

**Reparations in International Criminal Prosecutions: The Congo  
*Situation* at the International Criminal Court**

A DISSERTATION

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***Doctor Iuris***

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by

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### **Statutory Declaration**

I, Arnold Ainory Gesase, do hereby declare that **‘Reparations in International Criminal Prosecutions: The Congo *Situation* at the International Criminal Court’** is my work. It has not been submitted for any degree or examination in any other university or academic institution. All the sources I have used or quoted have been indicated and acknowledged as complete references.

Arnold Ainory Gesase

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Lastly, thank you GOD the Almighty for your love and blessings, AMEN.

## **Dedication**

In loving memory of my late sister Dr. Nyobhasi Ainory Gesase whose painful and untimely death on 17<sup>th</sup> December 2017 created a huge void in my family.

## **Abbreviations and Acronyms**

AFDL	Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre
ASP	Assembly of States Parties
CAR	Central African Republic
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
FNI	Front des Nationalistes Intégrationnistes
FRPI	Force de Résistance Patriotique en Ituri
FPLC	Force Patriotique pour la Libération du Congo
ICC	International Criminal Court
ICJ	International Court of Justice
ICCPR	International Covenant
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
MCL	Mouvement de Libération du Congo
OPCV	Office of the Public Counsel for the Victims
RCD	Rassemblement Congolais pour la Démocratie
RPE	Rules of Procedure and Evidence
RPF	Rwanda Patriotic Front
TFV	Trust Fund for Victims
TRC	Truth and Reconciliation Commission
UPC	Union des Patriotes Congolais
UPDF	Uganda People's Defence Forces

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## CHAPTER ONE

### INTRODUCTION AND GENERAL OVERVIEW OF THE STUDY

#### 1.1 Introductory Remarks

The term *reparation* could mean “the act of making amends for a wrong”.<sup>1</sup> It is a natural law norm that has existed since time immemorial.<sup>2</sup> In moral terms, a wrong doer must provide redress to the victim for harms resulting from their deeds. Historically, *reparation* has assumed different meanings in the sphere of international law and relations.

Following World War I, the understanding of reparation was very state-centric in the sense that it was taken to mean compensatory payments made by the defeated state to the victorious state for losses incurred by the later.<sup>3</sup> Post war reparations focused on sanctioning the losers of war and not on the needs of individual victims of an armed conflict. At that time, public international law was only applicable to the sovereign states as subjects and individuals injured by acts of a foreign state could only claim redress against such states through their state of nationality.<sup>4</sup>

In classical international law, an individual had no right to demand reparation from the warring states. Only states of the injured party could claim reparation from the offending state.

Nevertheless, the state-centric meaning of reparations changed with the advent of transitional justice<sup>5</sup> and the prominence of the victim’s justice in the discourse of human rights.<sup>6</sup> In the same vein, the internationalisation of human rights following World War II freed individuals from the

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<sup>1</sup> Garner BA (ed) *Black’s Law Dictionary* 7ed (1999) 1301.

<sup>2</sup> Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Separate Opinion of Judge Cañado Trindade, Judgment of 19 June 2012, International Court of Justice, para 29, available at <https://www.icj-cij.org/files/case-related/103/103-20120619-JUD-01-01-EN.pdf> (accessed 12 October 2018).

<sup>3</sup> Gomes L *German Reparations, 1919-1932: A Historical Survey* (2010) 3-45; Powers KL and Proctor K ‘Victim’s Justice in the Aftermath of Political Violence: Why Do Countries Award Reparations?’ (2015) 13 *Foreign Policy Analysis* 2; Shelton D *Remedies in International Human Rights Law* 3ed (2015) 16.

<sup>4</sup> See ‘Rule of Law Tools for Post-Conflict States: Reparations Programs’ (2008) at page 5. Available at <http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf> (Accessed on 29 February 2016).

<sup>5</sup> Transitional Justice is a generic term that has been employed to encompass all judicial and non-judicial approaches to providing justice in countries emerging from armed conflicts, dictatorships or entrenched state violation of human rights. Such justice and rebuilding approaches could be prosecutions, truth gathering, restructuring of state institutions and promotion of rule of law as well as reparations for victims of abuses.

