges must be included in the indictment, after which the evidence must be presented and summarised. If these requirements are not met, the individual cannot be held accountable for making reparations. There are circumstances under which a prosecutor may forego an investigation and prosecution if it is in the "interests of justice."⁸⁰ This has an impact on how victims get compensated. One argument advanced for reducing or narrowing the charges is the failure to investigate the wide range of crimes experienced by victims in each case before the Court. According to Nsereko, an appellate judge of the Court, it is even more important because a prosecutor's decision whether to press charges or not can damage public trust in both their office and the administration of justice.⁸¹ A key strategy for minimising and preventing abuse is to improve the prosecutor's decision-making process through transparency and other means of accountability.⁸²

4.3.3 Reparations linked to conviction enhance victim hierarchy

The founding principle is that to receive reparations, a victim must fall under the legal definition of a victim as prescribed under the *Rome Statute*. On the subject of reparations, such requests are often made by the victims or on their behalf. In

⁷⁷ *Lubanga case, Judgment pursuant to Article 74 of the Statute* para 896.

⁷⁸ Ferstman 2012 *International Journal of Human Rights* 797.

⁷⁹ Ferstman 2012 *International Journal of Human Rights* 797

⁸⁰ See A 53 of the *Rome Statute*.

⁸¹ Nsereko 2005 *Journal of International Criminal Justice* 16.

⁸² Nsereko 2005 *Journal of International Criminal Justice* 16.

exceptional cases, the Court may begin the reparation proceedings *proprio motu*.⁸³ In the same vein, Rule 85 of the *Rules of Procedure and Evidence* provides that victims are "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court." They may also comprise legal persons such as institutions and organisations. In the *Situation in the Democratic Republic of Congo*,⁸⁴ the Pre-Trial Chamber submitted a four-part test on the issue of victims. The test is based on the following:

- (i) whether the identity of a natural person or legal person can be established;
- (ii) whether the applicants claim to have suffered harm;
- (iii) whether a crime within the jurisdiction of the Court can be established; and
- (iv) whether harm was caused "as a result" of the event constituting the crime within the jurisdiction of the Court.⁸⁵

The Court's reparative jurisprudence is extensive on the definition of victims and the context of their participation in the Court's proceedings – particularly during the reparations phase.⁸⁶ However, the following questions arise:

- Does the above definition prioritise and create a potential hierarchy of victims?
- Should there be differentiation and hierarchy when reparations are concerned?
- Should there be an independent definition for victims pertaining to reparations?

Cohen presents a crucial argument that there are some criteria that may result in a hierarchy when it comes to reparations.⁸⁷ The choice of which conflict to focus on, the time period during which these serious crimes occurred, the charges preferred against the individual perpetrator and the eventual conviction - which will provide information

⁸³ A 75(1) of the *Rome Statute*; Rule 95(1) of the *Rules of Procedure and Evidence (ICC)*; Dwertmann *The Reparation System of the International Criminal Court* chp 6.

⁸⁴ *Situation in the Democratic Republic of the Congo, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6* ICC PT. Ch. 1, 17 January 2006 (hereafter *DRC Situation: Decision on the Applications for Participation in the Proceedings*) para 9

⁸⁵ *DRC Situation: Decision on the Applications for Participation in the Proceedings* para 79.

⁸⁶ *DRC Situation: Decision on the Applications for Participation in the Proceedings* para 65. See also, Ferstman and Goetz "Reparations Before the International Criminal Court" 320.

⁸⁷ Cohen *Reparations for International Crimes and the Development of a Civil Dimension of International Criminal Justice* 135.

on the victims who will be affected by such a conviction - are among these factors.⁸⁸ These factors determine which victims will receive reparations and which ones will not. Hence, if indeed the victims do not satisfy the parameters of the conviction, they may be excluded from reparations.⁸⁹

In the same vein, there has been a request for reparations to take into account each victim's unique requirements based on their experiences and circumstances. According to a significant study conducted in 2015, victims are often parties in reparations proceedings because they anticipate receiving reparations.⁹⁰ This assumption was the main driver of the vast majority of victim participants, as illustrated in Uganda and the Democratic Republic of Congo (DRC). Despite these figures, only slightly more than half were said to have received reparations.⁹¹ This makes it necessary to highlight a few issues in this regard. The first is related to the interests of victims as defined by article 68(3) of the *Rome Statute*.⁹² The second is the conviction that serves as the foundation for the reparation award and order. This poses the risk of creating a distinction between victims who were harmed by the same conflict or circumstance that is before the court as opposed to victims of specific charges brought against the individual perpetrator.

Regarding the first issue, this thesis contends that decided reparations cases generally do not address the full nature of victims' suffering and that, as such, a gender-inclusive and sensitive reparations strategy is needed. For instance, the *Lubanga* case did not include gender sensitivity or an inclusive approach.⁹³ It was limited to victims of child soldiers. This overlooked a comprehensive approach to reparations and failed to

⁸⁸ Cohen *Reparations for International Crimes and the Development of a Civil Dimension of International Criminal Justice* 135.

⁸⁹ Cohen *Reparations for International Crimes and the Development of a Civil Dimension of International Criminal Justice* 135.

⁹⁰ Cody *et al The Victims' Court?*

⁹¹ Cody *et al The Victims' Court?*

⁹² A 68(3) of the *Rome Statute* states that:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court.

⁹³ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 193.

recognise the diversity of victims' sufferings and harm.⁹⁴ At this juncture, I am drawn to the submission made by Chappell that two approaches have historically been used to genderize international criminal law: first, by "gender capture," second, the overt male dominance of positions of authority where decisions about crimes are made.⁹⁵ The longstanding dominance of men over international law has resulted in the silencing of women's voices, whether on purpose or accidentally, including as judges, advocates, war victims, and perpetrators.⁹⁶ This raises the question of whether this represents the Court's view regarding the decision to find Mr Lubanga not guilty of charges involving rape and sexual violence in the *Lubanga case*. As the Trial Chamber noted,

The Chamber strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence. He advanced extensive submissions as regards sexual violence in his opening and closing submissions at trial, and in his arguments on sentence he contended that sexual violence is an aggravating factor that should be reflected by the Chamber. However, not only did the former Prosecutor fail to apply to include sexual violence or sexual slavery at any stage during these proceedings, including in the original charges, but he actively opposed taking this step during the trial when he submitted that it would cause unfairness to the accused if he was convicted on this basis.⁹⁷

The Trial Chamber went on to state that the prosecution contends that this demonstrates that the crimes of conscription, enlistment, and use of children were committed with egregious cruelty and were intended to harm victims who were particularly helpless, according to the description in Rule 145(2)(b)(iii) of the Rules, as demonstrated by the acts of sexual violence and rape that some girl soldiers experienced.⁹⁸ The Trial Chamber did make an effort to involve victims of sexual and gender-based violence during the reparations phase. However, following the initial

⁹⁴ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 193.

⁹⁵ Chappell 2014 *Political Research Quarterly* 185.

⁹⁶ Chappell 2014 *Political Research Quarterly* 185.

⁹⁷ *Situation in the Democratic Republic of the Congo, Prosecutor v Lubanga Dyilo (Thomas), Judgment pursuant to Article 74 of the Statute* ICL 910 (ICC 2012) para 60.

⁹⁸ *Situation in the Democratic Republic of the Congo, Prosecutor v Lubanga Dyilo (Thomas), Judgment pursuant to Article 74 of the Statute* ICL 910 (ICC 2012) para 61.

ruling and order's issuance in August 2012, reparation for the victims of these acts could not be ordered, according to the defence, because Lubanga had not been charged with or proven guilty of crimes based on sex or gender.

Given the submissions above, it will be difficult to meet the unique demands of the many victim categories if the reparation cases do not address these. According to the *Ntaganda* case,

In light of the type of reparations to be awarded, the Chamber finds it appropriate to establish the eligibility criteria for reparations rather than identifying the victims eligible itself.⁹⁹

Again, the language in article 75(2) – "against a convicted person," becomes relevant. Victims will be eligible for reparations provided the crimes they have suffered from the individual perpetrator are charged, prosecuted and have reached a successful conviction.¹⁰⁰ The reparative jurisprudence is a glaring example of this conundrum. In the *Lubanga* case, the Court excluded the victims of crimes committed by child soldiers as well as victims of sexual and gender-based violence in the conviction. In the *Katanga* case, the conviction did not include victims of rape, sexual violence or gender-based violence. In the *Mahdi* case, victims who suffered bodily harm or who had their property damaged during the attack on the protected buildings were excluded.

The above examples compel one to argue that conceptualising reparations on the premise that the victim must have suffered harm as a result of the commission of the crime of which the accused person was convicted¹⁰¹ is too high a standard. As a result, potential victims will not be included in the reparation award. Additionally, it appears that the Court is committed to upholding the rights of the accused and providing a fair trial with little attention to the suffering, needs and interests of victims. Preserving the rights of the accused at all costs presents a procedural hurdle that affects reparations. Thus, it is inevitable that many victims will not receive Court-ordered reparations.

⁹⁹ *Katanga case, Order for Reparations* para 105.

¹⁰⁰ Moffett 2013 *International Journal of Human Rights* 375.

¹⁰¹ *Mahdi case, Reparations Order* paras 25- 26.

Furthermore, there is the perception that victims of sexual violence have been left out of the subject of criminal prosecution¹⁰² due to restrictive eligibility requirements and limitations on the right to seek reparations. This can be attributed to the flawed strategies of the Office of the Prosecutor.¹⁰³ On this, Wiersing commented that the framework of reparations by the Court is not intended to provide reparations to all victims who have suffered harm arising from the same situation.¹⁰⁴ This may be problematic and leaves the matter unanswered. The threshold for "conviction of crimes" in a criminal trial is the other problem with this strategy. The bottom line is that the perpetrator's acts cause harm to victims. Therefore, a requirement of "conviction" may limit the objective for reparations in this regard and impair the goal of restorative justice for victims.

4.3.4 The reparations proceedings merged within the Court's proceedings

The merging of a criminal trial with a reparation processes whose main characteristic is one of a civil nature is another complexity. The precise scope of reparations liability has a civil nature. To put it in another way, the ICC's reparations mandate represents civil forms of obligation that are associated with criminal proceedings.¹⁰⁵ This connection aims to accomplish two objectives: first, to make sure that individual perpetrators take responsibility for their actions, and second, to repair the harm they have done. In light of the fact that restitution, compensation, and rehabilitation are the three kinds of reparation, one may assume that repairing the harm suffered by the victims has a civil meaning.

The recognition of reparations for victims portrays a civil dimension within the Court's proceedings. It is a unique feature in the context of international criminal justice. However, incorporating such an approach infers that judges who hear and decide on pre-trial, trial and appeals proceedings (which are inherently criminal matters) are the same judges who decide on the principles of reparations, from which victims will benefit, the proof reparations procedures require, and the type of reparations,

¹⁰² Labenski 2020 *LSE Law - Policy Briefing Paper* 10.

¹⁰³ Labenski 2020 *LSE Law - Policy Briefing Paper* 10.

¹⁰⁴ Wiersing 2012 *Amsterdam Law Forum* 37.

¹⁰⁵ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 179.

amongst other issues (all which are civil in nature).¹⁰⁶ The Court has acknowledged that reparations form a special kind of civil liability even though they are linked to a criminal conviction. In his view on this, Stahn posits that reparation:

[D]iffers from purely civil forms of liability due to its connection to criminal proceedings which requires reconciliation of different interests, namely the rights of victims and the convicted person.¹⁰⁷

These speak to the civil dimension of reparations, a trait that is uncommon in any legal system at the level of international criminal justice. In linking reparations to the conviction of the individual perpetrator, the Court's already established criminal dimension gains significance as a result of this interconnection.¹⁰⁸ Alternatively, this is a *sui generis* system where one dimension is not entirely separate from the other.¹⁰⁹ In other words, the criminal and civil elements cannot be entirely separated. Hence, the Appeals Chamber relies on a unique legal approach to reparations.¹¹⁰

The point of disagreement in this instance is on the incorporation of a civil dimension into a criminal process. One is immediately drawn to the topic of reparations and the process that should be followed at this point. But there is confusion as to whether these proceedings acknowledge a civil dimension but do not use a civil approach. As Stahn opines, due to its relationship to the criminal case, and more specifically, the emphasis on conviction, the reparations framework of the Court differs from civil claim models. Accordingly, reparation orders are intimately related to the individual whose criminal responsibility is proven in a conviction and whose guilt for this criminal conduct is assessed in a sentence or verdict.¹¹¹ This explains the connection between criminal conviction and article 75 reparations.¹¹²

¹⁰⁶ Cohen *Reparations for International Crimes and the Development of a Civil Dimension of International Criminal Justice* 124.

¹⁰⁷ Stahn 2015 *Journal of International Criminal Justice* 801-813.

¹⁰⁸ Cohen *Reparations for International Crimes and the Development of a Civil Dimension of International Criminal Justice* 124.

¹⁰⁹ Cohen *Reparations for International Crimes and the Development of a Civil Dimension of International Criminal Justice* 124.

¹¹⁰ Stahn 2015 *Journal of International Criminal Justice* 808.

¹¹¹ Stahn 2015 *Journal of International Criminal Justice*

¹¹² Stahn 2015 *Journal of International Criminal Justice*

According to Moffett, the Court represents a *partie civil* nature of reparations whereby victims can join a criminal case to seek compensation.¹¹³ Agreeing with Moffett however, I posit that the Court fails to acknowledge that reparations are of a civil nature. Furthermore, reparations by the Court follow processes of international criminal law and are founded on the conviction of the accused, which may not be sufficient to deal with victim reparations where issues such as the standard of proof remain contentious. This makes reparations add-ons to a criminal trial. It also creates an impression that repairing harm to victims through reparations was an afterthought and that more thinking could have been put into ensuring sufficient reparation for all victims.

If the Court's approach is to adopt a civil character to reparations, then victims' participatory rights will be affected. There are concerns about the sustainability, effectiveness, efficiency and significance of the participation of victims in the Court's processes.¹¹⁴ Despite significant investments and efforts, the participation system is currently falling short of the potential for the ICC to develop a system that greatly benefits victims through reparations.¹¹⁵ This problem most likely results from the different roles that the individual perpetrator and the victim perform throughout a criminal trial. The views and concerns of the victims should be expressed and taken into account

[A]t stages of the proceedings determined to be appropriate by the Court and in a manner, which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹¹⁶

Hence, the protection of the accused's rights remains the main priority. This has an impact on the nature of reparations because they have a civil basis yet are seen as an addendum during a criminal trial. Such an interpretation ultimately impacts whether victims receive reparations.

¹¹³ Moffett 2017 *International Journal of Human Rights* 3.

¹¹⁴ Agger *et al* "Independent Panel of Experts Report on Victim Participation at the International Criminal Court."

¹¹⁵ Agger *et al* "Independent Panel of Experts Report on Victim Participation at the International Criminal Court."

¹¹⁶ A 68(3) of the *Rome Statute*.

The next issue is at what stage in the trial can a reparation proceeding be triggered in this regard? The *Rome Statute* provides that:

[I]n its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of victims and will state the principles on which it is acting.¹¹⁷

However, it is not so much about who can lodge these requests for reparations at what stage of the proceedings. The procedural complexity in this light is that dealing with a reparation issue within a criminal trial serves as a procedural challenge against the Court. Inferring from the jurisprudence from all four reparative cases, the Court consolidates trials that are inclusive of hearings on reparations. This brings about an issue in that combining both trial processes of hearing evidence for convicting the accused person on the one hand and reparations on the other may not be feasible if the Court is aimed at making reparations effective for victims. I argue that without a separate procedure for reparations, the Court cannot currently afford this potential procedural problem. However, the optimum course of action to solve this is not to combine the two proceedings. It is my view that is that not having a separate trial for reparations can be a procedural challenge which the Court cannot afford to face at this stage.

4.3.5 The perpetrator-centric versus victim-centric perspectives in claiming reparations

Due to their past failure to recognise reparations in the framework of judicially mandated justice, international criminal tribunals have come under fire for emphasising retributive prosecution above alternative reparations theories in their conception of international criminal justice. In this regard, the sole inclusion of a reparations mandate inside the International Criminal Court can be interpreted as an effort to broaden the scope and significance of international criminal justice. As stated in the *Ntaganda* case, reparation

[R]equires full and meaningful consultation and engagement with victims, giving them a voice in the design and implementation of reparations

¹¹⁷ A 75(1) of the *Rome Statute*.

programmes and allowing them to shape the reparation measures according to their needs.¹¹⁸

Since the reparations system depends on the prosecution of the charged crimes and their eventual conviction, the claim for reparations may appear to be more centred on the perpetrator. In this context, the problem arises from the issuing of a reparation order against the guilty person. This can be seen as departing from a victim-centric viewpoint. Reparation orders appear to be conditioned on the prosecution and conviction of the accused.¹¹⁹ According to Moffett, the reparations system of the Court appears to be a case of copying and pasting, depending on which individual perpetrators were involved and the crimes for which they were found guilty.¹²⁰ Ferstman shares the same view by stating that,

The reparations process is connected to a criminal court and reparation flows not just from the decisions about who to prosecute and for what crimes, but on the success of such prosecutions.¹²¹

From these two concurring views, probably, this challenge emanated from the drafting of the *Rome Statute*. There was a concern as to whether this was insufficient to limit the ICC's order for reparations to the convicted individual perpetrator.¹²² The explanation suffices that the drafters of the *Rome Statute* intended for victims to claim reparations against the individual convicted persons. Article 75(2) states that the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims. The spirit purported in this was solely dependent on a retributive prosecution of individual perpetrators at the expense of other concepts of justice, such as reparative justice for victims.¹²³

According to the *Bemba* case, the Chamber is reminded that it can only examine reparations for harm incurred as a result of crimes after the individual perpetrator has been found guilty and that it must respect the Court's limitations.¹²⁴ The drawback of

¹¹⁸ *Ntaganda case, Reparations Order* para 45.

¹¹⁹ Moffett 2017 *International Journal of Human Rights* 6.

¹²⁰ Moffett 2017 *International Journal of Human Rights* 1.

¹²¹ See Ferstman "Reparations at the ICC."

¹²² See McKay "Are Reparations Appropriately Addressed in the ICC Statute?" 167; Muttukumaru "Reparations to Victims" 262–270.

¹²³ Brodney 2016 *Journal of the Oxford Centre for Socio-Legal Studies* 8.