<sup>6</sup> Jochnick C ‘Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights’ (1999) 21 *Human Rights Quarterly* 58.

conservative structures of state sovereignty by allowing for protection and enforcement of human rights beyond national borders.<sup>7</sup>

Now *reparation* is being conceptualised as a justice mechanism that seeks to offer both material and symbolic redress for victims of human rights violations in post conflict societies.<sup>8</sup> In the past, transitional settings on reparations would normally respond to specific individual harms resulting from violations of civil and political rights rather than broader human rights issues relating to, for example, denial of socio-economic and cultural rights.<sup>9</sup> That approach is somehow fading as transitional justice actors are beginning to advocate for reparation policies that also respond to violations relating to socio-economic and cultural rights.<sup>10</sup>

Notwithstanding the traditional understanding of reparation as a justice mechanism that obligates a wrongdoer to make good the harm suffered by a victim, De Greiff breaks down the concept of reparation into two aspects.<sup>11</sup>

He conceptualises the term *reparation* in juridical and state-policy contexts. In juridical terms, reparations mean all measures and strategies, both symbolic and material, which could provide relief for the harm suffered by victims of human rights violations. Such legalistic approach to defining reparations has been firmly embodied in the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and serious violations of International Humanitarian Law

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<sup>7</sup> Haller G *Human Rights Without Democracy?: Reconciling Freedom with Equality* (2012) 90-92; Friedman LM 'The Internationalization of Human Rights by David P. Forsythe' (1993) 13 *Boston College Third World Law Journal* 189-198.

<sup>8</sup> Val-Garijo F 'Reparation for Victims as Key Element of Transitional Justice in the Middle East Occupied Territories: A Legal and Institutional Approach' (2010) 6 *International Studies Journal* 39-42; 'Reparations in Theory and Practice' (2007) *International Center for Transitional Justice, Reparative Justice Series*, p.2, available at <https://www.ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf> (accessed on 14th March 2016).

<sup>9</sup> Roht-Arriaza N and Orlovsky K 'A Complementarity Relationship: Reparations and Development' in De Greiff and Duthie R (Eds.) *Transitional Justice and Development* (2009) 172.

<sup>10</sup> Roht-Arriaza N 'Reparations and Economic, Social, and Cultural Rights' (2013) University of California Hastings College of the Law Research Paper No.53, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2177024](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2177024) (accessed on 15<sup>th</sup> March 2016).

<sup>11</sup> De Greiff P 'Justice and Reparations' in De Greiff P (ed) *The Handbook of Reparations* (2006) 452-453.

(Hereinafter “UN Basic Principles on Reparations”).<sup>12</sup> The UN Basic Principles on Reparations provide that reparations could take the form of compensation, restitution, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>13</sup>

On the other hand, De Greiff suggests that reparations could also be obtained through state-policy reparation programs aimed at providing benefits to victims of particular types of crimes.<sup>14</sup> Indeed, the concept of *reparation programs* was prevalent in Latin American countries that established state-led reparation programs aimed at alleviating specific harms suffered by individuals or a category of individuals as a consequence of dictatorships and atrocity crimes.<sup>15</sup>

Likewise, the UN Basic Principles on Reparations enjoin States to establish reparation programs to provide redress for victims of human rights violations if those responsible for the violations are unable or unwilling to meet their obligations to provide individualised reparations.<sup>16</sup>

Therefore, it is crucial to understand that reparations could result from judicial decisions or governmental reparative programs that have a basis in law but are not necessarily susceptible to court adjudication.<sup>17</sup> Relatedly, international law recognises that the right to reparation for victims of gross human rights violations could be realised through criminal, civil, administrative, or disciplinary proceedings either at the domestic, regional or international level.<sup>18</sup>

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<sup>12</sup> 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, A/RES/60/147, adopted on 21 March 2006.

<sup>13</sup> Principles 18-23, UN Basic Principles on Reparations.

<sup>14</sup> State reparations programs are distinct from judicial reparations in that they are not linked to court cases.

<sup>15</sup> Beristain CM ‘Truth, Justice, and Reparation: Democracy and Human Rights in Latin America’ in Beristain et al *Contribution of Truth, Justice, and Reparation Policies to Latin American Democracies* (2011).

<sup>16</sup> Principle 16 of Part IX (Reparation for harm suffered).

<sup>17</sup> As for the distinction between judicial reparations and administrative or state-led reparation programs, see Shelton D *Remedies in International Human Rights Law* (2015) 122-130. Countries have enacted laws to facilitate reparations through courts of law. For example, Colombia enacted law number 975/2005 that enabled victims to participate in criminal proceedings and apply for reparations. Likewise, numerous transitional Latin American Countries enacted laws that regulated administrative reparation programs for victims of a specific category of crimes.

<sup>18</sup> See Principle 32 (Reparation procedures) of ‘Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity’, E/CN.4/2005/102/Add.1 of 8 February 2005 available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>> (accessed on 29<sup>th</sup> February 2016).

The right of victims to receive reparations has been affirmed at regional human rights tribunals, domestic and international criminal courts, and claims commissions. Importantly, the thesis focuses on the reparative justice mandate of the International Criminal Court (The ICC). While all human rights violations entail the provision of redress and reparation to the victims,<sup>19</sup> the thesis dwells on reparative justice in the context of serious violations that constitute crimes under international law.

Under customary international law, the right to reparation was pronounced for the first time in the often-cited *Chorzow Factory Case* between Germany and Poland.<sup>20</sup> In the case, the Permanent Court of International Justice articulated a principle to the effect that reparations should aim at redressing the consequences of a wrongful act and restore a victim to a situation that would have existed save for the wrongful act.<sup>21</sup>

The reparation principle in the *Chorzow Factory Case* has been accepted and endorsed by numerous judicial pronouncements as the founding legal basis under international law for an obligation of wrongdoers to provide redress for the victims of their deeds.<sup>22</sup> For example, in the *Palestinian Wall Case*, the International Court of Justice followed *Chorzow* as a customary source for reparative justice by arguing that Israel should provide reparation to individuals who lost their

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<sup>19</sup> Theo van Boven 'The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' United Nations (2010) at page 2, available at [http://www.nuhanovicfoundation.org/user/file/van\\_boven\\_introduutory\\_note\\_to\\_bnasic\\_principles\\_and\\_guidelines.pdf](http://www.nuhanovicfoundation.org/user/file/van_boven_introduutory_note_to_bnasic_principles_and_guidelines.pdf) (accessed 28th February 2016).

<sup>20</sup> *Factory and Chorzow Case* (Germany v. Poland) Merits, Judgment No 13, 1928, Permanent Court of International Justice, Series A, No. 17; See also, Shaw MN *International Law* 5ed (2003) 715.

<sup>21</sup> *Factory and Chorzow Case* (Germany v. Poland) Merits at page 47.

<sup>22</sup> A number of judgments have reaffirmed "the obligation to repair harm" principle established in the *Factory at Chorzow Case*. Recent examples include two advisory opinions of the International Court of Justice: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, para 460, available at <https://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf> (accessed on 29<sup>th</sup> February 2016); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136 , para 152, available at <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> (accessed on 29<sup>th</sup> February 2016).

businesses, homes, and agricultural land in consequence of the construction of a wall in the occupied territories of Palestine.<sup>23</sup>

Although originally articulated in the context of state responsibility claims between states, the principle has now been customarily accepted and enforced as a right for individuals against both states and individuals involved in human rights violations.<sup>24</sup> Today, the right of individuals to reparation for violations of human rights has been codified in a number of conventional, regional, and declarative human rights instruments that enjoy global recognition and support.<sup>25</sup>

Therefore, subject to conventional international law, states are obligated to ensure that their citizens can realise the right to reparation both in law and in practice.<sup>26</sup> States have a duty to ensure the protection of individuals against violation of their rights, whether by state or non-state actors. The reparation case of *Velasquez Rodriguez v. Honduras* that was determined by the Inter-American Court of Human Rights dictates that states must prevent violations, investigate culprits and take them to court, and ensure that victims can receive reparations.<sup>27</sup>

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<sup>23</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion of 9 July 2004 at paragraph 152.

<sup>24</sup> Letschert R and van Boven T ‘Providing Reparation in Situations of Mass Victimisation: Key Challenges Involved (2011) *Victimological Approaches to International Crimes, Intersentia* 154.