¹²⁴ *Bemba case, Final Decision on the Reparations Proceedings* para 3.

conviction, which is the retributive basis for reparation, is that it will mostly likely be the first priority for holding the individual perpetrator to account. Reparations follow conviction. This may not meet the demands of victims in the long run.

4.3.6 Technicalities in the modalities of reparations and the determination of appropriate reparations

Another procedural complexity is the appropriateness of the modality of reparations made in favour of victims. Article 75(1) refers to the modalities of reparations, such as restitution, compensation and rehabilitation.¹²⁵ These are not limited, as the Court can grant reparations with a symbolic, preventative or transformative value.¹²⁶ The Appeals Chamber stresses that the appropriate modalities for reparations ought to be made to victims. It noted that some damages suffered by victims could essentially be unquantifiable in monetary terms.¹²⁷

The problem is that it can be difficult to determine the appropriate modality to take in cases of community victimisation, making it challenging to repair the harm suffered by victims in such communities. What is the appropriate modality to be made for harm suffered in non-monetary terms for mass victimisation? To respond to this query, the Court falls short of making an award that satisfies and provides assurances against repetition in accordance with international human rights law. This is because it is challenging to require an individual perpetrator to offer satisfaction and guarantees of non-repetition because doing so would require state accountability. The Court is yet to reflect this in its reparation awards. In the *Mahdi* case, it said:

Reparations in the present case are designed – to the extent achievable – to relieve the suffering caused by the serious crime committed, address the consequences of the wrongful act committed by Mr Al Mahdi, enable victims to recover their dignity and deter future violations. Reparations may also assist in promoting reconciliation between the victims of the crime, the affected communities and the convicted person.¹²⁸

¹²⁵ Reiterated in the Rule 97(1) of the *Rules of Procedure and Evidence (ICC)*.

¹²⁶ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 222.

¹²⁷ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* paras 211-212.

¹²⁸ *Mahdi case, Reparations Order* para 28.

The question of which modality of reparation is appropriate in each victimisation case requires a distinction between individual and collective reparations. According to article 97(1) of the *Rules of Procedure and Evidence*, reparations can be made collectively and individually. In the *Katanga* case, the Trial Chamber II conceptualised individual reparations as redress measures aimed at addressing specific individual harm resulting from crimes for which a person was convicted.¹²⁹ Therefore, reparations have an individual character and serve to repair harm. Since individual reparations are selective and tend to respond to specific harm caused by numerous criminal incidents, it is possible that some victims from the same *situation* may not be eligible for reparations.

Collective reparations refer to reparations intended for a group of victims who have suffered harm from a similar crime.¹³⁰ A group may exist on the basis of a shared identity or shared victimisation. It is not important for the group to have a legal personality to become eligible for reparations.¹³¹ For collective reparations to be accessible to a group of victims, they must have suffered shared harm, irrespective of the form of violation.¹³² The Court's preference for collective reparations over individual reparations is purely for economic reasons. While it is generally acceptable that the provision of collective redress measures to mass victims would be speedier and less costly to implement, it is critical for the Court to appreciate that harm suffered by the victims is always personal.

According to the *Ntaganda* case *Appeal Decision*, reparations contain "personalised components." Therefore, this was not a "typical" case of collective reparations in the sense of community-based reparations, where the number of prospective recipients might not be as significant to the establishment of the award's amount depending on the circumstances.¹³³ Given the fact that international prosecutions involve mass victims, the ICC may never be able to individually assess the harms suffered by each victim, as that would prolong the proceedings and would impede fair trials. This leads

¹²⁹ *Katanga case, Order for Reparations* para 271.

¹³⁰ *Katanga case, Order for Reparations* para 274.

¹³¹ *Katanga case, Order for Reparations* para 276.

¹³² *Katanga case, Order for Reparations* para 275.

¹³³ *Ntaganda case, Appeal Against the Decision Reviewing Restrictions* para 19.

to the submission that even though the Court recognises victims as individual holders of rights, it does not necessarily make it unlawful for the non-assessment of individual reparations applications before the Court. This is an issue because these individual victims have suffered harm.

The same is applicable to the modalities of reparations, given that some violations cannot be compensated. The objective of the modalities of reparation is to repair as much harm as they can. This makes reparations geared towards symbolic gestures like apologies and psychological overtones.¹³⁴ According to De Greiff, no transitional or post-conflict reparations programme has been able to provide reparations for victims in proportion to the harm they suffered because it is difficult to quantify each harm. Any suggestion that this should be undertaken could lead to unrealistic expectations.¹³⁵

On the question of modalities or forms of delivering reparations to the victims, it has been unanimously held by the ICC that the listed forms under article 75 are not conclusive.¹³⁶ The reasoning of the Court confirms that reparations should explore additional modalities that have symbolic, "preventative or transformative value" in addition to the traditional mechanisms recognised by the *Rome Statute*. This would involve the convict making symbolic reparations in the form of apologies.¹³⁷ However, this will not suffice as most victims see this as a "slap on the face."

Restitution, as a modality of reparation prescribed by the Court, means restoring the victim to the original position prior to the commencement of the harm.¹³⁸ But the challenge here is that the nature of the crimes falling within the jurisdiction of the Court makes it impossible to have a *restitutio in integrum*. It may also be impossible to redress the harm caused to victims using this modality. The last issue is the fact that restitution and compensation are monetary reparations which may be

¹³⁴ Wolfe "Conceptual Understandings of Redress and Reparation" 69.

¹³⁵ De Greiff "Justice and Reparations" 455.

¹³⁶ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 222; *Mahdi case, Reparations Order* para 46; *Katanga case, Order for Reparations* para 297.

¹³⁷ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 222; *Katanga case, Order for Reparations* para 297. *Mahdi case, Reparations Order* para 49.

¹³⁸ A 75(2) of the *Rome Statute*.

problematic. Article 75 excludes other modalities, such as satisfaction and guarantees of non-repetition, because they require the State or State actors. However, such exclusion is certain to affect victims negatively due to the lack of resources in the Court to achieve and implement monetary reparations.¹³⁹ This difficulty is coupled with the fact that liability for providing the same reparations rests on the convicted individual.¹⁴⁰

4.3.7 The relationship between the Trust Fund for Victims and the indigency of the convicted person

Reparations can be ordered through two separate institutions - the ICC and the Trust Fund for Victims.¹⁴¹ The Trust Fund for Victims is a reparative mechanism created in terms of article 79 of the *Rome Statute*. It has a two-folded mandate pertaining to reparations. First, it provides general assistance to victims. Second, it implements Court-ordered reparations.¹⁴² The first mandate refers to the general assistance provided to victims falling under the jurisdiction of the Court prior to the conviction,¹⁴³ while the second mandate is implemented after the conviction through an implementation plan approved by the Court.¹⁴⁴ Only natural persons (victims and their families) who are direct and indirect victims may receive reparations.¹⁴⁵

Apart from the above, the Trust Fund for Victims "can also use its resources to benefit victims of crimes that have not given rise to prosecution."¹⁴⁶ In other words, the Trust Fund for Victims has a reparations mandate and an assistance mandate. According to Weirsing, the Trust Fund for Victims serves the dual purposes of general assistance and reparations and has been referred to as one of the unique aspects of the Court. The three main types of reparations that the Court can order are fines, forfeitures and sentences. The Trust Fund for Victims is required to obey the Court's directives.¹⁴⁷ It

¹³⁹ Kelly "The Status of Victims Under the *Rome Statute* of the International Criminal Court" 61.

¹⁴⁰ Kelly "The Status of Victims Under the *Rome Statute* of the International Criminal Court" 61.

¹⁴¹ A 75(2) of the *Rome Statute*.

¹⁴² Balta, Bax and Letschert 2019 *International Criminal Justice Review* 225.

¹⁴³ Regs 42 and 46 of the *Regulations of the Trust Fund for Victims*.

¹⁴⁴ Regs 42 and 46 of the *Regulations of the Trust Fund for Victims*.

¹⁴⁵ Reg 46 of the *Regulations of the Trust Fund for Victims*.

¹⁴⁶ Van den Wyngaert 2011 *Case W Res J Int'l L* 480.

¹⁴⁷ Wiersing 2012 *Amsterdam Law Forum* 28.

also has a more proactive capability that allows it to start projects at any time to help victims.¹⁴⁸

The question arises of the extent to which a convict's indigence affects monetary reparations against them. In other words, what happens when the convict cannot fund reparations? The situation still prevails that victims suffer harm and, as a result, have real needs to be addressed regardless of the convict's indigence. Also, some victims may never benefit from the reparative mandate of the Trust Fund for Victims because the Trust Fund for Victims does not have unlimited funds. Article 75(2) of the *Rome Statute* states that "where appropriate, the Court may order that the award for reparations be made through the Trust Fund." There is uncertainty regarding the reparations mandate through the Trust Fund for Victims. The Appeals Chamber further reiterated this view on the basis that an order for reparations will always be issued against the convicted person and that it may be met through the Trust Fund for Victims.¹⁴⁹ The drawback of this approach is revealed when the convicted person is indigent in spite of his financial responsibility to fund reparations.¹⁵⁰ As mentioned above, all persons against whom the Court has ordered reparations so far are indigent.

There is a possibility that convicted persons are likely to be indigent and unable to afford the reparation orders made against them.¹⁵¹ However, the role of the Trust Fund for Victims is not to exonerate the convicted person from financial reparations. Since the Trust Fund for Victims is experiencing a financial crisis, it is unclear whether it will be able to fund reparations with its limited resources.¹⁵² Moffett and Sandoval raise some important questions in this regard:

[T]here has been little thought on how the Court and states will oversee and enforce reparation orders against convicted persons once they are released. Do they confiscate any earnings they have, disincentivising them from officially declaring any job they have? Do they take a percentage contribution from their income to be used towards the reparation debt they have at the ICC, allowing them to provide for themselves and their family, or for the matter to be dropped entirely, given the likely costs in monitoring

¹⁴⁸ Wiersing 2012 *Amsterdam Law Forum* 28.

¹⁴⁹ *Lubanga case, Appeal of Decision Setting the Size of the Reparations Award* para 76.

¹⁵⁰ *Lubanga case, Appeal of Decision Setting the Size of the Reparations Award* para 104.

¹⁵¹ Van den Wyngaert 2011 *Case W Res J Int'l L* 491.

¹⁵² Van den Wyngaert 2011 *Case W Res J Int'l L* 491.

and enforcement? Would remunerated work in detention be able to be transferred to victims? The Court has yet to address the long-term implementation and implications of reparations.¹⁵³

Hence, the Trust Fund for Victims can address some of the victims' financial reparations but not all. It is also unclear how the Chambers can advise on how "resources" of the Trust Fund for Victims should be used.¹⁵⁴ More so, the Court simply cannot decide how victims should be compensated when the convicted persons are indigent. Article 79 empowers the Court to order the transfer of money and property collected through fines and forfeitures to the Trust Fund for Victims. Wierda and de Greiff observe that the order must be specific on

[T]he nature of reparations and the identities of victims to whom reparations should be made, the role of the TFV may simply be to implement the order.¹⁵⁵

The Court has two avenues for compensating victims - payment from the convicted person's funds and awards through the Trust Fund for Victims. The first occurs through fines and forfeitures.¹⁵⁶ The challenge is that a convicted person may claim indigency. Another challenge is that imposing fines and forfeitures may not be appropriate in certain cases, such as genocide, war crimes and crimes against humanity.¹⁵⁷

Two issues come into perspective when discussing compensation for victims. The first concerns gains made by convicted persons during the commission of crimes and whether they were proportional to the crimes.¹⁵⁸ The second question is whether making reparation orders against indigent convicted persons will yield fruit. In this context, one may also ask if the Court has the means to ensure that a convicted person provides the necessary funds to cover the Court's order.¹⁵⁹ The fact that no fine can be imposed on the State even though the individual was acting on behalf of the State is also an issue. According to the Court, an order for reparations will be made against the convicted person regardless of his indigence, and despite that the Trust Fund for

¹⁵³ Moffett and Sandoval 2021 *Leiden Journal of International Law* 5.

¹⁵⁴ Van den Wyngaert 2011 *Case W Res J Int'l L* 491.

¹⁵⁵ Wierda and de Greiff "Reparations and the International Criminal Court."

¹⁵⁶ Keller 2006 *T Jefferson L Rev* 195.

¹⁵⁷ See Rule 145 and 146 of the *Rules of Procedure and Evidence (ICC)*.

¹⁵⁸ Keller 2006 *T Jefferson L Rev* 197.

¹⁵⁹ Killean and Moffett 2020 *Melbourne Journal of International Law* 115-143.

Victims may avail some resources to compliment the award of reparations.¹⁶⁰ This means that the determination of the reparations award will be made regardless of the convicted person's indigence.¹⁶¹ But the issue is how to enforce a reparations order against an indigent person.

4.4 Conclusion

This chapter unravels procedural complexities present in the fulfilment of the Court's reparative mandate. The discussion illustrates that the Court's approach remains dominantly tied to the conviction of the accused person, which in turn generates challenges that threaten the prospects of receipt of reparations by victims. The reparation framework is essentially unable to offer reparations to every victim in every case. Although this is detrimental to some victims, it is expected due to financial constraints. The novelty of awarding reparations in an international criminal court comes with unique obstacles that pile on top of other unavoidable restrictions involved with reparations. Many of these difficulties may go unnoticed by victims because they are so focused on expecting the Court to punish individual perpetrators for the harm they suffered. Where victims have unrealistic expectations for the Court's decision-making process, their position is made more difficult by participation in criminal proceedings as witnesses against persons from whom they seek reparations. The Court clearly highlights the necessity of the Trust Fund for Victims in managing the anticipations of victims. However, it is challenging to determine how this may come to fruition.

Perceptions that the Trust Fund for Victims is a 'fire extinguisher' complicates Court-ordered reparations by overburdening the Trust Fund for Victims with extra demands for funds when it is already experiencing constraints in sourcing funding for reparations. However, these procedural complexities point towards a more motivated and relevant approach to be adopted by the Court in matters concerning reparations. There is a need for the Court to consider these complexities so that it may design reparation principles that advance the needs and interests of victims within the

¹⁶⁰ *Mahdi case, Reparations Order* para 114.

¹⁶¹ *Mahdi case, Reparations Order* para 112.

stipulations of the *Rome Statute*. The Court needs to consider the extent of its success in fulfilling its reparative mandate. In this way, the Court needs to work more intensively with domestic and international jurisdictions. However, a realisation of this reparations mandate is plagued by some procedural complexities. The next chapter will take the discussion further by examining substantive complexities which may arise in realising the reparations mandate of the Court.

Chapter 5

Substantive Complexities

5.1 Introduction

More than 20 years have elapsed since the adoption of the *Rome Statute of the International Criminal Court*. Article 75 of this instrument spearheads a victim-centred justice approach that captures the aspirations of the international community to bring justice for victims of serious international crimes by, *inter alia*, procedural and substantive provisions for reparations. The reparations mandate in article 75 of the *Rome Statute* is crucial in that it does not only give victims a voice but also grants them the opportunity to exercise their rights within the international criminal justice system.¹ Article 68(3) of the *Rome Statute* provides a right for victims to present their concerns at various stages of the proceedings whenever they feel that their reparative rights and other personal interests have been unlawfully breached and they have suffered as a result. This provision is pivotal in establishing individual criminal liability and adds to the meaning of the reparation framework encapsulated in article 75. Notably, article 75 is the only provision of the *Rome Statute* that directly provides for reparations.

Article 75(1) requires the Court to establish legal principles concerning reparations to victims. This provision is the starting point when considering the substantive law that governs the Court's powers on reparations. Reference to substantive law on reparations emphasises the ideal outcome that victims should receive from a reparations process. The outcome entails repair of the harm suffered. This substantive legal position is an unprecedented opportunity for victims as far as reparations are concerned.² It is on this basis that this chapter seeks to examine the difficult issues that are evident in the application of the substantive law developed by the Court through the four cases that have reached that stage. In this regard, the concept of who is a victim of a serious crime, the determination of causation, harm and the standard of proof are discussed as part of the substantive complexities arising from

¹ Redress Trust "Making Sense of Reparations at the International Criminal Court " 1.

² War Crimes Research Office *Victim Participation Before the International Criminal Court* 8-14.

the reparations mandate. The first part of the chapter is a synoptic discussion of the meaning of the substantive legal framework of the Court according to article 75(1) and (2) of the *Rome Statute*. The second part delves into the substantive complexities afore mentioned. The *Lubanga* case is used in this chapter as a founding 'rubric' case on how these issues have been addressed by the Court. The other three cases, namely, the *Katanga* case, *Mahdi* case and the *Ntaganda* case, are used to illustrate the practical application of the reparations mandate. The analysis in this chapter will answer the question: what deductions can be made from the jurisprudence of the Court on the substantive complexities regarding the implementation of reparations.

5.2 Substantive law for reparations in article 75(1) and (2)

5.2.1 Synopsis

The substantive legal framework on reparations can be interpreted through the lens of the outcome of judicial processes that include reparation hearings and the evaluation of victims to receive such reparations.³ Thus, there is an expectation for victims to pursue awards for reparations.⁴ For this reason, the Court's uniqueness is partly its contribution to enabling victims to receive reparations. Victims bear several rights, which include the right to justice and the right to truth. They also have a right to reparations. In this regard, they are benefactors of a substantive procedure which is intended to alleviate the harm they suffered.⁵ On this, Moffett rightfully submits that compared to the rights to justice and to truth, reparations provide victims with more concrete measures that can raise the quality of their lives.⁶ In addition to the need to end impunity by putting to trial, convicting and punishing perpetrators, finding the truth about the crimes committed against victims is as important as giving them the

³ Moffett *Justice for Victims Before the International Criminal Court* 4; Balta *What's Law Got to Do With It?* 55.

⁴ Bassiouni 2006 *Human Rights Law Review* 203-279.

⁵ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* outlines five main types of reparations including restitution, compensation, rehabilitation, measures of satisfaction, and guarantees of non-repetition, as appropriate in effectively remedying gross violations of human rights.

⁶ Moffett *Justice for Victims Before the International Criminal Court* 4.

platform to exercise a substantive right to reparations. As such, the eventual award of reparations remains equally relevant.

The substantive law on reparations for victims can also be interpreted by looking beyond the accountability achieved by convicting and sentencing perpetrators. It helps to alleviate and acknowledge the suffering caused by the commission of serious crimes in international law. Prior to the *Lubanga* case, the formulation of the substantive law on reparations by the Court was slow. In comparison to other international instruments, the *Rome Statute*, which is the governing law of the Court, contains no provisions on the substantive law to be applied for reparations, even though it gives the Court power to work on this aspect. It can be said that the Court was mandated to develop principles for reparations, and the *Lubanga* case was an opportunity to do so and acknowledged that though the principles are not cast in stone, they can be altered in subsequent cases. Notwithstanding, article 75(1) of the *Rome Statute* speaks to the procedure for reparations and sheds little light on the substantive approach pertaining to the outcome of the reparation award and order.