<sup>25</sup> Article 8 of Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948; Article 2(3) of International Covenant on Civil and Political Rights, United Nations, Treaty Series, vol. 999, p. 171; Article 6 of International Convention on the Elimination of All Forms of Racial Discrimination, United Nations, Treaty Series, vol. 660, p. 195; Article 14(1) of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, Treaty Series, vol. 1465, p. 85; Article 39 of Convention on the Rights of the Child, United Nations, Treaty Series, vol. 1577, p. 3; Article 7 of African Charter on Human and Peoples’ Rights, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); Article 25 and 63(1) of American Convention on Human Rights (1969); Article 5(5) and 13 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N. G.A. Res. 40/34, U.N. Doc. A/40/53 (Nov. 29, 1985), at 214; 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, U.N. G.A. Res. 60/147, U.N. Doc A/60/147 (Dec. 16, 2005); Article 91 of the Additional Protocol to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts; and Article 68 and 75 of the Rome Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998 (The ICC Statute).

<sup>26</sup> See a publication by REDRESS entitled ‘Reaching for Justice: The Right to Reparation in the African Human Rights System’ (October 2013) at page 13. Available at <<http://www.redress.org/downloads/publications/1310Reaching%20For%20JusticeFinal.pdf>> (accessed on 1<sup>st</sup> March 2016).

<sup>27</sup> Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).



In transnational settings, the right to reparation has been interpreted and enforced by regional human rights courts<sup>28</sup> and the ICC that has jurisdiction over atrocity crimes.<sup>29</sup> The ICC is legally empowered to order reparations against a convicted person.<sup>30</sup> The right to reparation for victims of crimes under international law<sup>31</sup> is a new development in the field of international criminal justice.<sup>32</sup>

Before the establishment of the ICC in 2002, there was no international instrument that codified the right to reparations for victims of core crimes.<sup>33</sup> The ad hoc criminal tribunals<sup>34</sup> that had or have jurisdiction over atrocity crimes did not have the power to order reparations against convicted persons. The tribunals only had powers to order restitution of property that was taken unlawfully from the property holder.<sup>35</sup>

The legal and moral necessity for reparations for victims of crimes under international law is important because such crimes are usually massive both regarding damage and magnitude of perpetration.<sup>36</sup> It is submitted that the traditional retributive justice model which is perpetrator-

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<sup>28</sup> The Inter-American Court of Human Rights is known for handing down pioneer and ground-breaking reparations judgments against States responsible for human rights violations in the Americas. Similar courts in Africa and Europe have also been doing the same.

<sup>29</sup> The term “atrocity crimes” refers to crimes against humanity, genocide, and war crimes. Such crimes are usually perpetrated by states, organised criminal gangs, and state-like organisations on a large scale that creates massive damage and innumerable victims; Framework of Analysis for Atrocity Crimes - A Tool for Prevention, United Nations, 2014, available at <http://www.refworld.org/docid/548afd5f4.html> (accessed 12 October 2018).

<sup>30</sup> Article 75 (2) of the ICC Statute.

<sup>31</sup> There are four core crimes under international law namely, war crimes, genocide, crimes against humanity, and the crime of aggression as per Article 5 of the ICC Statute; Cassese A *International Criminal Law* 2nd Edn. (2008) pp.11-30; Damgaard C *Individual Criminal Responsibility for Core International Crimes* (2008), pp.56-85; Werle G *Principles of International Criminal Law* 2nd Edn. (2009), p. 29.

<sup>32</sup> Evans C *The Right to Reparation in International Law for Victims of Armed Conflict* (2012) p. 87.

<sup>33</sup> Core crimes refers to crimes under international law namely genocide, crimes against humanity and war crimes. See Marchuk I *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis* (2014) p.70.

<sup>34</sup> By ad hoc tribunals I mean non-permanent criminal tribunals that were established to deal with specific conflicts such as the Special Court for Sierra Leone, the International Criminal Tribunal for Rwanda, and the International Criminal Tribunal for former Yugoslavia. The primary goal of such courts was perpetrator-centred: to prosecute persons responsible for the violations and thereby contribute to restoration of peace and security. They preferred retributive justice over restorative justice.

<sup>35</sup> See Article 24 (3) and 23 (3) of the Statutes of ICTY and ICTR respectively.

<sup>36</sup> Powers and Proctor (2015) 2-3.

centred may not provide sufficient redress for the victims of gross violations unless complemented by reparative justice which focuses on the needs of victims.