The substantive law for reparations also refers to new participation and reparation schemes for victims that move beyond the traditional approach in international criminal law into a more victim-centric one.⁷ The concept of victims is not elusive in international law. Hence, the acknowledgement of their right to reparations remains undisputed. For this reason, I argue that article 75 contains a civil dimension which allows victims to participate in criminal proceedings as *partie civile* with the possibility of becoming beneficiaries of reparations such as restitution, satisfaction, compensation and rehabilitation.⁸ This civil aspect throws an interesting light on the Court as a predominantly criminal one but whose procedures bring a civil dimension in the form of reparations arising from criminal proceedings. However, this civil dimension of reparations leaves a *lacuna* on the substantive law to be used for reparations by the Court. As such, it is fraught with substantive complexities worth exploring further in this chapter.

⁷ Fowler 2021 *Journal of International Criminal Law* 28.

⁸ Van der Pol 2020 *Netherlands International Law Review* 212.

5.2.2 *The relationship between article 75(1) and (2) and 21*

Article 75 deals with reparations and does not provide any specific guidelines or principles thereon. Rather, it directs the Court to develop the principles of reparations. The *lacunae* in the *Rome Statute* are cured by 75(1), which implores the Court to close that gap. Although article 75(1) and (2) is the only provision that protects the right to reparations for victims, it does not explicitly define the right to reparations, its extent and purpose.

Article 75(1) partly says that the "Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation, and rehabilitation." This provision implicitly provides a substantive framework while the rest of article 75(1) lays down the procedure to be followed. Similarly, to many other provisions of the *Rome Statute*, article 75 provides a basic legal framework that must be expanded by the Court's actual practice. However, the evolution of the reparations mandate does not provide the judicial imagination as much room as certain other areas of "constructive ambiguity" in the *Rome Statute*.⁹ It is arguable that the Court is required to consider established legal principles from torts law and other jurisdictions, both domestically and internationally, based on article 21. Thus, when interpreting the spirit of article 75(1), one is drawn to article 21, which contains a legal framework for tailoring reparations. It states that:

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.

After considering this provision, one can argue that since the Court does not have express substantive law on reparations, it is worth referring to article 21, which provides a hierarchy of laws that are binding on the Court. The application of article 21 is also relevant to the substantive aspects of reparations. In the same vein, the question arises whether the principles established in the *Lubanga* case were drawn from sparse pre-existing principles or whether the Court established them. To answer

⁹ Van den Wyngaert 2011 *Case W Res J Int'l L* 486.

these questions, I refer to article 21, which is important because it contains a hierarchy of laws that the Court should apply. The hierarchy starts with the provisions of the *Rome Statute*, the Elements of Crimes and the *Rules of Procedure and Evidence*. After applying these, the Court can refer to applicable treaties and principles and rules of international law.¹⁰ The Appeals Chamber confirmed this in the *Lubanga* case and elaborated that the Court can refer to soft law instruments on the issue of reparations. It also confirmed that the Court could seek guidance from the jurisprudence of regional and international human rights courts.¹¹ Hence, the Court also refers to the *Basic Principles of Justice for Victims of Crime and Abuse of Power*¹² and the *Basic Principles on Reparations for Victims*¹³ to fulfil its article 75(1) mandate to establish principles for reparations.¹⁴

The connection between articles 75 and 21 of the *Rome Statute* demonstrates the judicial, rather than regulatory, nature of the Court's role in establishing principles for reparations.¹⁵ The Court must apply the *Rome Statute*, the *Rules of Procedure and Evidence*, and its principles on reparations when it performs its judicial function.¹⁶ When it interprets the principles of reparations that it established in the *Lubanga* case, the Court must examine the substantial legitimacy to which these principles must conform and ensure that they are in line with the spirit and purpose of the applicable international instruments. However, this makes the Court work in isolation in the interpretation of its custom-made reparation principles. Notwithstanding, the principles of reparations set in the Court's jurisprudence must be consistent with the notion of reparations recognised by international law.¹⁷

¹⁰ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 46.

¹¹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 2.

¹² *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

¹³ *Basic Principles and Guidelines on the Right to a Remedy*.

¹⁴ *Mahdi case, Reparations Order* para 24.

¹⁵ Kabalira *The Right to Reparations Under the Rome Statute of the International Criminal Court (ICC)* 51.

¹⁶ A 52 of the *Rome Statute*.

¹⁷ Redress Trust "Board of Trustees' Report and Financial Statements for the Year Ended 31st March 2011" 25-28.

Arguably, article 21 is built on the premise of giving the Court access to both general and external sources of law (article 21(1)(b)-(c) and article 21(1)(a) and 21(2), respectively), and internal sources of law. This conclusion is consistent with article 38(1) of the *Statute of the International Court of Justice*, which breaks down "well-established sources of international law" into primary and secondary sources that the ICJ must consider when formulating its judgements.¹⁸ Article 21 gives the Court an unrestricted resort to existing international instruments as well as norms in developing the principles. It takes a much wider approach rather than subjecting the court to restrictions. However, when fitting this in the context of reparations by the Court, there is a *lacuna* which suggests that the Court has work to do concerning several parts of the applicable law on reparations. It must consider that any reparation principles and/or substantive law should have "general provisions, which offer an underlying understanding of the notion of reparations in line with international law."¹⁹

Strict compliance with article 21(b) entails that the Court must draw deductions from customary international law, although this will result in substantial complexities. Extending the application of customary international law - which is based on State responsibility and primarily guided by a civil approach - to fit the Court's definition of individual criminal liability may not be sufficiently suited to satisfy the needs of victims. However, one may also argue that the Court has no choice but to draw conclusions from international norms because there is no international criminal precedent at its disposal. Some of the crimes that fall under human rights law and international law are outside the jurisdiction of the Court as they may be perpetrated by States and not individuals.²⁰ Cryer notes that the "interrelationship of sources is more complex than article 21's apparently rigid hierarchy implies [that] the overlap between the sources is too complex to reduce to simple formulae, including by reference to hierarchy."²¹

¹⁸ See A 38(1) of the Statute of the International Court of Justice (1945) (hereafter *Statute of the ICJ*).

¹⁹ Redress Trust "Board of Trustees' Report and Financial Statements for the Year Ended 31st March 2011" 25-28.

²⁰ Leyh 2017 *Fordham Int'l LJ* 699.

²¹ Cryer 2009 *New Criminal Law Review* 393-394.

It can also be argued that the Court's comparative inference of international law and international human rights law may not be the best approach for the Court, particularly in light of recent developments on granting victims a substantive right to reparations. For example, the Court's objectives may be at odds with the IACtHR's jurisprudence on reparations since it is mostly instituted against States while the Court concentrates on criminal prosecutions based on individual criminal responsibility.²² It is because the philosophies are different: in criminal cases, the focus is to ensure the individual perpetrator or convicted person pays for the crimes he/she committed. In treaty or regional bodies, States have to deal with violations attributable to them since they have breached an international obligation. Simply put, the Court is governed by individual criminal responsibility for reparations as opposed to State responsibility. Notwithstanding, the IACtHR's jurisprudence offers some insights for the Court. Since the jurisprudence of international criminal law tribunals differs from that of the IACtHR, it is crucial for the Court to develop a substantive law that considers the interests of victims at its level.

However, the *Lubanga*, *Katanga*, *Mahdi* and *Ntaganda* cases do not explain the significance of internal legal instruments on reparations, such as the Regulations of the Court and the Assembly of States Parties' official decisions.²³ This omission conflicts with article 79(3) of the *Rome Statute*, which provides that the Trust Fund for Victims must be managed in line with the determinations of the Assembly of States Parties.²⁴ There is also a contradiction here in that article 75(1) states that the Trust Fund for Victims is managed by the Assembly of States Parties, but the Court may issue a reparations order through the Trust Fund for Victims. One can question whether this implies that the role of the Assembly of States Parties is limited concerning matters of reparations.

²² Bitti, Stahn and Sluiter "Article 21 of The Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC" 304; Contreras-Garduno and Fraser 2014 *IAEHR* 175.

²³ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 46.

²⁴ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 46.

If the above is the position, one can go further to inquire about the extent of such a limitation. If one looks at article 79(3) of the *Rome Statute*, it is apparent that the decisions of the Assembly of States Parties are included in matters concerning reparations and the Trust Fund for Victims. The Trust Fund for Victims is merely an administrative unit that deals with financial competence and payment mechanisms. It has a relationship with the Assembly of State Parties and not the Court per se. The Court decides and awards the reparations the Trust Fund for Victims implements or executes. The interpretation of such becomes considerably difficult since the Trust Fund for Victims is established by the ASP – just like any other organ of the Court. The Assembly of State Parties is like the General Assembly – it determines and defines the scope of authority.

This creates a grey area regarding whether the Court can establish principles for reparations where the outcome of a trial leads to the acquittal of the accused person. In this regard, one wonders at what stage such principles should be developed - at the beginning of the trial or after conviction. Since reparation principles must determine the basis of any determinations of the scope and extent of damage, loss, and injury to or on behalf of the victims, the decisions on principles do not depend on the conviction or acquittal of the accused person. This will help prevent victims from pursuing reparations through the Court. The current law is that it is done only after conviction. My argument is to debunk that approach by noting that once a crime is committed and there are victims, tying the award of reparations to the conviction of the perpetrator is unfair to the victim. It is unfair because, without conviction, there are no reparations. Secondly, the delays: trials may take a long time, while the victim endures the pain, agony and humiliation.

5.3 Legal complexities arising from the substantive law on victims

Before delving into the discussion of these substantive complexities, it is pivotal to outline the complexities that arise from the elements that comprise the principles of reparations. They include:

- Issue of victimhood: direct and indirect victimisation

- Individual and collective reparations vis-à-vis mass victimisation
- Determining the causal link
- The standard of proof
- Recoverable harm for reparation purposes
- Modalities for reparations

The above listed are discussed in the discussions that follow.

5.3.1 Issue of victimhood: direct and indirect victimisation

5.3.1.1 Overview

There are several legal complexities arising from the substantive law of victims with regard to reparations. Understanding these complexities is necessary in the context of victim eligibility for reparations. In the *Katanga* case, the Chamber posited that in all matters pertaining to reparations, the Court "shall treat the victims with humanity and shall respect their dignity and human rights."²⁵ The Court is further duty-bound to treat all victims equally and with fairness, even if they did not participate in the criminal proceedings culminating in a decision under article 74 of the *Rome Statute*.²⁶

Article 75(1) of the *Rome Statute* states that reparations must be given "to, or in respect of, victims." Reparations frequently involve a large group of victims. However, the passage of time and the widespread and systematic nature of crimes make it difficult to determine the exact number of victims.²⁷ Moreso, the meaning of who is a victim is not explicitly mentioned in the substantive law on reparations. Instead, the *Rome Statute* makes references to and links itself with victim participation in legal proceedings rather than reparations.²⁸ The four reparations cases do not provide any additional insight on this matter. Hirst states that, for the most part, interpretation should be laid on the value given by the participation of victims in the process rather

²⁵ *Katanga case, Order for Reparations* para 30.

²⁶ *Katanga case, Order for Reparations* para 30.

²⁷ *Ntaganda case, Reparations Order* para 8.

²⁸ A 68 of the *Rome Statute*.

than in the outcome of a case.²⁹ Whether victims participate in a trial or not does not alter the outcome of a case.³⁰ Recognition of victims and the provision of information to them is part of victim participation.³¹ This raises several complex issues that cannot be avoided, such as who or what counts as a victim for the purpose of receiving reparations. What substantive law regulates victim eligibility for reparations? In an attempt to answer these questions, an argument can be raised that the substantiveness of reparations may never be realised because victims are prioritised for participation rather than ensuring that their interests are fairly represented in the outcome of decisions pertaining to reparations. The answer to the complex issues at hand may also come from Rule 85 of the *Rules of Procedure and Evidence*, which divides victims into two: direct and indirect victims. Its contents are relevant for reparations purposes. The following paragraphs examine these two categories.

5.3.1.2 Direct and indirect victims

The Trial Chamber propounded the following criteria for determining who is a direct victim:

- (i) the applicant must be a natural or juristic person;
- (ii) the applicant must have suffered harm;
- (iii) the crime which caused the harm must fall within the jurisdiction of the Court; and
- (iv) there must be a causal link between the harm suffered and the crime.³²

However, these requirements do not specify who qualifies as a direct victim for the purpose of receiving reparations. The term 'victim' is not clarified for reparations purposes, hence the use of a general approach. Article 63(1) of the *ACHR*³³ can be used to shed some light in this regard. Accordingly, it refers to a victim as the 'injured

²⁹ Jones 2020 *Journal of International Criminal Justice* 81.

³⁰ Jones 2020 *Journal of International Criminal Justice* 81.

³¹ Jones 2020 *Journal of International Criminal Justice* 81.

³² *Katanga case, Order for Reparations* para 46.

³³ Article 63(1) of the *American Convention on Human Rights* states that:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

party' - a person whose freedom has been abused or whose human rights were violated. The crucial element in this understanding is tied to Rule 85(a) of the *Rules of Procedure and Evidence*, which provides that a victim ought to have suffered harm as a result of the crime committed by the convicted person. In the *Katanga* case, the definition of a victim was expanded to include legal entities such as institutions and organisations that have directly suffered damage to their property that is used for charitable, educational, artistic, or scientific objectives.³⁴ In this context, property includes hospitals, historical monuments and other locations, and items used for humanitarian purposes and which have been harmed as a result of the commission of a crime that is within the Court's jurisdiction.³⁵ Beyond the *Katanga* case, the meaning of victimhood has been construed to include children born of rape and sexual slavery.³⁶ This has a substantial practical effect in that the descendants of these children born as a result of rape and sexual slavery may also be considered indirect victims due to transgenerational harm. Therefore, the harm Mr Ntaganda caused can extend to not just one but even two generations who were not yet born when the crimes were committed.

An indirect victim, on the other hand, is a person who has a close relationship with the direct victim. In the *Katanga* case, the Trial Chamber noted that psychological suffering brought by the unexpected death of a family member or the pecuniary hardship that results from the loss of their contribution are two examples of the harm endured by indirect victims.³⁷ Indirect victims also include individuals who intervened to prevent the alleged crimes from happening. For a person to be an indirect victim, they should have intervened with the intention of preventing the commission of the crime in question.³⁸ The following paragraphs illustrate the substantive complexities arising from these definitions.

³⁴ *Katanga case, Order for Reparations* para 35.

³⁵ *Katanga case, Order for Reparations* para 19.

³⁶ *Ntaganda case, Reparations Order* para 122.

³⁷ *Katanga case, Order for Reparations* para 19.

³⁸ *Lubanga case, Decision on 'Indirect Victims'* para 51.

5.3.1.2.1 The retributive approach

In accordance with the reparation mandate of the Court, legal proceedings for reparations can be brought by the filing of a request by the victims or by other persons on their behalf. In exceptional circumstances, the Court may initiate a reparation procedure *proprio motu*.³⁹ However, this approach leads to complexity because the role of the Court is largely retributive. The Court's main mandate is to punish persons convicted of crimes, not to repair the victims. The current law is that it is done only after conviction. My argument is that tying the award of reparations to the conviction of the perpetrator is unfair to the victim especially one falling outside the scope of such conviction. This can be considered unfair because, without conviction, there will be no reparations. Secondly, the delays in the trials may take a long time, while the victim endures pain, agony, and humiliation. Either being a direct or an indirect victim, the retributive undertone to reparation, which is based on conviction, does not wipe out the harm suffered by the victims. Victims expect to be 'repaired' after suffering from the harm caused by the perpetrator hence, reparation by the Court tied to conviction of the accused leaves some victims destitute with no form of 'repair' at all. Thus, when presenting their views and concerns (article 68(3)) in the reparation phase, a reparation order not covering for all victims promotes a retributive connotation.

When victims participate in trial proceedings, article 68(3) ensures that their interests are weighed against the fundamental rights of the accused in line with the requirements of a fair trial.⁴⁰ This article only refers to participation and says nothing about reparations. This shows that although the interests of victims are considered, their interests do not necessarily transcend in a substantive sense which allows judges to apply these interests to the outcomes of the reparation award.⁴¹ As such, it makes victim-oriented justice only limited to a procedural dimension and does not extend it to the substantive form of justice, which will be more meaningful for victims.

³⁹ A 75(1) of the *Rome Statute*; Rule 95(1) of the *Rules of Procedure and Evidence (ICC)*. See Dwertmann *The Reparation System of the International Criminal Court* chp 6.

⁴⁰ Fowler 2021 *Journal of International Criminal Law* 45.

⁴¹ Moffett 2015 *Crim L Forum* 3.

The Court must balance the competing interests by responding to the interests of victims on the one hand and considering the rights of the accused on the other. However, this balancing exercise will not be favourable for victims on the issue of reparations, which is always seen as an afterthought. Fowler posits that the constant weighing of victims' rights against other rights and values leads to the constant erosion of their interests. Thus, the dilution of article 68(3) is the result of the prioritisation of the punishment of the accused as opposed to reparations for victims.⁴² Notwithstanding the erosion of the interest of victims to reparations because of counterweighing them with the rights of the accused, the Court must continue to fulfil its retribution mandate. The prevailing sentiment is that the Court is bending its retribution mandate to suit the aims of reparation. However, this is not a call for the Court to completely strip away its retributive process, although this may limit the scope of reparations.⁴³ On this, Fowler posits that placing victims on a pedestal and promising them restorative justice through a retributive model is unsustainable.⁴⁴ I concur with this submission because to make justice meaningful for victims, a model of repairing the harm suffered ought to transcend one that is purely retributive.

To further support the above argument, the substantive law on victimhood relating to reparations often takes the form of prosecution, conviction and victim participation. This approach results in a more retributive outcome. An example can be seen in the *Katanga* case, in which the prosecution withdrew its appeal against Mr Katanga because he had accepted conviction and expressed remorse to the victims.⁴⁵ However, the judgement failed to recognise the interests of the victims pertaining to the harm that they suffered as a result of sexual violence orchestrated by Mr Katanga. This case illustrates that preference is for punishment, as opposed to the interests of victims.

To further illustrate in the context of victimhood in the context of participation in reparations proceedings, Stahn and Olasolo *et al* make an important submission.

⁴² Fowler 2021 *Journal of International Criminal Law* 45.

⁴³ Fowler 2021 *Journal of International Criminal Law* 46.

⁴⁴ Fowler 2021 *Journal of International Criminal Law* 46.

⁴⁵ *Situation in the Democratic Republic of the Congo, The Prosecutor v. Germain Katanga, Decision on the Victims' Requests to Participate in the Appeal Proceedings* ICC-01/04-01/07-3505 (hereafter *Katanga case, Decision on the Victims' Requests to Participate in the Appeal Proceedings*).

Accordingly, and on a practical level, victims' participation in ICC proceedings can be understood as a recognition of the significance of those who can offer a human perspective on the events being narrated throughout the proceedings and who have first-hand knowledge of the commission of the relevant crimes.⁴⁶ On a moral level, victims' participation will guarantee that the Court and the larger international community are fully informed of the agony faced by victims.⁴⁷ Moffett on the other hand, views this as one linked to procedural justice. As Moffett posits, access to redress and fair treatment within processes are key components of procedural justice for victims, which raises issues with due process.⁴⁸ Procedural justice contains a number of procedures to safeguard the interests of victims, including safeguards, participation in proceedings that affect their interests, access to legal representation, aid, and support, as well as the right to seek reparation.⁴⁹ With these submissions in mind, I still hold the view that the interpretation of victimhood as regards their participation in a trial is limited mainly to the extent for which their interests (as stated in article 68(3)) favours eventual conviction of the individual perpetrator. Thus, also has an impact on the substantiveness of the receipt of reparations.

Furthermore, when interrogating article 68(3), one sees that it focuses on the participation of victims in the investigation, trial and sentencing. However, this interpretation does not extend to the victims' substantive right to reparations and the extent they have been affected.⁵⁰ This creates opposing viewpoints in the reparation process. It also clashes with the importance of placing the interests of victims at the forefront versus the rights of the accused to a fair trial before an impartial judge. Although this is a procedural requirement, it also affects the substantiveness of the reparation outcome if these conflicting interests override each other. Moffett submits that victim participation should also be extended to reparation proceedings while maintaining the role of the prosecution and upholding the rights of the defendant.⁵¹

⁴⁶ Stahn and Olasolo *et al* 2017 *Journal of International Criminal Justice* 221.

⁴⁷ Stahn and Olasolo *et al* 2017 *Journal of International Criminal Justice* 221.

⁴⁸ Moffett 2015 *Journal of International Criminal Justice* 7.

⁴⁹ Moffett 2015 *Journal of International Criminal Justice* 7.

⁵⁰ Moffett 2015 *Crim L Forum* 7.

⁵¹ Moffett 2015 *Crim L Forum* 19.

In the context of the foregoing discussion, one asks whether there is a need to broaden the definition of a victim for the purpose of reparations. To answer this question, one can infer from the comprehensive definition of a victim in the IACtHR. This instrument defines victims as natural persons⁵² and victim groups⁵³ whose rights have been violated directly or indirectly⁵⁴ or that can potentially be violated.⁵⁵ Comparing this definition to Rule 85 of the *Rules of Procedure and Evidence* shows that the IACtHR classifies victims as persons who are at potential risk of a violation. The *Rules of Procedure and Evidence* do not have this provision. Thus, limits the substantive outcome of the reparation award for the victims.

5.3.1.2.2 The fluidity of the methodology for determining victims

Victims may be subdivided into two further groups: victims who participate in the court proceedings during reparations hearings and those who join as beneficiaries at the implementation stage after the reparation order has been made.⁵⁶ In the *Katanga* case, the Chamber limited the application of the beneficiaries eligible for reparations to a certain date.⁵⁷ In the *Lubanga* case, there were no time limitations on the application by victims who were eligible for reparations. This expanded the number of victims to hundreds and possibly thousands of people.⁵⁸ The Trust Fund for Victims screened eligible victims at the implementation stage using the methodology submitted by the Court. However, the Court in the *Mahdi* case took a different

⁵² *Case of the Juvenile Reeducation Institute v Paraguay, Acosta Ocampos and ors v Paraguay, Preliminary objections, merits, reparations and costs* IHRL 1495 (IACHR 2004) (hereafter *Case of the Juvenile Reeducation Institute v Paraguay*) para 106.

⁵³ *Case of the Yakye Axa Indigenous Community v Paraguay, Yakye Axa Indigenous Community v Paraguay, Merits, Reparations and Costs* IHRL 1509 (IACHR 2005) (hereafter *Yakye Axa Indigenous Community v Paraguay*) para 176.

⁵⁴ *Case of the Ituango Massacres v Colombia, Separate Opinion of Judge Sergio García Ramírez Concerning the Judgment of the Inter-American Court of Human Rights of June 29, 2006, in the Case of the Ituango Massacres* (IACtHR 2006) (hereafter *Separate Opinion of Judge Sergio García Ramírez in the Case of the Ituango Massacres*) para 10.

⁵⁵ *Case of Hilaire, Constantine and Benjamin et al v Trinidad and Tobago, Merits, Reparations and Costs* IHRL 1477 (IACHR 2002) (hereafter *Hilaire v Trinidad and Tobago*) paras 116-117; *Sudrez-Rosero v Ecuador* 6 IHRR 729 (1999) (hereafter *Sudrez-Rosero v Ecuador*) para 98.

⁵⁶ Balta *What's Law Got to Do With It?* 105.

⁵⁷ *Katanga case, Order for Reparations* para 168

⁵⁸ *Situation in the Democratic Republic of the Congo, Prosecutor (on the Application of Victims) v Lubanga Dyilo (Thomas), Corrected Version of the 'Decision Setting the Size of the Reparations Award for Which Thomas Lubanga Dyilo is Liable'* ICL 1814 (ICC 2017) (hereafter *Lubanga case, Corrected version of the 'Decision setting the Size of the Reparations Award'*) para 293.

approach whereby it decided not to screen the victims after it had received 139 applications during the reparations phase. It assigned this task to the Trust Fund for Victims at the implementation stage.⁵⁹ These different methodologies and fluidity in determining victims limit the possible likelihood of some victims obtaining potential benefits from reparations.

It also raises problems because victims present at the reparation procedure and victims at the implementation phase are separate categories and undergo different screening processes, as shown in the aforementioned cases. Although this methodology is commendable, the point is that reparations are distributed differently for victims in the procedural phase than for victims in the implementation phase. This widens the gap between the two categories of victims. This proposition is further supported by the fact that victims identified by the Trust Fund for Victims during the implementation phase will not have taken part in the reparation proceedings, thereby depriving them of the advantages of substantive justice. In the long run, the fluidity of this approach negatively affects the substantive outcome of reparations.

5.3.2 Individual and collective reparations vis-à-vis mass victimisation

During the reparations process, the Court has the authority to decide whether to grant individual or collective reparations. This discretion raises several complex concerns in cases of mass victimisation. In the *Lubanga* case, it was said that the intent behind the present framework for reparations is not to provide for all victims in any particular situation and that even if this were the case, it would have been impossible.⁶⁰ This acceptance of the reality of the situation sheds light on the challenges of providing victims with reparations. The main challenge is that the civil liability of reparations is linked to a criminal conviction. Hence, Stahn argues that the Court's reparation awards differ from purely civil forms of liability due to their relationship to a criminal conviction, necessitating the conciliation of several interests, such as the rights of victims and convicted individuals.⁶¹

⁵⁹ *Mahdi case, Reparations Order* para 142

⁶⁰ Wiersing 2012 *Amsterdam Law Forum* 37.

⁶¹ Stahn 2015 *Journal of International Criminal Justice* 801-813.

Furthermore, collective reparations may be targeted by the Court depending on the defining standard such as the ethnic, racial, social, political, or religious group of the beneficiaries to the reparation order; or the group of beneficiaries that can be identified after the collective harm resulting from the crimes for which a person was convicted.⁶² Even while the Court favours this approach, it has been argued that the dispersion of victims in receipt of reparations could lead to tensions and disputes.⁶³ This is due to the reason that it may be difficult to carry out individual reparations if the convicted person's financial circumstance prevents them from, for example, liable for reparations to a large number of victims. This is detrimental to the effectiveness and efficiency of the ICC reparation framework as it will be substantially compromised due to its limited resources to handle a sizable number of individual reparations. As such, collective reparations may be the only option because individual reparations would either be impossible or would exclude a significant number of victims.⁶⁴

The above approach was one that was adopted in the *Mahdi* case. The Court in the *Mahdi* case concluded that the entire community of Timbuktu had experienced the harm inflicted primarily as a collective.⁶⁵ Therefore, it was decided that collective reparations were the most suitable.⁶⁶ Only a small number of victims were given individual reparations for the harm suffered by individuals whose ancestors' graves were destroyed and for the financial loss of those whose livelihood depended solely on the buildings.⁶⁷ The Court's jurisprudence continued to favour collective reparations, as shown in the *Ntaganda* case. Measures of restitution, compensation, rehabilitation and satisfaction are some examples of these collective reparation methods. When appropriate, they may also include a symbolic, preventative or transformative value.⁶⁸ The inclination toward collective reparations runs the potential risk of leading to a shortfall in the legal quality and solidity of such collective awards. Although this may be reasonable, one can question the legitimacy and soundness of such collective reparations as well as their justice to the individual victims.

⁶² *Katanga case, Reparations Order* para 274.

⁶³ Dwertmann *The Reparation System of the International Criminal Court* 101.

⁶⁴ Roth-Arriaza 2004 *Hastings International and Comparative Law Review* 157,181.

⁶⁵ *Mahdi case, Reparations Order* para 76.

⁶⁶ *Mahdi case, Reparations Order* para 67, para 82, para 140.

⁶⁷ *Mahdi case, Reparations Order* para 81, para 90.

⁶⁸ *Ntaganda case, Reparations Order* paras 191-208.

5.3.3 Determining the causal link

The determination of the causal link between the act of the accused and the harm suffered is a fundamental concept for ascertaining criminal responsibility in international criminal law.⁶⁹ There must be a connection between the act or other conduct of the perpetrator and the crime. This means that the act or conduct of the convicted person must have caused the harm suffered. It should also be borne in mind that the harm must be linked to a crime for which the individual perpetrator is convicted. So, if he/she stood trial for murder and rape, and he is convicted of murder only, then, there will be no reparations for rape. This requirement underlies that the crimes would not have been committed without the given set of circumstances. The IACtHR propounds an interesting submission in this respect that

Every human act produces diverse consequences, some proximate and others remote. An old adage puts it as follows: *causa causæ est causa causati*. Imagine the effect of a stone cast into a lake; it will cause concentric circles to ripple over the water, moving further and further away and becoming ever more imperceptible. Thus, it is that all human actions cause remote and distant effects.⁷⁰

Traditionally, three types of causation arise in a criminal matter: cause in fact, legal cause and proximate cause.⁷¹ The cause, in fact is the *sine qua non* or the 'but for' test. It entails that for the harm to have occurred, the perpetrator's action was necessary.⁷² The legal cause (legal causation) is used to evaluate whether the perpetrator's action is culpable for bringing about certain harm, taking into cognisance a "number of policy considerations which are, protected social interests, foreseeability, deterrence and directness of the contribution."⁷³ Proximate cause refers to the causal link that connects the crimes for which the accused person is convicted, the harm suffered by the victims for such crimes, and the reparations award granted to alleviate such suffering.⁷⁴

⁶⁹ *Lubanga case, Judgment pursuant to Article 74 of the Statute* para 211.

⁷⁰ *Case of Aloeboetoe et al v Suriname, Aloeboetoe, Reparations and Costs* IHRL 1396 (IACHR 1993) (hereafter *Aloeboetoe v Suriname, Reparations and Costs*) para 48.

⁷¹ Aksenova *Complicity in International Criminal Law* 117.

⁷² Aksenova *Complicity in International Criminal Law* 118.

⁷³ Aksenova *Complicity in International Criminal Law* 118.

⁷⁴ See Rule 85 of the *Rules of Procedure and Evidence (ICC)*.

In the reparation jurisprudence of the Court, proximate cause has been used to establish the causal link between direct and indirect victims in relation to the harm suffered. Whereas for direct victims there must be a nexus between the harm and the crimes committed by the perpetrator;⁷⁵ indirect victims must demonstrate a relationship between themselves and the direct victims and must show that their harm is caused by the loss, injury, or damage sustained by the direct victims.⁷⁶ In *Prosecutor v Clément Kayishema and Obed Ruzindana*, it was confirmed that the act of the perpetrator must have been proven beyond a reasonable doubt and that it must have contributed to or had a consequence on the commission of the crime.⁷⁷

The implementation of the proximate cause raises some challenges. Firstly, as evident in the *Lubanga* case, the prosecution argued that it is justifiable to award reparations to victims who have suffered sexual crimes because such harm is the proximate consequence of the crimes for which the defendant is convicted.⁷⁸ This implies that any victim who has suffered harm directly or indirectly from the acts for which the defendant was convicted should be awarded reparations.⁷⁹ The Defence challenged this reasoning on the grounds that the inclusion of such victims in the reparation award infringed the rights of Mr Lubanga as he was not convicted of sexual crimes.⁸⁰ As such, reparations were not awarded to victims of Sexual and Gender-Based Violence (SGBV).

Secondly, since the Court's procedures are criminal, the acknowledgement of reparations for victims introduces a civil dimension to the proceedings. The civil component of the case is intertwined with the criminal trial of the accused in circumstances where the same judges hear the case at the pre-trial, trial and appeal

⁷⁵ *Ntaganda case, Reparations Order* para 121.

⁷⁶ *Ntaganda case, Reparations Order* para 121.

⁷⁷ *Prosecutor v Kayishema (Clément) and Ruzindana (Obed), Trial Judgment* ICL 85 (ICTR 1999) (hereafter *Prosecutor v Kayishema*) para 199.

⁷⁸ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* paras 207-209.

⁷⁹ Ferstman and Goetz "Reparations Before the International Criminal Court" 331.

⁸⁰ *Situation in the Democratic Republic of Congo, Prosecutor (on the Application of Victims V01 and Victims V02) (on Behalf of The Office of Public Counsel for Victims) v Dyilo (Thomas Lubanga), Judgment on the Appeals Against the 'Decision Establishing Principles and Procedures to be Applied to Reparations' of 7 August 2012 with Amended Order for Reparations (Annex A) and Public Annexes 1 and 2* ICL 1655 (ICC 2015) (hereafter *Lubanga case, Judgment on the Appeals Against the 'Decision Establishing Principles and Procedures to be Applied to Reparations'*) para 9(b).

stages to determine the guilt or innocence of the accused. The same judges will also Rule on the reparations. One may ask whether proximate cause as a standard of causation is appropriate, considering the interconnection of the civil dimension of reparation hearings in a criminal case.

Thirdly, a causal connection between the harm sustained and the criminal charge should be proven in accordance with Rule 85 of the *Rules of Procedure and Evidence*. However, neither the *Rome Statute* nor the *Rules of Procedure and Evidence* provide guidance regarding the causative relationship between the harm, loss or injury for which reparation is to be provided. In other words, it is not clear whether proving the causal link to recoverable harm is necessary to demonstrate the defendant's liability.⁸¹ The lack of clarity around this issue has led to a situation in which the level of accountability for damages and determination of causation remains unresolved.

Fourthly, the Court's use of proximate cause is not fully explained. The degree of harm that is considered a direct cause of a crime is unsettled. The Court and Rule 85 of the *Rules of Procedure and Evidence* are quiet on this matter.⁸² This leads to the conclusion that harm could be defined as any natural consequence of the crime, whether direct or indirect, that falls within the context of Rule 85(a) in the case of a natural victim.⁸³ This conclusion might be overly general and susceptible to errors, particularly when attempting to prove causation. It contrasts with Rule 85(b), which states that the injury must be the direct cause of the crime.⁸⁴

⁸¹ Kabalira *The Right to Reparations Under the Rome Statute of the International Criminal Court (ICC)* 105.

⁸² *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court; Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo, Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations* ICC-01/04-01/06-2911 (hereafter *Lubanga case, Decision on the Defence Request for Leave to Appeal the Decision Establishing the Principles and Procedures to be Applied to Reparations*) para 9.

⁸³ Rule 85(a) of the *Rules of Procedure and Evidence (ICC)* states that:
"Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.

⁸⁴ Rule 85(b) of the *Rules of Procedure and Evidence (ICC)* states that:

Consequently, the definition of 'direct cause' is a point of debate. In the *Lubanga case*, the Court found that the crimes of recruiting and conscripting minors under the age of 15 and employing them to actively participate in hostilities should not be restricted to 'direct' harm or the 'immediate effects,' and that the Court should utilise the standard of proximate cause.⁸⁵ Although the Court did not properly define the meaning of proximate cause, it further stated that the proximate cause must be balanced with the 'but for' test. The Court further stated the relevant standard of causation to be applied to reparations must be satisfied and that the 'but for' relationship between the crime and the harm must be established. In the *Lubanga case*, it found that the crimes for which Mr Lubanga was convicted were the proximate cause of the harm for which reparations were sought.⁸⁶ The 'but for' test that was considered in this case was factual causation. Thus, one must interpret the test by asking the following question: would the harm have occurred 'but for' the conduct of the responsible party? In other words, the 'but for' test means that the harm would not have occurred 'but for' the act of the perpetrator. Hence, such an act must be the cause of the harm suffered by the victim. However, this does not dilute the meaning of proximate cause and does not define instances that may require the harm to be the proximate cause of the crime that leads to reparations. This is because the definition used by the Court renders such a definition vague.⁸⁷

Another conundrum surrounding the proximate cause test is how it will be determined in the case of victim-perpetrators which in this context refers to victims who participated in the atrocities and crimes of the convicted person. The Court must be more effective at limiting assumptions about what it can and cannot do. This does not imply, however, that crimes beyond the purview of the Court should go unpunished.

Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

See also, *Lubanga case, Decision on the Defence Request for Leave to Appeal the Decision Establishing the Principles and Procedures to be Applied to Reparations* para 9.

⁸⁵ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 249.

⁸⁶ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 250.

⁸⁷ *Lubanga case, Decision on the Defence Request for Leave to Appeal the Decision Establishing the Principles and Procedures to be Applied to Reparations* para 9.