Admittedly, conviction-based reparations of a criminal court such as the ICC may not have the capacity and resources to fully address needs of, for example, traditionally marginalised categories of victims such as women and children. The question of whether ICC reparations can be needs-based is dealt with extensively in chapter four and five.

The ICC presents a binary judicial system of punitive and restorative justice models through prosecutions and reparations. Since the reparation jurisprudence is at the nascent stage of development, the extent to which the ICC will go in providing meaningful redress to the victims remains to be seen, given the fact that it takes a strictly individualised approach to reparations that ties liability for reparations to a criminal conviction.

Put differently, can reparations for grave violations be *meaningful* if their implementation parameters are based on the scope of charges and the resultant conviction? This question is answered extensively in chapter four and five.

At the domestic level, states transitioning from armed conflicts and undemocratic regimes have responded to past injustices by employing a range of transitional justice mechanisms such as criminal prosecutions, reparations, truth commissions, and wide-ranging reforms to state institutions, laws, and policies.<sup>37</sup>

While it would be impossible to completely repair or undo the harm done to victims of atrocity crimes,<sup>38</sup> it is argued that reparations occupy a critical position in providing justice for past crimes in transitional societies.<sup>39</sup> Victims need recognition, truth, acknowledgment of their suffering, and legal justice. In whatever form or method they would take, reparations have the potential of

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<sup>37</sup> Werle (2009) 74-76.

<sup>38</sup> Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Separate Opinion of Judge Cañado Trindade, Judgment of 19 June 2012, International Court of Justice, para 26.

<sup>39</sup> Tomuschat C 'Darfur-Compensation for the Victims' (2005) 3 *Journal of International Criminal Justice* 581; Manirabona AM and Wemmers JM 'It Doesn't Go Away with Time: Victims Need Reparation Following Crimes against Humanity' in Wemmers JM (ed) *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (2014) 72.

according direct benefits (whether material or symbolic) to victims and thereby act as an impetus for post-conflict reconciliation and rebuilding of societal relations.<sup>40</sup>

Arguably, the success of a reparation program depends on its ability to alleviate effects of a violation and to recreate a sustainable legal order that restores human dignity.<sup>41</sup> Dignity is an essential corollary to the right to reparation as victims need to be treated humanely in an equal and compassionate manner.<sup>42</sup>

## **1.2 Contextual Background**

This section covers contextual issues relating to the Congo conflict, transitional justice, and the factors that triggered or necessitated the involvement of the ICC in the Democratic Republic of the Congo (the DRC). While the historical dimension of this study provides a synopsis of the Congo conflict as it stretches back to Belgian colonialism, the analysis and discussion of factual and legal issues relating to the conflict and reparative justice through the ICC are limited to crimes under international law, committed between July 2002 and 2013.

### **1.2.1 Historical Insights into the Congo Conflict**

Historians agree that the causes of modern day instability of the DRC, the second largest country in Africa and a country well-endowed in natural resources, stretches back to pre-independence Belgian rule that sowed seeds of corruption, nepotism, embezzlement of public resources, and unequal distribution of public wealth.<sup>43</sup> Many conflicts have taken place in the DRC since its independence in 1960. However, this study concentrates on the Congo wars that took place in the last decade of the 20<sup>th</sup> Century.

In the 1990s, the DRC descended into a protracted and complex bloody conflict that was triggered by an invasion of Rwanda and Uganda which, among other things, culminated into the fall of

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<sup>40</sup> Tunamsifu SP ‘Transitional Justice and Peacebuilding in the Democratic Republic of Congo’ (2015) 15 *African Journal on Conflict Resolution* 68.

<sup>41</sup> Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Separate Opinion of Judge Cançado Trindade, Judgment of 19 June 2012, International Court of Justice, para 39.

<sup>42</sup> Para XI (10) of The UN Basic Principles on Reparations.

<sup>43</sup> Turner T *The Congo Wars: Conflict, Myth, and Reality* (2007); Ikambana P *Mobutu’s Totalitarian Political System: An Afrocentric Analysis* (2007); Lemarchand R ‘The Democratic Republic of Congo: From Failure to Potential Reconstruction’ in Rotberg R (ed.) *State Failure and State Weakness in Time of Terror* (2003).