As the Trial Chamber I in the Lubanga case rightly noted, Trial Chamber I opined that "[r]eparations should secure, whenever possible, reconciliation between the convicted person, the victims of the crimes and the affected communities".⁸⁸ It has been submitted that political violence and armed conflicts can make the binary identities of victim and perpetrator more nuanced.⁸⁹ Hence, there are questions regarding how proximate cause in these two instances will be handled. Moffett argues for a depoliticization of debates surrounding reparations for complicated victims who should neither be excluded nor equated to innocent victims. In this regard, Moffett does not dispel the ensuing uncertainty.⁹⁰ The gap in this area compounds the fundamental problems associated with demonstrating causality to award reparations precisely in the context of victim-perpetrators. How the Court will balance this conflict is yet to be addressed.

5.3.3.1 Inherent complexities of the 'but for' test

In the *Ntaganda* case, it was held that the 'but for' test should be used to determine the link between the crimes and harm.⁹¹ It is also necessary for the crimes for which a person was convicted to be the proximate cause of the harm for which reparations are requested.⁹² Proximate cause is legally sufficient to give rise to liability and for determining, among other things, whether it was reasonably foreseeable that the acts and conduct that led to the conviction would result in harm. This is an application of the 'but for' test.⁹³ The case of *Bosnia and Herzegovina v Serbia and Montenegro* is crucial in explaining this. In this case, the ICJ found that a direct and certain causal nexus should be established as a connection between the wrongful act and the breach of obligation.⁹⁴ Such a nexus should be considered only if the breach of the obligation could have been averted if the respondent acted in compliance with its legal

⁸⁸ Lubanga case, Decision establishing the principles para 139.

⁸⁹ Moffett 2016 *International Journal of Transitional Justice* 146-167.

⁹⁰ Moffett 2014 *Queen's University Belfast Law Research Papers* 23.

⁹¹ *Ntaganda case, Reparations Order* para 132.

⁹² *Ntaganda case, Reparations Order* para 132.

⁹³ *Ntaganda case, Reparations Order* para 133.

⁹⁴ *Application for Revision of the Judgment of 11 July 1996 in the case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) Preliminary Objections, Yugoslavia v Bosnia and Herzegovina, Judgment, Preliminary Objections (Admissibility)* ICGJ 19 (ICJ 2003) (hereafter *Yugoslavia v Bosnia and Herzegovina*) 462.

obligations.⁹⁵ The ICJ did not use the reasoning used in the application of the 'but for' test. Instead, it applied the standard of factual causation in establishing the nexus between an act and its consequences.⁹⁶ However, the 'but for' test causes complications if the individual did not act alone and if they committed a crime jointly with or through another person.

The relationship between the proximate cause and the 'but for' test is not elusive. This is evident from the deduction made by the Appeals Chamber with particular emphasis on para 250 of the *Lubanga* case, where it was found that a combination of the proximate cause and the 'but for' test will be used in the determination of the extent of the liability of the defendant for reparations. In this light, causation must be interpreted as the causal link between the crime, conviction and the measures of reparations. However, it is concerning that establishing causation for the purpose of conviction is not necessary. Instead, causation for reparations is established by taking cognisance of the causal link established between the crime, conviction and the measures of reparations.

The IACtHR holds that a causal connection must be direct and that the "solution provided by law...consists of demanding that the responsible party makes reparation for the immediate effects of such unlawful acts."⁹⁷ If this approach is adopted by the Court in the context of reparations, the Court must award reparations based on the direct result of the harm suffered. One can then ask: what is the relevance of the 'but for' test to the determination of proximate causation? Sugarman says that the question should rather be, "what would have happened had the defendant acted carefully instead of the way he or she did act?"⁹⁸ Since reparations denote the civil dimension of the Court's proceedings, the question of a proximate cause may not be feasible. This is because only the direct cause of the harm is weighed against the 'but for' test

⁹⁵ *Yugoslavia v Bosnia and Herzegovina* para 462.

⁹⁶ See A 25(3) (a) of the *Rome Statute*. According to this article, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.

⁹⁷ *Aloeboetoe v Suriname* para 49

⁹⁸ Sugarman 2002 *Sup Ct Rev* 10.

when determining liability for reparations. It must be remembered that reparations should be made to recover damages for all harm - past, present and prospective.⁹⁹

The adoption of the civil dimension in showing causation in an international criminal matter is intriguing. The point of contention is whether this criterion meets the needs of individual reparations. Also, whether each instance of harm will be shown using the established standard of causality. Will this acknowledge the necessity to satisfy the specific needs of victims? Is it necessary to show that individual harm occurred through the proximate cause? Should this illustration be evaluated against the 'but for' test? In matters concerning collective reparations, it is possible to use this standard. However, in cases concerning individual reparations, it is not appropriate because the Court often opts to award collective reparations due to their reach of a wider net of victims. Also, this broad approach is not appropriate in matters involving victims who have specific claims, demands or interests due to their experience of personal damage.¹⁰⁰ In the *Lubanga* case, the Court used a community-based approach and rejected individual requests because Mr Lubanga was indigent and there were no funds available from his estate to satisfy the individual demands of the victims.¹⁰¹ Since victims did not receive individual reparations for the harm they suffered, one may ask what real justice for victims actually means.¹⁰²

5.3.4 The standard of proof

During reparation proceedings, victims must produce sufficient proof of the causal relationship between the harm suffered and the crime.¹⁰³ The specific circumstances of each case, including any challenges the victims may encounter in acquiring evidence, will determine the appropriate standard of proof and the burden of proof on them.¹⁰⁴ Generally, the *onus* to prove a claim lies with the party making

⁹⁹ Geistfeld 2021 *Md L Rev* 451.

¹⁰⁰ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 221.

¹⁰¹ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 221.

¹⁰² Fletcher "Refracted Justice" 317-319.

¹⁰³ *Ntaganda case, Reparations Order* para 77.

¹⁰⁴ *Ntaganda case, Reparations Order* para 77.

the claim.¹⁰⁵ This principle is applicable in national and international courts in both civil and criminal matters.¹⁰⁶ Thus, he who asserts a claim has the burden to prove that claim. A similar principle applies in the case of reparations, in which the claimant (victim) must prove victimhood and the harm suffered. Therefore, each reparation claimant is responsible for furnishing documents and other evidence that satisfactorily proves their eligibility for reparation.¹⁰⁷

It can further allude that the perpetrator's liability is not established by merely proving how the defendant acted wrongfully but by how he/she should have acted.¹⁰⁸ The burden of proof for reparation purposes lies on the victims to submit evidence and other relevant information in relation to the harm suffered. They must do so to the fullest extent possible in the circumstances of each case. In the context of the Court, a lesser standard is required at reparation hearings.¹⁰⁹ In the *Lubanga* case, the Court said that proof on a balance of probabilities is sufficient and proportionate to establish the facts that are relevant for reparations when it is directed against a convicted person.¹¹⁰ A look into the *Ntaganda* case further confirms this legal position. In this case, the Court noted that the difficulties facing victims in producing the relevant information or producing copies of official documents in supporting their claims for reparations are immense.¹¹¹ The Court referred to these difficulties as a justification

¹⁰⁵ *Situation in Uganda, Decision on Victims' Applications for Participation* ICL 1514 (ICC 2007) (hereafter *Situation in Uganda, Decision on victims' applications for participation*) para 13.

¹⁰⁶ For example, according to Rule 23 bis of the *Internal Rules ECCC*:

In order for Civil Party action to be admissible, the Civil Party applicant shall: (a) be clearly identified; and (b) demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based.

¹⁰⁷ See A 35(1) of the Provisional Rules for Claims Procedures of the Governing Council of the United Nations Compensation Commission (1992) (hereafter *Provisional Rules for Claims Procedures of the Governing Council*) states that:

For the payment of fixed amounts in the case of serious personal injury not resulting in death, claimants were required to provide documentation of the fact and date of the injury, in the case of death, claimant are required to provide simple documentation of the death and family relationship. Document of the actual amount of loss will not be required.

¹⁰⁸ Sugarman 2002 *Sup Ct Rev* 10.

¹⁰⁹ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 251.

¹¹⁰ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 253.

¹¹¹ *Ntaganda case, Reparations Order* para 139.

for using the balance of probabilities as a standard for proving that the victims had suffered as a result of the crimes for which Mr Ntaganda was convicted.¹¹²

What is the definition of 'balance of probabilities'? *Black's Law Dictionary* defines the balance of probabilities as:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.¹¹³

The concept of probability entails an evaluation that involves weighing the past event against all facts and assumptions that are relevant for the purpose of that evaluation.¹¹⁴ This standard has been applied by the Court in establishing the standard of proof of eligibility for participation in reparation proceedings.¹¹⁵ However, the question remains on how the balance of probabilities must be applied in the context of reparation proceedings, which are embedded in inherently criminal proceedings in which the standard of proof is one beyond a reasonable doubt. How the Court will merge both standards in proving criminal conviction beyond reasonable doubt and liability for reparations on a balance of probabilities is an aspect worth exploring. At what stage is proof on a balance of probabilities required? Is it at the participation stage, where victims are allowed to present evidence for the whole trial? Or is it at the reparation stage at which victims will be called to participate by submitting evidence pertaining to reparations?

In answering the above questions, adopting the standard of proof beyond reasonable doubt may be problematic in that it requires victims to submit evidence that is relevant to their claims. Although some submissions at such a standard are relevant for

¹¹² *Ntaganda case, Reparations Order* para 143.

¹¹³ Garner (ed) *Black's Law Dictionary* quoted in the *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* ft 439.

¹¹⁴ See explanation on the Wilkinson *Standards of Proof in International Humanitarian and Human Rights Fact -Finding and Inquiry Missions* 49-50.

¹¹⁵ See *Situation in the Democratic Republic of the Congo, Prosecutor v Lubanga Dyilo (Thomas), Decision on Victims' Participation* ICL 505 (ICC 2008) (hereafter *Lubanga case, Decision on victims' participation*) paras 99-100.

purposes of individual reparations, victims may be unable to obtain additional materials that are acceptable enough for the Court to make factual findings.¹¹⁶ Rule 86 of the *Rules of Procedure and Evidence of the Special Tribunal for Lebanon* sheds some light on this aspect. It requires the pre-trial judge to consider whether the applicant has presented *prima facie* evidence that he/she is a victim. This determination is necessary for deciding whether the applicant may participate in the proceedings.¹¹⁷ The *prima facie* standard of proof is widely acknowledged as the standard employed during the initial assessment of victim status on an international scale.¹¹⁸ Hence, the standard of proof on a balance of probabilities is applied to international law when assessing the status of victims.¹¹⁹

Another concern with the standard of proof on a balance of probabilities is that it is used to establish the legal standing of victims at the pre-trial stage as opposed to establishing the quality and quantity of evidence at the reparations stage. Significant differences emerge between the pre-trial and reparations stages because the quantity and quality of evidence in a civil claim (with regards to reparations) are different from that required to make findings of criminal responsibility.¹²⁰ The *Lubanga* case shows that it may be difficult to determine the appropriate standard of proof at the reparations stage, which comes about due to the difficulty facing victims in obtaining evidence to support their claims when such evidence has been destroyed or when it is not available to them.¹²¹

¹¹⁶ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 97, para 99 - para 100.

¹¹⁷ Rule 86 of the *Rules of Procedure and Evidence of the Special Tribunal for Lebanon* (2009) (hereafter *Rules of Procedure and Evidence of the Special Tribunal for Lebanon*) states that:

In deciding whether a victim may participate in the proceedings, the Pre-Trial Judge shall consider [...] whether the applicant has provided prima facie evidence that he is a victim as defined in Rule 2." Rule 2 provides that "A natural person who has suffered physical, material, or mental harm as a direct result of an attack within the Tribunal's jurisdiction.

¹¹⁸ See Rule 86 of the *Rules of Procedure and Evidence of the Special Tribunal for Lebanon*.

¹¹⁹ *Co-Prosecutors v Kaing (Guek Eav) alias 'Duch,' Appeal Judgment* ICL 1550 (ECC 2012) (hereafter *Kaing case, Appeal Judgment*) para 523.

¹²⁰ *Kaing case, Appeal Judgment* para 512.

¹²¹ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 252.

The standard of proof on a balance of probability has a two-way application process. The victims submit evidence on the one hand, while the convicted person must rebut such evidence by providing proof which is weighed on a balance of probabilities. The Court says that when establishing the standard of proof, harm must be the direct result of the commission of a crime.¹²² However, this requires a much higher standard because it emanates from a criminal trial rather than a purely civil trial where presumptions are accepted. Also, the standard of proof that is applicable must be determined after considering the need to uphold the fair trial rights of an accused person.¹²³ In the *Lubanga* case, the Court adopted a lower standard of proof due to the complexities of crimes for reparations purposes¹²⁴ and also because the criminal standard of proof beyond a reasonable doubt is inappropriate for reparations claims which are akin to civil claims.¹²⁵ There is also the added difficulty facing victims in obtaining evidence, which necessitates the adoption of a flexible approach that is feasible in the determination of factual matters for reparations.¹²⁶

Hence, it is interesting to examine the substantial implication of adopting the civil standard of proof on a balance of probabilities in a criminal trial. Confusion about which standard to apply at a particular stage of the proceedings (criminal trial or reparations) may be detrimental to victims. Arguably, the confusion arises because the standard of proof in reparations proceedings is that of the civil dimension because reparation proceedings take place at the end of the trial if the accused has been convicted. This was demonstrated by the *Lubanga* case, in which the Court was reluctant to prosecute gender-based crimes. The Court's decision met numerous scholarly criticisms.¹²⁷ Thynne posits that:

The fact that these charges [concerning sexual violence] were not brought in the *Lubanga* case means that the Court is excluding consideration of the

¹²² Contreras-Garduno and Fraser 2014 *IAEHR* 182.

¹²³ See Rule 89(4) of the *Rules of Procedure and Evidence (ICC)*.

¹²⁴ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* paras 25-254.

¹²⁵ Shelton "Reparations for Victims of International Crimes" 146.

¹²⁶ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 254.

¹²⁷ Fletcher "Refracted Justice" 311-312. Thynne 2009 *Alberta Law Review* 968.

major aspects of the conflict with which they are supposed to be dealing. In so doing, they are excluding the victims of all of these other crimes."¹²⁸

As such, the standard of proof may be attributed to the Court's selective victimhood, which led to inadequate prosecution of crimes of gender-based and sexual violence. This does the victims more harm than good.¹²⁹

Lastly, having two standards of proof to prove the liability of the perpetrator may overburden the criminal trial in a disproportionate manner. This may impose significant constraints and restrictions on victims making reparation requests. The reason for this is founded on the premise that the Court is not a civil court and that dealing with a massive number of claims for reparations and determining reparations may burden criminal proceedings.

5.3.5 Recoverable harm for reparation purposes

One of the central issues pertaining to reparations is addressing the harm suffered by victims. The implementation of the substantiveness of reparations in this light seeks to recognise the harm suffered by victims and the violation of their rights individually and collectively.¹³⁰ The notion of harm is pivotal in the substantive evaluation of reparations because reparations must directly cater for the harm suffered by victims through symbolic and material measures.¹³¹ Therefore, it is important for reparations to address the suffering of victims due to the harm caused to them. On this, the *Basic Principles and Guidelines* have stipulated that reparation awards must be tailored appropriately to suit the situation and other issues prevailing at the time of the commission of the crime. Accordingly, reparations should be reasonable and proportional to the seriousness of the violations, the harm sustained, and the circumstances of each case.¹³² Also, reparations must be effective in repairing the harm to the victim.¹³³ Letschert and Van Boven have observed that "the

¹²⁸ Thynne 2009 *Alberta Law Review* 968.

¹²⁹ Chappell *The Politics of Gender Justice at the International Criminal Court* 156-157.

¹³⁰ Balta *What's Law Got to Do With It?* 55.

¹³¹ Balta *What's Law Got to Do With It?* 55.

¹³² Principle 18 of the *Basic Principles and Guidelines on the Right to a Remedy*.

¹³³ Principles 18 of the *Basic Principles and Guidelines on the Right to a Remedy*.

acknowledgement of the victimological notion of collective victimhood makes this instrument conceptually truly innovative."¹³⁴

What is recoverable harm for reparations purposes? This is another contentious issue. Article 75(1) of the *Rome Statute* does not list or define recoverable harm. It merely recognises that reparation "requires a broad application, to encompass all forms of damage, loss and injury, including *material, physical and psychological harm*."¹³⁵ The Court has referred to submissions made under international law to deduce the meaning of the term 'harm,' which it says refers to physical harm, psychological harm, and material harm.¹³⁶ In this regard, the Court stated that the harm suffered ought to be personal, whether suffered directly or indirectly.¹³⁷ However, the *Rome Statute* and the *Rules of Procedure and Evidence* do not define these terms. Presently, the COVID-19 pandemic makes it difficult to determine harm by making it impossible for experts to organise field missions in situation countries where these atrocities occur. This is mainly due to travel restrictions and regulations, which are being gradually lifted at the time of writing. Restrictions imposed by the pandemic mean that there are limited face-to-face interviews with victims.¹³⁸

The notion that reparation awards should be proportionate to the harm suffered is ripe for consideration. The proportionality of the reparations to the harm is important for the Court to understand and redress the harm. However, the question arises on how to strike a balance between the reparations and the harm. Should the reparations be equivalent to the liability of the defendant? Interestingly, the Pre-Trial Chamber I in the *Lubanga* case addressed this issue as follows:

In the absence of a definition, the Chamber must interpret the term [harm] on a case-by-case basis in the light of Article 21 (3) of the Statute, according

¹³⁴ Letschert and Van Boven 2011 *Intersentia*171.

¹³⁵ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 229 (emphasis added).

¹³⁶ This was the position accepted by the Pre-Trial Chamber I in *DRC Situation: Decision on the Applications for Participation in the Proceedings* para 81, para 115 - para 116 and para 131, for which the Chamber inferred from internationally recognised principles with reference to "emotional suffering" and "economic loss" as types of harm.

¹³⁷ *Lubanga case, Decision on 'Indirect Victims'* paras 44; 49.

¹³⁸ Wakabi 2020 <https://www.ijmonitor.org/2020/07/covid-19-forces-delays-to-reparations-order-in-taganda-case/>.

to which [t]he application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights.¹³⁹

In its decision to use internationally recognised instruments, the Pre-Trial Chamber referred to the *Declaration of Basic Principles of Justice for Victims* and the *Basic Principles and Guidelines*. It inferred that both instruments refer to emotional suffering and economic loss as forms of harm.¹⁴⁰ It concluded that the definition of harm is equally applicable to reparations and that in accordance with internationally recognised human rights, emotional suffering and economic loss constitute harm within the meaning of Rule 85 of the *Rules of Procedure and Evidence*.¹⁴¹

The determination of what constitutes harm affects individual and collective awards. Fowler says only recognised victims who qualify as a result of the connection between the harm they endured and the crimes for which the perpetrator was found guilty may receive individual or collective reparations.¹⁴² This defeats the purpose of ensuring an equitable response that encompasses all victims (including SGBV victims), not just those who have been granted eligibility for reparations.¹⁴³ The Court will undoubtedly obtain a conviction for SGBV at some point and issue reparations, although such an eventuality will be too tentative, fragmented and too late, as was evident in the *Ntaganda* case.

It is important to establish mechanisms for ascertaining harm for both direct and indirect victims. The Court said that in the case of direct victims, the causal link between the crimes with which the defendant is charged and the harm suffered by the victim must be established.¹⁴⁴ In the case of indirect victims, harm is established through a personal relationship with the direct victim. As such, the "harm suffered by indirect victims must arise out of the harm suffered by direct victims."¹⁴⁵ In the

¹³⁹ *DRC Situation: Decision on the Applications for Participation in the Proceedings* para 81.

¹⁴⁰ According to Principle 1 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*:

"Victims" means "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.

¹⁴¹ *DRC Situation: Decision on the Applications for Participation in the Proceedings* para 116.

¹⁴² Fowler 2021 *Journal of International Criminal Law* 44.

¹⁴³ Fowler 2021 *Journal of International Criminal Law* 44.

¹⁴⁴ *Lubanga case, Decision on 'Indirect Victims'* para 47.

¹⁴⁵ *Lubanga case, Decision on 'Indirect Victims'* para 49.

Katanga case, the Appeal Chamber held that one approach by which an applicant can show the harm suffered and that the harm resulted from the crimes of which the person in question was convicted (thereby satisfying both eligibility requirements) is by establishing the existence of a close personal relationship with the direct victim.¹⁴⁶ Contrary to the claims advanced by the Defence, this means that as long as the indirect victim can show they have suffered personal injury as a result of the crime perpetrated against the direct victim, it is irrelevant whether the family member is close or distant to the direct victim, or whether their relationship is abstract.¹⁴⁷

There is an acceptance that children born out of rape committed as an international crime should be considered indirect victims. In the *Ntaganda* case, the Court concluded that given the facts of the case, children born as a consequence of rape and sexual slavery might be considered direct victims because the harm they experience is a direct result of rape and sexual slavery.¹⁴⁸ As a result of the suffering that was caused to the victims of the crimes for which Mr Ntaganda was convicted, other children who were not born as a result of rape and sexual enslavement but who are the offspring of women and girls were considered indirect victims of such crimes.¹⁴⁹ The Court observed that in addition to other types of reparations, acknowledging the specific harm children born out of rape and sexual slavery suffered and identifying them as direct victims rather than indirect victims may provide a sufficient degree of fulfilling their needs.¹⁵⁰

Furthermore, the Court also emphasised that the definition of victims under Rule 85(a) requires the person to have experienced harm. The test is not the degree to which the victim is close to a family member who is a direct victim. This was noted by the Appeals Chamber in the *Katanga* case.¹⁵¹ Family members must have experienced personal harm for indirect victims to be eligible for reparations. Such harm may have been caused, for example, by the psychological suffering experienced because of the

¹⁴⁶ *Katanga case, Order for Reparations* para 116

¹⁴⁷ *Ntaganda case, Reparations Order* para 125.

¹⁴⁸ *Ntaganda case, Reparations Order* para 122.

¹⁴⁹ *Ntaganda case, Reparations Order* para 122.

¹⁵⁰ *Ntaganda case, Reparations Order* para 123.

¹⁵¹ *Katanga case, Order for Reparations* para 115.

abrupt loss of a family member.¹⁵² The Court further pointed out that victims who experienced personal harm as a result of a crime committed against someone who was significant to them, even though they did not have a close personal relationship with them, may be entitled to reparation.¹⁵³ However, the indirect victims must show that they were harmed as a result of the commission of the crime against the direct victim.¹⁵⁴

5.3.6 Modalities for reparations

Individual and collective reparations are permitted under Rule 97(1) of the *Rules of Procedure and Evidence*. These categories are not exclusive of one another and may be given out simultaneously.¹⁵⁵ Individual and collective reparations should, to the extent practicable, complement one another when both types of reparations are granted at the same time.¹⁵⁶ Individual reparations are received by victims as exclusive benefits to which they are uniquely entitled. They are meant to directly repair the harm sustained by victims as a result of the offences for which the perpetrator is convicted.¹⁵⁷ These reparations ought to be given out in a way that does not exacerbate tensions and divisions in the concerned communities.¹⁵⁸ Collective reparations are commodities and services supplied to communities and groups who have suffered as a result of the criminal conduct of the defendant.¹⁵⁹ They are different from individual reparations in that they assist people who have experienced a common wrong. A group is eligible for collective reparations even if it is not a legal persona or holder of a collective right. The infringement of a collective right is not required for the shared injury to occur.¹⁶⁰ When collective reparations are granted, they should take both the victims' individual and collective harm into account.¹⁶¹

¹⁵² *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 58

¹⁵³ *Ntaganda case, Reparations Order* para 127.

¹⁵⁴ *Ntaganda case, Reparations Order* para 127.

¹⁵⁵ *Ntaganda case, Reparations Order* para 78.

¹⁵⁶ *Ntaganda case, Reparations Order* para 78.

¹⁵⁷ *Katanga case, Order for Reparations* para 271; *Ntaganda case, Reparations Order* para 79.

¹⁵⁸ *Katanga case, Order for Reparations* para 271; *Ntaganda case, Reparations Order* para 79.

¹⁵⁹ *Katanga case, Order for Reparations* para 275; *Mahdi case, Reparations Order* paras 59-67.

¹⁶⁰ *Katanga case, Order for Reparations* para 276; *Mahdi case, Reparations Order* paras 83-90

¹⁶¹ *Ntaganda case, Reparations Order* para 80.

Although there are several variations, there are mainly two types of collective reparations.¹⁶² The first type, known as community reparations, is meant to help the community as a whole rather than focusing on particular community members.¹⁶³ A second type is a form of collective reparation with individualised components concerning particular group members. Despite the collective origin of these types of reparations, they produce individual benefits that meet the demands and circumstances of various victims within the group.¹⁶⁴ The methods used to treat the different categories of harm covered by reparations are known as modalities of reparations.¹⁶⁵ Restitution, compensation and rehabilitation are among the non-exhaustive modes listed in article 75 of the *Rome Statute*.¹⁶⁶ Reparations may also reconcile the victims, communities and the convicted perpetrators of harm. They also have a preventative, transformative and symbolic purpose.¹⁶⁷

Restitution aims to rebuild a person's life and, whenever feasible, return the victim to their pre-crime circumstances. This entails creating conditions for them to return to their family, house, or previous job, funding for further education, and giving back lost and stolen possessions.¹⁶⁸ Legal entities like schools or other institutions may also benefit from restitution.¹⁶⁹ The concept of *restitutio in integrum* presents difficulties, especially in light of the kinds of crimes that fall under the Court's purview and the harm that may result from those crimes. This complexity requires the Court to think about reparation models that make up for the harm caused to the victims.¹⁷⁰ Economic relief, known as compensation, often consists of monetary awards or other actions mandated by the Court to make up for the damages that were sustained by the victims. Compensation covers monetary and non-monetary losses. It is a fallback

¹⁶² *Katanga case, Order for Reparations* para 279.

¹⁶³ *Katanga case, Order for Reparations* para 280.

¹⁶⁴ *Katanga case, Order for Reparations* para 280.

¹⁶⁵ *Mahdi case, Reparations Order* para 46.

¹⁶⁶ *Mahdi case, Reparations Order* para. 297

¹⁶⁷ *Mahdi case, Reparations Order* para 28; *Lubanga case, Judgment on the Appeals Against the 'Decision Establishing Principles and Procedures to be Applied to Reparations'* para 71; *Ntaganda case, Reparations Order* para 82.

¹⁶⁸ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 351

¹⁶⁹ *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para. 36

¹⁷⁰ *Ntaganda case, Reparations Order* para 83.

remedy offered as redress when other actions are unable to reverse the consequences of the infringement.¹⁷¹ Rights that have been violated cannot be replaced or restored through compensation alone, although compensation may repair the victims who have been harmed.

Physiological and emotional issues facing victims as a result of the harm can be addressed by rehabilitation efforts.¹⁷² It is essential to offer victims chances for rehabilitation. Medical care and services such as psychological and psychiatric support, legal and social services, may be included in rehabilitation. To provide effective support, a holistic approach to rehabilitation must establish a climate of confidence and trust. Confidential assistance must be provided to victims to gain their trust and confidence in the rehabilitation process.¹⁷³

Measures that acknowledge the wrongdoing and that seek to protect the victim's honour and reputation are referred to as satisfaction.¹⁷⁴ They may also be appropriate to address non-monetary damages. Often, they cover a wide range of actions. Reparations are significant for victims, their families and communities, just like convictions and penalties imposed on perpetrators.¹⁷⁵ Reparation orders which examine the many harms and that rectify them may also help to highlight the severity of the harm done and lead to its acknowledgement. Victim counselling is necessary for some satisfaction measures, especially when it comes to victims of SGBV.¹⁷⁶ Reparations must be timely, fair and appropriate in order to establish justice for victims. Accordingly, the Court's awards for reparation must be proportionate to its determination of the hurt, injury, loss and damage caused by the harm.¹⁷⁷ When a significant amount of time has passed since the crime was committed, the reparation procedure should be quick, economical and feasible, and prevent excessively drawn-out, complicated and expensive litigation.¹⁷⁸

¹⁷¹ *Ntaganda case, Reparations Order* para 84.

¹⁷² *Mahdi case, Reparations Order* para 48.

¹⁷³ *Ntaganda case, Reparations Order* para 87.

¹⁷⁴ *Ntaganda case, Reparations Order* para 88.

¹⁷⁵ *Ntaganda case, Reparations Order* para 88.

¹⁷⁶ *Ntaganda case, Reparations Order* para 88.

¹⁷⁷ *Ntaganda case, Reparations Order* para 89.

¹⁷⁸ *Ntaganda case, Reparations Order* para 89.

5.4 Conclusion

This chapter considers substantive complexities that arise in the execution of the reparations mandate by the Court. The main aim of the chapter is to examine the development of the substantive law for reparations as stipulated in the *Rome Statute* and the decisions of the Court. The analysis highlights that the reparations mandate takes a civil dimension because victims join the criminal proceedings as *partie civile*. The participation of victims makes reparations more tangible to them. However, the civil dimension of the proceedings introduces some complexities, which this chapter explores at length. The discussion shows that the substantive law pertaining to reparations must address the outcome by repairing the harm suffered by victims. In all four reparative cases examined in this chapter, the Court endeavoured to address the substantial complexities. Although the reparations mandate is a novel and welcome development, there is a lot of work to be done in developing the applicable principles.

The Court has to depend on the established principles for reparations, notwithstanding the shortcomings that are evident in their application. The construction of article 75(1) and (2) undertones a civil dimension in a criminal trial. This affects the reparation outcome to the extent of the award and order made against the convicted perpetrator. To this effect, the present chapter submitted discussions on how incorporating a civil dimension in a criminal trial can present some substantial complexities. However, appreciation is given to the Court for its development of the reparations principles.

Chapter 6

Conclusion and Recommendations

6.1 Introduction

If an individual perpetrator is charged with a crime by the Court and is found guilty at the conclusion of the trial, the judges of the Court may decide to order that individual perpetrator to make reparation to the victims for the harm they have caused as a result of the crimes committed. As has been emphasised repeatedly throughout this thesis, repairing the harm done to victims through reparations has never been a focus of international criminal law. It has consistently been perpetrator or accused-centred. It is recognised that for the first time in the history of international criminal justice, the coming into effect of the *Rome Statute* allows victims of serious crimes to seek reparation for their harm. There was no international framework that allowed victims to approach individual perpetrators for reparations prior to the establishment of the ICC. On this premise, this thesis has explored the legal reparation framework of the ICC within the confines of article 75(1) and (2) of the *Rome Statute*. To achieve this, it examines the four cases which have delivered decisions on the subject of reparations. As a result, it is crucial to provide the knowledge that has been acquired so far and to draw general conclusions from the research presented in previous chapters to help formulate possible recommendations for the issues highlighted in the problem statement outlined in chapter 1.

6.2 General conclusions

The analysis in previous chapters reveals legal complications that develop in the application and fulfilment of article 75(1) and (2) of the *Rome Statute*. The reparations decisions in the *Lubanga*, *Katanga*, *Mahdi*, and *Ntaganda* cases illustrate the difficulties in this regard. The complexities arise because of the novelty of reparations in the setting of the Court. The *Lubanga* case, which was the first on the issue of reparations, set the stage for a piqued interest in how principles of reparations can evolve in current and future case law. In totality, the four cases demonstrate the Court's commendable progress in this context, as far as establishing reparation principles and a consistent

legal framework is concerned. They provided the Court with unique opportunities to elaborate its work in accordance with the reparations mandate stated in article 75(1) and (2) of the *Rome Statute*. The reparations regime signifies a change in emphasis from a prosecution-centred goal with preventative and punitive measures to the inclusion of victim-centric approaches that repair the harm caused to victims by the actions of the perpetrators of serious international crimes.

Chapter 1 of this thesis contextualised the thesis by presenting the problem statement arising from potential procedural and substantive legal complexities on the interpretation of reparations principles. It also set the stage for a critical analysis of the four decided cases on reparations. The issues highlighted in the problem statement include the following:

- The fluidity in the implementation of the reparation principles.
- The blurriness of the definition of harm and its limitation in practice.
- The appropriate test for establishing causation for reparation purposes.
- The appropriate standard of proof for reparation purposes.
- The implication of reparation orders on convicted persons.
- The implementation of the principles and the appropriateness of the modalities of reparations to mass victims.
- The reality that the awarding of reparations against convicted individuals will not always be favourable to all victims of unlawful actions.
- The indigence of convicted persons regarding liability for reparations and the role of the Trust Fund for Victims.

Chapter one also shows that reparations put the Court in a unique setting and that there is room to explore the abovementioned legal complexities that arise in the application of the established principles on reparations. These complexities stem from the obvious: the making of reparation orders against convicted persons. In this regard,

chapter 1 shows that there are profound challenges regarding the impact of this on victims who are not included in the scope of the reparation orders. The legal issues arising from defining and establishing harm, causation, and the standard of proof for reparation purposes are also demonstrated in chapter 1 of this thesis. The chapter also emphasises the implications of making reparation orders against persons who have been convicted and deemed indigent. In this light, it lays the foundation to show how that will affect monetary reparations in favour of victims on the one hand, and the role of the Trust Fund for Victims, on the other.

The second chapter examines the evolution of reparations in international criminal justice. It first discusses the right to reparations from the perspective of international human rights law and other international and regional legal norms. This is accomplished by establishing the relationship between international human rights law and international criminal law in the context of reparations for victims of serious crimes in international law. In this regard, it showcases that international human rights law is nonetheless crucial because it provides precedent that is appropriate for the circumstances covered by international criminal law. By making victims the intended recipients of reparations for human rights crimes, international human rights law and international criminal law become intricately entwined. Therefore, to attain justice for victims, among other things, the right to reparations is required. The chapter further proceeds to analyse the legacy of the Nuremberg and Tokyo trials, as well as the *ad hoc* criminal tribunals for Rwanda and the former Yugoslavia. It also discusses the hybrid tribunals in Lebanon, Sierra Leone and Cambodia. This chapter's goal is to provide an examination of how reparations within the scope of international criminal law have changed over time, highlighting both trends that have remained consistent and those that have changed since the *Rome Statute* has come into effect. The analysis of these international criminal tribunals is necessary to lay the ground for including reparations under article 75(1) and (2) of the *Rome Statute*, which is discussed in chapter 3.

Chapter 3 delves into examining reparative jurisprudence. It accomplishes this by taking into account the established reparations judgements of the Court. The chapter opens with a brief explanation of the elements that comprise the principles of

reparation. This literature is critically positioned within the framework of the Court's larger theoretical interest in reparative justice, including the cases that fall within its purview, as a collection of reparation-related observations. It also concentrates on the *Lubanga* case's reparation principles, which are based on the five elements for a reparation order. Lastly, it showed that these elements were only expanded in the *Ntaganda* case. This literature helps to understand the procedural and substantive complexities that were alluded to in chapters 4 and 5.

Chapter 4 explores, among other things, the importance of reparations, the attention that should be given to a victim-centred procedure, and the presence of procedural complexities that affect the timing and success of reparation orders and awards within criminal trials. It assesses potential procedural challenges that might arise when issuing reparation orders. Among these complexities are the connections between reparations and the conviction of the accused, the hierarchy and selection of victims in the definition of victimhood for reparations, and the procedural role of the Trust Fund for Victims in relation to the accused persons' indigence. The competing views on the right to a fair trial for the accused, on one hand, and allowing a swift and procedural process for victims to receive reparations, on the other, add to these difficulties. This analysis is undertaken in the third chapter in the context that the Court does not separate a reparation procedure from its trial proceedings.

After examining the procedural complexities in the fourth chapter, the thesis delves into the substantive law complexities on reparations in chapter 5, which addresses the complex substantive complexities that arise when the Court applies the substantive law it has formed through its four reparative cases. These include the concept of who is a victim of a serious crime, the determination of causation, harm and the standard of proof arising from the reparations mandate. The fourth chapter shows that the *Lubanga* case served as a model for how the Court will handle these substantive challenges going forward. The other three cases, namely *Katanga*, *Mahdi* and *Ntaganda*, serve as illustrations of how the reparations mandate is fulfilled in practice. The focus of chapter 5, in totality, is to expose the inferences that may be derived from the Court's precedents concerning the substantive challenges arising from the implementation of reparations. Taking into consideration the analyses in the previous

chapters, this concluding chapter proffers recommendations for putting the reparation principles into practice and how to address and mitigate the procedural and substantive complexities arising from the Court's reparations mandate.

6.3 Recommendations

6.3.1 Procedural recommendations

6.3.1.1 The fluidity of reparation principles

The main area of contention regarding the procedural complexities affecting the Court's reparations mandate is the fluidity of reparation principles, which are applied homogeneously. This raises the question of whether such principles should be applied on a case-by-case basis. The dissemination of these principles should take cognisance of the heterogeneous nature of the needs of victims. This projection presents the suffering of victims, which differs from case to case. As such, reparations will only add value if these principles are developed to suit the individual and collective needs and expectations of victims.