Mobutu's dictatorial regime.<sup>44</sup> Before the fall of Mobutu in May 1997, he had ruled the DRC with an iron fist for three decades; in a regime that was characterised by endemic corruption, nepotism, blatant disregard for the law, plunder of natural resources, an illegal crackdown on dissidents and extra-judicial killings.<sup>45</sup>

The First Congo War (1996-1997) was triggered by an invasion of the Rwandan army (the RPF) into the DRC to eliminate Hutu refugees and former soldiers of the Rwandan army (ex-FAR/*Interahamwe*) who had perpetrated genocide against Rwandan Tutsis in 1994.<sup>46</sup> To legitimise the invasion and camouflage the real intentions of the war, Rwanda created and extended logistical support to an anti-Mobutu rebel movement called 'Alliance of Democratic Liberation Forces' (Alliance des Forces Démocratiques pour la Libération du Congo-Zaïre, the AFDL) which succeeded in claiming power in May 1997.<sup>47</sup> The AFDL was under the leadership of Laurent-Désiré Kabila.

The success of AFDL in toppling Mobutu was an easy project as the Congolese population had tired of Mobutu's dictatorial tendencies and the regime had also lost the support of the West following the end of cold war.<sup>48</sup> The large scale military campaign launched by AFDL with the participation of Rwanda and Uganda resulted in the perpetration of atrocity crimes that left millions displaced, dead and crippled. Kabila's takeover of the reins of power in the DRC did not spare the DRC from further conflict. His fallout with Rwanda and Uganda led to the outbreak of the Second Congo War.

The Second Congo War, characterised as the worst humanitarian crisis since World War II, was also triggered by the invasion of Rwanda and Uganda in the DRC in August 1998.<sup>49</sup> The war, although it subsequently turned to be a war of partition and plunder,<sup>50</sup> was started by Rwanda and

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<sup>44</sup> Turner (2007) 1.

<sup>45</sup> Ikambana (2007) 54-55.

<sup>46</sup> Turner (2007) 3-5.

<sup>47</sup> Clark JF *The African Stakes of the Congo War* (2002) 55-56; Stearns J et al *The National Army and Armed Groups in the Eastern Congo: Untangling the Gordian Knot of Insecurity* (2013) 20.

<sup>48</sup> Meldon J 'Long U.S. Dance with Mobutu Ends' (1997) *The Consortium*, available at <http://www.consortiumnews.com/archive/story31.html> (accessed 23 May 2016).

<sup>49</sup> Nzongola-Ntalaja G 'The International Dimensions of the Congo Crisis' (2004) 6 *Global Dialogue*.

<sup>50</sup> Naidoo S (ed) 'The War Economy in the Democratic Republic of Congo' (2003) *IGD Occasional Paper No.37*, available at [http://www.igd.org.za/jdownloads/Occasional%20Papers/op\\_37\\_chapter\\_1.pdf](http://www.igd.org.za/jdownloads/Occasional%20Papers/op_37_chapter_1.pdf) (accessed 12 October 2018).

Uganda as an attempt to oust Laurent Kabila who had turned his back on his allies (Rwanda-RPF and Uganda-UPDF). The two neighbouring countries participated actively in the rebellion that led to the fall of Mobutu Sese Seko in May 1997. On 28<sup>th</sup> July 1998, Kabila ordered a complete withdrawal of foreign troops from the DRC.<sup>51</sup>

Among their other reasons for maintaining a continued presence of foreign troops in the DRC, Rwanda and Uganda, who share a border with the DRC, had hoped to benefit from the ouster of Mobutu by having unfettered access to the DRC's vast reserve of natural resources.<sup>52</sup> Kabila's decision to side-line Rwanda and Uganda would prove costly. Having started the aggression, Rwanda and Uganda actively supported dissident military groups like *the Congolese Rally for Democracy* (Rassemblement Congolais pour la Démocratie, RCD) and *the Congo Liberation Movement* (Mouvement de Libération du Congo, MCL).<sup>53</sup> Even though the invaders created rebel movements in the Eastern part of the DRC to hasten the removal of Kabila, the rebellion against Kabila was unsuccessful mainly due to the support he received from some foreign forces.<sup>54</sup>