A consideration of the precedents set in the *Lubanga*, *Katanga* and *Mahdi* cases illustrates that the Court applied the principles for reparations as they are. They were further expanded in the *Ntaganda* case. This raises the question of whether these principles needed to be expanded or developed in the first place, even though each case had unique facts. If these concepts are to be properly construed, a general application approach will not be viable. On this note, and particularly referring to the submission in the *Lubanga* case that reparation principles should be applied in the context of the current case, it becomes clear that this argument was not followed in the *Katanga* and *Mahdi* cases. This strengthens the argument in favour of a strict case-by-case approach to address this uncertainty.

Another area of contention is the stage of the trial proceedings during which the Court should modify, expand or adapt reparation principles. Should the Court do so before or after conviction? The *Ntaganda* case shows that the principles were expanded before conviction. If the Court is to expand reparation principles, on what basis and stage in the proceedings should it do so? Also, at what stage should the Court deviate

from the established principles? The view adopted in this thesis is that the precedent set in the *Ntaganda* case should not be recommended. It would be risky for the Court to follow it because it would violate the first element of a reparation order, which is that the reparation order must be made against the convicted person. As such, reparation principles should be developed at the stage where it will not be detrimental to the criminal proceedings that precede the reparation order. This will contribute to more expeditious reparations proceedings that give meaning to the pursuance of prompt reparations for victims.¹ Another proposal could be for a separate proceeding to address matters related to reparations.

6.3.1.2 The appropriate procedural law for reparations

There is uncertainty about the appropriate procedural law for reparation matters. In 1994, the International Law Commission (ILC) stated that it faced serious questions regarding the appropriateness of combining criminal procedures with civil claims for damages. It said that such a combination would be challenging for an international court.² On this note, the case law suggests that it is unusual for an international criminal justice system to include civil components within its criminal proceedings. However, the Court does this as part of its acknowledgement of the need for victim reparations. However, this means that judges who hear and decide on pre-trial, trial, and appeal proceedings to determine the guilt of the accused and the eventual criminal remedy are the same judges who will determine reparations, which are inherently civil by nature. The same judges determine which principles of reparations to apply, who will benefit from the reparations, the standard of proof for reparation procedures, and the modality of reparations to be awarded.³

These attest to the civil dimension of reparations, which is a characteristic that is rarely present in any international criminal justice framework. The Court's approach is *sui generis* in that one dimension is not wholly distinct from the other. In other words, the criminal and civil dimensions cannot be entirely separated. In this regard, the

¹ *Ntaganda case, Reparations Order* para 5.

² International Commission of Jurists "Report of the International Law Commission on the Work of its Forty-Fourth Session" 12.

³ Cohen *Reparations for International Crimes and the Development of a Civil Dimension of International Criminal Justice* 124.

Appeals Chamber's reliance on liability to repair harm speaks to a distinctive legal approach to awarding reparations. This legal approach should not be entirely governed by the Court's criminal law system, even though its civil claim models are linked to criminal cases.⁴ If it is done, it will result in a failure to acknowledge the civil nature of reparations.

This thesis recommends that to deal with difficulties arising from the question of which procedural law should apply in determining reparations, the Court should develop a system of law that benefits victims. This will mitigate concerns about the Court's sustainability, effectiveness, efficiency, and significance for victims. Thus, advocacy for specific procedural laws that should be embodied in the *Rules of Procedure and Evidence* to deal with reparations should be fostered. An expansive reading and implementation of article 68(3) of the *Rome Statute* is required and should consider reparations for victims. Such an interpretation should go beyond expressing views and concerns by victims. It should alleviate the thinking that reparations are no more than addenda during criminal trials. Such an interpretation should also be applied to victims and place them at the forefront of the procedures. Reparations will be significantly enhanced by such an interpretation. To do this, I posit that the Court makes reference to Rules 74(4), 80(2), 91, 92, and 94(1)(a) of the *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia* which summarily provides that the judges' objective was to address the complexity of the Cambodian conflict as much as feasible.⁵ As stated by Balta, Bax, and Letschert, the ECCC was established as a hybrid court that took into account the circumstances surrounding the conflict in Cambodia, whereas the ICC was established as an international court that reflected the ideals of contemporary international criminal justice.⁶ Against the backdrop of developing conceptions about the position of the individual in international law, the inclusion of victims and their rights before the ICC is the product of coordinated efforts by States

⁴ Stahn 2015 *Journal of International Criminal Justice*

⁵ See Rules 74(4), 80(2), 91, 92, and 94(1)(a) on the *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia*. These rules assert that the judges ultimately develop a unique victim-oriented system based on both domestic and international laws which was indicative of the unique context of the ECCC.

⁶ Balta, Bax and Letschert 2019 *International Criminal Justice Review* 21.

and international Non Government Organisations.⁷ The ECCC, on the other hand, witnessed a more moderate improvement, largely based on domestic law that was expanded to take into account the intricacies of the Cambodian conflict.⁸ So that their requests can be adequately represented during the reparations hearings, it will not be illusive to propose that victims' procedural rights be broadened to include representation and participation other than witnesses in cases pertaining to reparations.

6.3.1.3 An independent reparation proceeding

As far as the nature of the proceedings for reparations is concerned, one may agree with Hamilton and Sluiter, who argue that the current approach runs the risk of being divorced from an appropriate legal framework of individual liability for harm. This is because its normative purpose is based on delivering justice to victims.⁹ This would be acceptable if the purpose of including reparations in the Court's proceedings was to add a philanthropic element to its criminal proceedings and if the Court's law and practice did not aspire to a proper and reliable legal foundation of accountability for harm. However, it is challenging to complete both tasks simultaneously.

The question of whether an independent reparation proceeding is necessary could be addressed by considering the possibility of triggering reparation proceedings independent from criminal trials. While the Court cannot afford to remain silent on reparation cases that unduly weigh down criminal trials, the precedents created by the four reparation cases illustrate that consolidating criminal and reparation proceedings presents challenges. The main challenge is that it may not be possible to integrate both criminal trials and reparation proceedings that involve hearing evidence for convicting the accused person on the one hand and reparations on the other. The legal complexities that come with this, such as the burden of proof, the presentation of evidence, and questions of causation, among others, should be handled in an independent trial for reparations. Even though the Court cannot afford to deal with

⁷ Balta, Bax and Letschert 2019 *International Criminal Justice Review* 21.

⁸ Balta, Bax and Letschert 2019 *International Criminal Justice Review* 21.

⁹ Hamilton and Sluiter "Principles of Reparations at the International Criminal Court" 39.

the intricacies that could result from having a separate proceeding for reparations, this should be something worth considering in future.

6.3.1.4 Modalities of reparations

In the context of this thesis, modalities relate to community victimisation. There is a question on whether the Court's preference for collective reparations over individual reparations meets the needs of victims. Arguably, it is challenging to decide the appropriate modality to follow in cases of communal victimisation to undo the harm suffered by victims. What should be done to compensate victims of mass victimisation for non-financial harm? To respond to this query, the Court should make awards that satisfy the claims and provide assurances against repetition. This was the position in the *Mahdi* case, where the Trial Chamber emphasised collective reparation strategies. The Trial Chamber concluded that the entire community of Timbuktu had experienced the majority of the harm, which was collective.¹⁰ Therefore, it decided that collective reparations were the most suitable and that individual reparations would only apply to a small number of victims. These included individuals whose livelihoods depended on certain buildings and who suffered pain and anguish from the destruction of the graves of their ancestors.¹¹

The Court's preference for collective reparations over individual reparations is due to economic considerations. Even though providing collective reparations to mass victims is quicker and cheaper to implement, it is crucial for the Court to appreciate that the harm suffered by victims is also personal for each individual. This gives rise to the notion that despite the Court's recognition of victims as holders of specific rights, it is sometimes legal to reject individual claims for reparations. It seems improbable that the Court will assess each victim's harm without endangering the norms of a fair trial, given the large number of victims in international proceedings. Individual reparation awards present unique challenges and are not always appropriate. This makes collective reparations necessary when communal rights are violated.

¹⁰ *Mahdi case, Reparations Order* para 76.

¹¹ *Mahdi case, Reparations Order* para 81.

Collective reparations are utilitarian and serve the needs of mass victims. However, they run the risk of undermining the right to reparations for individual victims. Collective reparations have the potential to marginalise vulnerable populations, including minority groups, women, children and the elderly, who may have different and additional requirements.¹² Furthermore, the communities and groups targeted by collective reparations may not view themselves as unitary groups with common goals and requirements. As such, collective reparations fail to adequately address all suffering by individuals in their personal capacities and as members of groups.¹³

Hence, collective reparations should not be conclusive. While restitution may also occasionally be impossible, and whereas resources to pay for compensation may not be sufficient given the severity of the suffering caused to victims of crimes that fall under the Court's jurisdiction, satisfaction is a significant form of atonement. Examples of guarantees of non-repetition include structural measures that enhance judicial independence, boost civilian control over the military, and advance social conflict avoidance techniques.

It is crucial to remember that whereas international crimes may have an impact on groups as a whole, they directly impact individuals that make up the groups. In principle, reparation awards should be given on an individual basis. Although collective reparations are permissible, they should only be given in certain circumstances. When crimes result in a narrow or well-defined group of victims, individual awards may be effective, making collective awards inapposite. If reparation awards are entirely determined by a process for filing individual claims, there would undoubtedly be a risk of encouraging a tendency to merely address harm on an individual basis. This could result in needless challenges on how to prioritise and divide resources between different victim groups and different types of injuries. From a larger viewpoint, an excessive concentration on individual claims for reparation could result in the design of reparations that do not make the best use of the available funds for the benefit of all victims.

¹² Moffett *Justice for Victims Before the International Criminal Court* 179.

¹³ Letschert and Van Boven 2011 *Intersentia* 170.

6.3.1.5 Indigence of the convicted person and the role of the Trust Fund for Victims

Article 75(2) of the *Rome Statute* empowers the Court to issue orders of reparations against convicted individuals. However, the convicted persons may not have insufficient funds to meet such orders, making it difficult to afford reparations for thousands of victims. This is a key issue with imposing reparations. Due to the Court's reliance on individual criminal responsibility, there is a chance that the amounts of reparations that victims obtain are limited. So far, all individuals convicted by the Court have been declared indigent. In the *Lubanga* case, the Trial Chamber held that due to Mr Lubanga's indigence, reparations could not be granted. The Appeals Chamber overturned this decision and held that a convicted person's liability is not affected by their indigence.¹⁴

The Court may use the reserves of the Trust Fund for Victims to bolster reparations orders against convicted persons.¹⁵ The Trust Fund for Victims held a reserve of \$1.8 million in 2013, which the Court used for reparations in its initial two orders against Lubanga and Katanga.¹⁶ Given that the Trust Fund for Victims is not a 'fire extinguisher,' it is unclear how reparations against indigent persons will be given to victims. Thus, the Trust Fund for Victims is certainly not sufficient to meet the victims' needs. In this regard, this thesis advances the following recommendations. First, it is necessary to rigorously examine the financial responsibility of the convicted person for the finality of reparation claims, asset seizure and freezing, and executing reparation orders. In the *Mahdi* case, for example, it was acknowledged that the convicted person's financial situation affected implementation in that the person could be ordered to pay reparations in instalments. However, the Court cautioned that such

¹⁴ *Lubanga case, Corrected version of the 'Decision setting the Size of the Reparations Award* para 269; *Katanga case, Order for Reparations* para 246; *Mahdi case, Reparations Order* para 114.

¹⁵ A 57(3)(e), 77(2), 93(1)(k), and 109 of the *Rome Statute*; and Rule 218 of the *Rules of Procedure and Evidence (ICC)*; *Prosecutor v Lubanga, 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 (including Corrigenda)* (ICC PTC I, Feb. 24, 2006) (hereafter *Lubanga case, Decision Concerning the Incorporation of Documents into the Record*) paras 136; 141.

¹⁶ See Assembly of States Parties "Report to the Assembly of States Parties on the Projects and the Activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2013 to 30 June 2014."

payment should not impose hardships on Mr Al Mahdi such that it would make it impossible for him to reintegrate into society upon his release.¹⁷

It is necessary to locate and collect the convicted person's assets to ensure the availability of sufficient financial resources to offer victims meaningful and effective reparation.¹⁸ Unfortunately, both the Court's efforts and the States Parties' international cooperation have been woefully insufficient. This was evident in the *Bemba* case, where one of his planes was left to rot on a runway to the point that the parking ticket on it was over €980,000 and the plane was only fit for scrap metal.¹⁹ Also, his shares in a Congolese beer company had not been frozen.²⁰ In this regard, the seizure and freezing of the accused's assets to provide funding for reparations must be strengthened to ensure the effectiveness of the Court's orders for reparations.

Second, the Court must limit its reliance on the Trust Fund for Victims' voluntarily provided resources to support reparations where the convicted person is indigent. When determining the adequacy of resources in light of the Trust Fund for Victims' obligation to allocate resources for reparations, it is necessary to give due weight to the nature of the offences and the size of the beneficiary group of victims. As acknowledged in the *Lubanga* case, the Trust Fund for Victims may never have the necessary financial means to successfully carry out the Court's reparation orders.²¹ To address the lack of resources, the Assembly of State Parties should consider designating a budget line for reparations in the Court's future budgets. By doing so, more stability and sustainable funding would be provided to eliminate the need for the Trust Fund for Victims to seek funding for reparations for each case of indigency that arises.

¹⁷ *Mahdi case, Reparations Order* para 114.

¹⁸ Killean and Moffett 2020 *Melbourne Journal of International Law* 115– 143.

¹⁹ *Situation in the Central African Republic, The Prosecutor v Jean-Pierre Bemba Gombo, Second Public Redacted Version of "Mr. Bemba's Claim for Compensation and Damages"* ICC-01/05-01/08-3673-Red2 (hereafter *Bemba case, Second Public Redacted Version of "Mr. Bemba's Claim for Compensation and Damages"*) paras 130-132.

²⁰ *Bemba case, Second Public Redacted Version of "Mr. Bemba's Claim for Compensation and Damages"* paras 130-132.

²¹ *Situation in the Democratic Republic of the Congo, Prosecutor v Thomas Lubanga Dyilo Redaction of Filing on Reparations and Draft Implementation Plan* ICC-01/04-01/06-3177-Red (hereafter *Lubanga case, Redaction of Filing on Reparations and Draft Implementation Plan*) paras 115-116.

Lastly, I posit that the Court should infer from the *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia* by expanding its mandate to award reparations without the financial resources of the convicted person.²² This would mean some changes in the procedural laws of the Court to give latitude and place more significance on the content of reparations in each case as opposed to focusing on punishment of the accused. In other words, reparation orders should be influenced by specific requests made by victims.

6.3.1.6 Reparations tied to the conviction of the accused

Article 75(2) of the *Rome Statute* empowers the Court to order a convicted person to pay reparations. According to the Appeals Chamber, the reparations judgement cannot exceed the crimes for which the perpetrator was convicted.²³ In a dissent, Judge Eboe-Osuji stated that reparations under the *Rome Statute* need not depend solely on conviction.²⁴ This thesis aligns with this position based on the fact that reparations are unlikely to help further the goals of reconciliation or reform of the victims when they are tied to the conviction of the accused. The Court's overemphasis on conviction is a narrow way to approach the narrative of repairing harm. It provides little comfort to victims who hope that international justice will work in their best interests, given the inability and unwillingness of domestic systems to administer justice, including restitution for harm.

While acknowledging the Court's existential crisis and its need to guarantee fair trials for the accused and provide justification and reparation for victims, this thesis does not suggest that the Court should attempt to limit reparation as much as possible.²⁵ Although the Court has emphasised the importance of the victims' right to reparation, the matter is not fully resolved in the Court's jurisprudence. The continued use of the criminal law approach when reparations are discussed, as well as the absence of an effective standard in human rights law, contribute to this issue.²⁶

²² Balta, Bax and Letschert 2019 *International Criminal Justice Review* 27.

²³ *Lubanga case, Appeal of Decision Setting the Size of the Reparations Award* para 3.

²⁴ *Lubanga case, Appeal of Decision Setting the Size of the Reparations Award* para 15.

²⁵ Balta, Bax and Letschert 2019 *International Criminal Justice Review* 227.

²⁶ Ferstman "Reparations at the ICC" 446–478.

Arguably, the victims' reparation should not be contingent on the conviction of the accused. This is because the conclusion of a trial takes time, meaning that victims will wait a long time for the reparations cases to be finalised. Instead, an alternate reparation principle should be developed. For instance, the Court and Trust Fund for Victims can handle reparations at the outset of cases. Alternate principles would give victims assurance that the harm caused to them is acknowledged at governmental level. It would also give them the right to pursue recourse that is not reliant on conviction. Thus, there is a need to look beyond the conviction threshold and explore reparations in holistic terms. To do this, domestic and international legal systems on reparations must be strengthened. States must firmly commit to making reparations for victims a top priority. This will present opportunities for reparations to be awarded whether or not a conviction has been secured. States must establish standards for classifying the nature, extent and scope of loss or injury, as well as the proper modalities of reparation. Orders for reparations given after the finalisation of trials will validate the harm caused to victims and give them the tools to comprehend how violence affects them.

The Court pays little regard to how reparation proceedings relate to national criminal justice systems, especially concerning the enforcement and recognition of ICC judgements in domestic legal systems. From the standpoint of defending the rights and interests of both victims and convicted persons, this is important. For instance, the Court instructed the Trust Fund for Victims to get in touch with the Government of the DRC to learn how the Government would contribute to the reparations process instead of exploring the possibilities of national coordination inherent in the Court's legal framework. Issues of coordination with national justice systems were not thoroughly explored in the *Lubanga* case.²⁷ The issue of how much the Court's reparations order shields a convicted individual from prospective national reparation proceedings involving the same facts can be problematic due to considerations such as double jeopardy and *res judicata*. As such, the implementation of reparation orders requires cooperation between the Court and national criminal justice systems.

²⁷ *Lubanga case, Corrected version of the 'Decision setting the Size of the Reparations Award.*

6.3.1.7 The connection between a perpetrator's conviction of certain charges and a victim's eligibility for reparations

Legally, a person should only be held accountable for the charges for which they have been proven guilty, as well as for the additional expressive benefits for victims in admitting the convicted person's accountability for their suffering.²⁸ But this demonstrates that reparations are an add-on to criminal prosecution. The goal of reparations is to address harm in a victim-centric way without relying on the identification, accusation or conviction of a perpetrator.²⁹ However, the jurisprudence of the Court shows that it is unable to provide reparations to every victim in every case. This could be resolved by drawing attention to the fact that the Court implements such rewards with assistance from the Trust Fund for Victims and States Parties. The Court needs to strike a balance between seeking retribution against perpetrators and providing effective justice through reparations for victims.

6.3.1.8 A call for the establishment of a reparations chamber

The Court's emphasis on the guilt of individuals puts pressure on the practicality of reparations, as evident in the four reparative cases. This gives rise to the call for a reparations court to specifically deal with such matters. The difficulties of containing reparations within a criminal trial have been emphasised by several international criminal tribunals. On this note, the ICTY and ICTR supported the victims' claims for compensation in letters addressed to the UN Security Council shortly after the adoption of the *Rome Statute*. The tribunals also noted that reparation proceedings would be time-consuming, increase their workloads and violate the defendants' rights to speedy trials.³⁰ To mitigate these conflicts, a different claims body or a reparations court should be established. Such a forum will be better positioned to realise victims' rights to reparation.

A reparations chamber would work directly with States to negotiate reparations for victims rather than barring them from taking part in ICC criminal proceedings. Instead

²⁸ Stahn 2015 *Journal of International Criminal Justice* 806.

²⁹ Principle 9 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

³⁰ President of the ICTY "Victims' Compensation and Participation."

of waiting years for a criminal conviction, a reparations chamber would enable victims to petition the Court immediately for reparations as soon as harm has been caused. Simultaneously looking into and punishing perpetrators and allowing victims to lodge their claims for reparation offers a dual-track strategy for bringing justice to victims and putting an end to impunity. A reparations chamber would also assist and oversee the realisation of the efforts of State Parties to develop their reparations capacities. This is supported by the Independent Expert Review (IER), which called for the establishment of a Specialised Reparations Chamber to which special judges would be appointed for a term. The IER suggests publishing an independent but legally binding document on reparation principles.³¹

6.4 Substantive recommendations

6.4.1 Article 21 as the substantive law for reparations

Hamilton and Sluiter argue that in the *Lubanga* case, the Court's concentration was primarily on figuring out the modalities of reparations rather than the important question of what sources of reparations law were relevant.³² This thesis notes the criticism submitted by the IER that the Court's functioning across its many organs is void of clear principles of reparation.³³ The lack of explicit requirements in the *Rome Statute* to establish principles of reparation based on national tort systems should not take away from the compromise nature of article 75. Rather, its contents should be interpreted as a demonstration of a lack of time to carefully consider the relevance of national tort systems, which the *Rome Statute* left for judges to develop subsequently.

The Court's extensive reliance on international law instruments, which has been customary procedure up until now, has several disadvantages. The framework for victim rights and state obligations that is established by international law on reparations does not lend itself well to direct application within the framework of the Court's reparation proceedings. While these principles are appropriate for the efforts

³¹ Assembly of States Parties "Independent Expert Review of the International Criminal Court and the *Rome Statute* System Final Report- 30 September 2020" para 898.

³² Hamilton and Sluiter "Principles of Reparations at the International Criminal Court" 17.

³³ Assembly of States Parties "Independent Expert Review of the International Criminal Court and the *Rome Statute* System Final Report- 30 September 2020."

of the UN to advance supranational coordination mechanisms that encourage States to uphold victim rights, they are insufficient for establishing a substantive framework for reparations that will be decided by the Chambers of the Court.³⁴

The application of reparation principles in the context of a criminal prosecution is not often addressed in the international legal framework on reparations. States can choose the means and methods of carrying out international restitution obligations, which gives them greater flexibility. As a result, reparations need not be a part of criminal proceedings. Where they form part of such proceedings, limitations and restrictions should be included. As a recommendation, this thesis advances the view that the concepts of reparation should extend beyond the international instruments relating to reparation and take into account the fact that many national criminal justice systems incorporate reparation processes within criminal proceedings.³⁵ This should reflect the fundamental protection of human rights, which states are bound by international treaties to protect.³⁶

6.4.2 Comprehensive and succinct characterisation of victims

The Court must examine the views and concerns of victims per the provisions of article 68(3). In light of international human rights law, the judges of the ICC acknowledge the views and concerns of victims, allowing them to be represented before the Court. However, victim involvement has no significant impact on how judges decide cases. This does not mean that the interests of victims must take precedence. It merely indicates that judges should give the interests of victims more weight when weighing them against the rights of the accused. To ensure that the victims' participation is significant and capable of satisfying their substantive demands may require judges to be more sensitive to their needs.

The Court should not fail to grant reparation to all the victims who have suffered harm as a result of the perpetrators' crimes. Victim status must move beyond the witness point. This is particularly necessary in the context that the Court's reparations are

³⁴ Hamilton and Sluiter "Principles of Reparations at the International Criminal Court" 27.

³⁵ A 122(1) of the *Swiss Criminal Procedural Code* (hereafter *Swiss Criminal Procedural Code*). See also A 1 of the Council Directive (2004) (hereafter *Council Directive*).

³⁶ See also A 1 of the *Council Directive*.

extremely selective and disadvantageous for all victims connected to the crimes at issue and who have suffered harm in the situation of the case during the conflict or same period of atrocity. Thus, one agrees with Moffet that information provided through outreach by the Court and civil society should limit victims' expectations to what is feasible before the ICC in order to prevent secondary victimisation when victims' expectations are not met.³⁷

6.4.3 Establishing the proximate cause for reparation

In accordance with Rule 85 of the *Rules of Procedure and Evidence*, a causal connection between the damage incurred and the crime must be proven. Neither the *Rome Statute* nor the *Rules of Procedure and Evidence* provide guidance on the causative relationship between harm, loss and injury for which reparations are sought. It is unclear whether proving the perpetrator's guilt requires demonstrating the causal link to harm. The ambiguity surrounding this issue makes it difficult to determine causality. Furthermore, there is no clarity on the connection between the 'but for' test and the proximate cause. This thesis advances the view that the question should not be whether the harm would have occurred 'but for' the conduct of the responsible party, but that it should be whether harm ensued due to the commission of the crime.

There should be a broader approach to accommodate victims on a large spectrum. Thus, the 'but for' test should not be the only test. It needs to be accompanied by legal causation. The Court should treat perpetrators as if they were completely responsible for the harm, even if the harm would have happened regardless. However, including legal causation in proving proximate cause does not neutralise factual causation. It is merely directed toward determining causation that is based on how adaptable the damage is to the harm that is directly or indirectly linked to the perpetrator's conduct. This makes legal causation more apparent in the sense that the harm would not have occurred 'but for' the conduct. However, the harm would still occur due to the perpetrator's conduct. This approach is preferable because it combines the traditional 'but for' test with legal causation to show a connection between harm and the crime. The application of the 'but for' test together with legal

³⁷ Moffett *Justice for Victims Before the International Criminal Court* 287.

causation removes the possibility of probability. In this instance, the relevant question should be whether the crime committed by the perpetrator caused the harm suffered by the victim. Answering this question would limit factual causation as a possibility under the traditional test for proximate cause. In other words, a concurrent causation test that includes factual causation and legal causation should be applied.

6.4.4 An independent proceeding and the evidential standard of a balance of probabilities

Rules pertaining to the substantive law in respect of reparation processes are often provided by national codes of civil procedure. The fact that reparation claims are handled within the framework of a criminal case does not preclude the application of procedural and evidentiary requirements associated with torts, which are contained in civil law and practice.³⁸ It is crucial to recall that the rules of evidence and procedure in civil and criminal cases differ significantly. The evidential standard on the burden of proof is frequently lower in civil proceedings than in criminal ones in that it is based on a preponderance of the evidence or a balance of probabilities. In criminal matters, the standard is one beyond a reasonable doubt. The burden of proof falls squarely on the shoulders of the prosecuting authorities in criminal procedures. In civil disputes, he who alleges must prove.³⁹

In national judicial systems, it is important to prevent any associated civil processes from unduly weighing down criminal trials. This might occur, for instance, when victims want to employ their procedural rights under the relevant civil procedure regulations to call witnesses or present other evidence to support their claims. There is a possibility that claims for harm would be ruled inadmissible since it would burden criminal trials.⁴⁰ The case of the *Democratic Republic of the Congo v Uganda* (hereafter, the *2022 ICJ Reparation Judgement*) is an important reference on this point.⁴¹ In this case, the Court referred to the aspect of foreseeability in the sense

³⁸ Hamilton and Sluiter "Principles of Reparations at the International Criminal Court" 31.

³⁹ Hamilton and Sluiter "Principles of Reparations at the International Criminal Court" 32.

⁴⁰ Hamilton and Sluiter "Principles of Reparations at the International Criminal Court" 32.

⁴¹ *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda, Judgment, Merits* ICGJ 31 (ICJ 2005) (hereafter *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda, Judgment on Merits*).

that Uganda should be forced to provide reparations because it was impossible for it to fail to anticipate the harm that its actions would cause.

The ICJ further stated that despite the support Uganda gave to several rebel groups whose actions resulted in damage, it is necessary to distinguish between the alleged actions and omissions that occurred in Ituri, which was under the occupation and effective control of Uganda and those that occurred in other areas of the DRC where Uganda did not necessarily have effective control.⁴² The Court reiterated that unless it was established, with respect to specific injuries, that it was not caused by Uganda's failure to uphold its obligations, Uganda is required to make reparations for all damage resulting from the conflict in Ituri, including the damage caused by the conduct of third parties.⁴³

The evidence standard should be based on a component of foreseeability from the perpetrator's acts that are connected to the proximate cause of harm and the specific crime in question. For instance, the Trial Chamber II in the *Katanga* case ruled that the applicants must demonstrate that "it is more likely than not" that they were harmed as a result of the convicted person's crimes.⁴⁴ Similar to this, it was determined in both the *Lubanga* case and the *Mahdi* case that the proximate cause approach could be utilised to prove, on a balance of probability, that the convicted person's conduct could have foreseeably led to the harm suffered by the claimants.⁴⁵

Therefore, the foreseeability component in the evidential standard of a balance of probabilities will be justified to the extent that it is not subjected to an onerous and cumbersome process while considering issues like the amount of time that has passed between the commission of the crime and the start of court proceedings. Also, the

⁴² *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda, Reparations Judgment* ICGJ 558 (ICJ 2022) (hereafter *Democratic Republic of the Congo v Uganda, Reparations Judgment*) para 95.

⁴³ *Democratic Republic of the Congo v Uganda, Reparations Judgment* para 95.

⁴⁴ *Katanga case, Order for Reparations* para 50.

⁴⁵ *Lubanga case, Decision Establishing the Principles and Procedures to be Applied to Reparations* para 59; *Mahdi case, Reparations Order* para 44.

Court should consider other potential challenges that victims may encounter in determining whether there is enough evidence to prove that they suffered harm.⁴⁶

6.4.5 Quantifying harm for reparations

The *2022 ICJ Reparations Judgement* is illustrative of this issue. In this case, the Court noted that with regard to the causal link, the perpetrator of the internationally wrongful act is obligated to pay reparation for any damage that would not have occurred had the internationally wrongful act not been committed, regardless of whether there were any intervening causes between the internationally wrongful act and the harm suffered. The point of dispute is not so much how harm should be defined but how damage may be measured. Even if the victim's damage is the focus, there needs to be a clear definition of harm for the purpose of seeking reparation.

6.5 Further recommendations

6.5.1 Involving national systems in reparation cases

In the *Lubanga* case, the Court instructed the Trust Fund for Victims to contact the Government of the DRC to learn how the Government might contribute to the reparations process instead of exploring the potential for national coordination that is built into the ICC's legal framework. However, the *Lubanga* case did not fully address the issues of coordination with national justice systems.⁴⁷ The issue of how an ICC reparations order shields a convicted individual from prospective national reparation proceedings involving the same facts emerges from that person's position. While a *ne-bis-in-idem* protection may not have the same scope and significance as in criminal law,⁴⁸ the issue of *res judicata* would have justified some sort of regulation in the Court's legal system, including the *Rome Statute* and the ICC's subsidiary sources of law.

⁴⁶ For instance, in the *Katanga case, Order for Reparations*, the Court observed that victims would have trouble demonstrating material losses because there was no evidence of property ownership in Bogoro. See *Katanga case, Order for Reparations* para 53 and para 60; *Lubanga case, Appeal Against the Decision on the Defence Challenge to the Jurisdiction of the Court* para 81.

⁴⁷ *Lubanga case, Corrected version of the 'Decision setting the Size of the Reparations Award*.

⁴⁸ Hamilton and Sluiter "Principles of Reparations at the International Criminal Court" 24.

Another matter that must be addressed is how the reparations mechanism used by the ICC affects the rights and interests of victims. It is important to consider the possibility that a victim seeking reparations may have to rely on national legal systems because their claim was not considered by the ICC reparation proceedings. There are several circumstances where the victim might want to seek reparations outside of, or in addition to, the ICC proceedings, such as when they failed to file a claim in a timely manner when the basis for their damage claim only became clear later (for instance, when the harm occurred after the crime was over), and when the ICC's reparation proceedings were unsuccessful.⁴⁹ A national reparation order will have better odds of domestic enforcement and improved access to the convicted person's assets.

6.5.2 A call for a reparative complementary

The Court and the Trust Fund for Victims should work with national reparations programmes and establish connections with organisations that run such programmes and provide capacity building, such as the International Organisation on Migration and the Office of the High Commissioner for Human Rights. Such cooperation will ensure the sustainability and effectiveness of reparations. It is positive that the Trust Fund for Victims is using this strategy in Uganda by working directly with the Health and Local Government Ministries to maintain the programmes it began under the mandate for support. A good example of reparative complementarity is the Trust Fund for Victims' legal support programme in Côte d'Ivoire, which helps victims apply to the domestic compensation scheme.⁵⁰

Consequently, there is a need for organisational and governmental accountability aspects of redressing transnational crimes and providing victims justice. Thus, complementarity must incorporate an all-encompassing strategy to eradicate the harm that international crimes inflict on victims. It must show how victims are affected by impunity. Accordingly, both individual and governmental accountability is necessary to effectively remove impunity. Such a strategy would be in line with the precedent set in international and human rights law that is implemented in the ICC.⁵¹ Providing the

⁴⁹ Hamilton and Sluiter "Principles of Reparations at the International Criminal Court" 24.

⁵⁰ Redress Trust "Making Sense of Reparations at the International Criminal Court " 67.

⁵¹ Moffett *Justice for Victims Before the International Criminal Court* 146-150.

appropriate resources for State Parties to give reparations as part of a reparations order against a convicted person could ensure security for victims both conceptually and practically. This might help close the gap between those few individuals before the Court and other victims of international crimes.⁵²

6.6 The way forward

When rigorously interpreted, article 75(1) and (2) of the *Rome Statute* reveals a victim clause that results in a right to reparations. There is a need to make reparation orders and awards in the victims' favour practical and beneficial. From both a procedural and substantive standpoint, there are issues with victim participation and reparation measures before the Court. Additionally, a gap must be minimised between impunity that exists in the impacted countries and steps taken towards reparations to alleviate victim suffering. This is not uncommon, given that when the need for reparations has been raised, countries have failed to provide victims with domestic justice.

The analysis of the Court's reparations framework reveals two critical problems with the reparation implementation structure: the indigent accused and the lack of resources. Although the Court is steadfast and committed to ensuring that victims receive adequate reparation, this thesis shows that its reparation framework is susceptible to procedural and substantive complexities due to limited resources, procedural challenges, and the indigence of convicted persons. If the Court is unable to exercise *ad hoc* jurisdiction over conflict states when it comes to reparations, such complexities may not be alleviated. Fortunately, they may partly be overcome by a reparative complementarity which results from shared liability between individual perpetrators and participating States.

The acquittal of an accused raises questions about what the Court should do with regard to victims. Furthermore, there is no mention of victims who do not receive reparations in cases where there are no convictions. The reparative jurisprudence shows that the Court is reluctant to exercise its jurisprudential authority when it comes to victims' reparations in cases that do not result in convictions. This issue has not yet

⁵² Moffett *Justice for Victims Before the International Criminal Court* 300.

been fully litigated and decided by the Court, except for the dissenting interventions by some judges. One would have anticipated the Court to coordinate with nations and interested organisations in reparation proceedings and choose the best way to bring reparations to the victims in such circumstances. To this end, it is necessary to further investigate this area.

It has been argued that the Court should separate itself from the inherently constrained perpetrator-centric reparations by encouraging States and organisations to participate in the provision of reparations to the victims in order to alleviate what appears to be chronic shortcomings of its reparation system.⁵³ Legal changes aiming at extending the Court's reparations framework would have been the quickest approach to addressing this challenge. The precedents of the Court show that it is difficult to change the core provisions of international instruments.⁵⁴ For victims, the implementation of the reparation order is crucial. The Court's reparation order may not always be carried out exactly as it was intended. The Court has granted individual and collective reparations to victims of mass crimes in its various judgements. In order to completely implement these reparations, a significant amount of resources might be needed.⁵⁵ This is, therefore, a call for the Court to investigate further possibilities of making reparations more realistic for victims.

6.7 Conclusion

It is logical to suppose that the legal reparation framework of the Court will not be able to provide reparation to every victim in every case. The novelty of reparations conducted by an international criminal Court such as the ICC has its own special complexities in addition to the limitations associated with reparations. Because the Court is so intent on retribution, that is, holding the individual perpetrator accountable, many of these issues might go ignored. In order to harness this, the predicament of victims who approach the Court must be linked to the individual culpability and liability

⁵³ *Gesase Reparations in International Criminal Prosecutions* 225.

⁵⁴ *Gesase Reparations in International Criminal Prosecutions* 225

⁵⁵ Trust Fund for Victims "Trust Fund for Victims Draft Implementation Plan for Collective Reparations to Victims" para 25.

for reparations weighed against the convicted person as opposed to the normative objectives of retribution.

There is still more to be done, even though only four cases have reached the reparations stage. It becomes crucial that the Court establish substantive law, as well as procedural rules and evidence-gathering standards that will provide a solid foundation for reparation. In the likelihood that this is not done, the Court will face numerous difficulties in enforcing its reparations order. For instance, striking an unfair balance between defending the rights of victims and unfairly slowing down the criminal trial. The ICC is free to make its own decisions in light of the unique traits and circumstances of the Court and drawing lessons from the previously decided reparation cases, 'but for' reparations to be effective, such decisions must be procedurally and substantively sound.

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