As earlier alluded to, the invasion of the DRC by Rwanda and Uganda was resisted vigorously by neighbouring foreign forces who fought alongside government forces. A total of eight countries participated in the military confrontation during the deadly Second Congo War.<sup>55</sup> Foreign forces of Angola, Chad, Namibia, Zimbabwe, and Sudan backed Kabila while Rwanda, Burundi, and Uganda supported rebel movements. The engagement of such military forces in the DRC resulted in the commission of egregious human rights violations which could be characterised as crimes under international law. In particular, mass rapes were committed on a large scale in the Eastern

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<sup>51</sup> Mbikavu EM 'An Analysis of the Implication of the ICC Mandate on the Consolidation of Democracy in the DRC', M.A. Dissertation (2012), University of Witwatersrand, at page 26, available at <http://mobile.wiredspace.wits.ac.za/handle/10539/11738> (accessed 12 October 2018).

(2012) 26.

<sup>52</sup> See UN Security Council Report entitled 'Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo' (2002), S/2002/1146, available at <http://www.srwolf.com/reports/UNCONGO.pdf> (accessed on 9 April 2016).

<sup>53</sup> Lemarchand (2003) 30.

<sup>54</sup> 'Conflicts in the Democratic Republic of Congo: Causes, Impact and Implications for the Great Lakes Region' (2015) *United Nations Economic Commission for Africa* 14, available at [https://www.uneca.org/sites/default/files/PublicationFiles/conflicts\\_in\\_drc\\_eng\\_25sept\\_rev1.pdf](https://www.uneca.org/sites/default/files/PublicationFiles/conflicts_in_drc_eng_25sept_rev1.pdf) (accessed 12 October 2018); Turner (2007) 5.

<sup>55</sup> Williams C 'Explaining the Great War in Africa: How Conflict in the Congo Became a Continental Crisis' (2013) 37 *The Fletcher Forum of World Affairs* 89.

part of the DRC.<sup>56</sup> The war fed on deep-rooted historical ethnic conflicts and the scramble for mineral-rich Eastern DRC.

War crimes and crimes against humanity were perpetrated against defenceless civilian population especially in the Eastern region of the DRC (Kivu, Goma, Ituri, and Bunia). The crimes were committed by both state forces and rebel militia groups. Thus, some states were highly complicit in the perpetration of atrocity crimes in the DRC.<sup>57</sup> Uganda's participation in the DRC conflict focused on Ituri, a region close to its border with the DRC. The 2005 Judgment of the International Court of Justice (ICJ) in the case of *Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda)* confirms that Uganda was the occupying power in Ituri during the relevant period of the conflict.<sup>58</sup> The ICJ made a finding that Ugandan troops committed crimes under international law.<sup>59</sup> Factually, there is also a decision handed down by the African Commission for Human Rights to the effect that the military intervention of Rwanda, Uganda, and Burundi in the DRC was a violation of international law.<sup>60</sup>

In the same vein, the African Commission held that, such countries, as the occupying powers of the eastern provinces of the DRC during the conflict, violated international law by not protecting civilians from egregious violations of human rights.<sup>61</sup> The said countries were also involved in a large scale plunder of resources of the DRC.<sup>62</sup> Relatedly, in the bloody fighting in the Eastern DRC that ended in late 2013, Rwanda has been confirmed as the creator and supporter of the rebel group

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<sup>56</sup> 'The War Within the War Sexual: Violence Against Women and Girls in Eastern Congo' (2002) *Human Rights Watch*, available at <https://www.hrw.org/reports/2002/drc/Congo0602.pdf> (accessed 12 October 2018).

<sup>57</sup> Hüls V 'State Responsibility for Crimes under International Law: Filling the Justice Gap in the Congo' (2004) *Law and Development* 21, available at <http://lawanddevelopment.org/docs/justicegapcongo.pdf> (accessed 12 October 2018).

<sup>58</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, para 178.

<sup>59</sup> *Armed Activities on the Territory of the Congo*, ICJ Judgment (2005), para 211.

<sup>60</sup> Communication 227/99 - D. R. Congo / Burundi, Rwanda and Uganda, 33<sup>rd</sup> Session of the African Commission, May 2003.

<sup>61</sup> African Commission Communication 227/99, para.79.

<sup>62</sup> African Commission Communication 227/99, para.94.

M23<sup>63</sup> which was under the leadership of Rwandan-born Congolese General Bosco Ntaganda who is currently on trial at the ICC for charges of war crimes and crimes against humanity.<sup>64</sup>

### **1.2.2 Post Conflict Accountability and Transitional Justice**

The preceding section has attempted to provide a clear general picture on the two Congo Wars of the 90s as well as war-related rebellions that continued until late 2013. Aptly, the Congo conflict has been the most complex and deadly in recent history. The conflict was exacerbated, among other things, by the involvement of foreign forces with varying and competing interests as well as the unscrupulous scramble for Congo's mineral wealth.

Contextually, the wars also fed on deep-rooted ethnic and political antagonism. The second Congo War inflicted unthinkable damage on the people of Congo. The country was quickly slipping into systemic anarchy and there was an urgent need for action essentially on three fronts: restoration of peace and security; restructuring the institutions of governance to return the country to rule of law and constitutionalism; and provision of justice for victims of gross violations.

The demand for post-conflict accountability and reconstruction gained support from both internal and external actors like the United Nations and the African Union.<sup>65</sup> In line with international law, the DRC is obligated to ensure that crimes perpetrated during the conflict are investigated and prosecuted properly, including the provision of reparation to victims.

The section below covers transitional justice issues, starting with the ceasefire agreements that aimed at stopping the Second Congo War.

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<sup>63</sup> Rebel Group created mainly by Congolese [Tutsi] soldiers on 6 May 2012. This was a new version to the then defunct rebel group called CNDP that was commanded by General Laurent Nkunda. On 23 March 2009, Nkunda's CNDP signed a peace deal with the Government of Congo, agreeing to, among other things, cessation of the violence on the condition that there would amnesty for the fighters and that they would be incorporated into the DRC National Army. Three years later, CNDP decided that the peace deal wasn't being implemented by the government hence the formation of new rebellion called M23; named after the date of truce in 2009.

<sup>64</sup> *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06.

<sup>65</sup> Hellmüller S, 'Timing and Sequencing of Post-Conflict Reconstruction and Peacebuilding Efforts in DR Congo' in Langer A and Brown G (eds) *Building Sustainable Peace: Timing and Sequencing of Peacebuilding Efforts and Reforms in Post-Conflict Countries* (2016) pp.243-261.

The DRC's transitional justice efforts gained momentum under President Joseph Kabila who became President after the assassination of his father in 2001.<sup>66</sup> By the time Kabila assumed leadership of the country, the DRC was a deeply divided country and war-ravaged. Kabila had no choice but to talk to the dissidents to chart out ways for dealing with the past. As a country transitioning from violent conflict to peace and democracy, the DRC was legally and economically constrained to deal with its past.<sup>67</sup> It had innumerable perpetrators and victims who should go through a transitional justice process that is just and fair as well as not susceptible to re-victimisation and creation of a new social conflict.

The DRC had to grapple with an extremely huge question of *justice for the victims* of atrocity crimes. Justice during a transition could take numerous forms depending on the contextual realities of the conflict. In the past, some Latin American countries employed a range of transitional justice measures essentially focused on redressing victims. Such measures could be prosecutions (domestic, internationalised or hybrid prosecutions), conditional or unconditional amnesty, reparations, reforms of state structures, and truth-seeking commissions.<sup>68</sup>

The DRC's road towards transitional justice started with the signing of the Lusaka Ceasefire Agreement on 10<sup>th</sup> July 1999 by the representatives from the governments of the DRC, Rwanda, Uganda, Angola, Zimbabwe and Namibia.<sup>69</sup> Crucial to the agreement was a pledge to end belligerent operations in Congo and to withdraw foreign troops so that the people of Congo could start an inclusive discussion on how to deal with the conflict.<sup>70</sup>

The ceasefire agreement did not stop the aggression of foreign forces in the DRC. In particular, the Rwandan and Ugandan forces continued to deploy in the DRC until after the signing of the

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<sup>66</sup> Reyntjens F *The Great African War: Congo and Regional Geopolitics, 1996–2006* (2009) 252.

<sup>67</sup> 'Democratic Republic of Congo: Confronting Impunity', Human Rights Watch, available at <<https://www.hrw.org/sites/default/files/reports/drc0104.pdf>> (accessed on 10<sup>th</sup> April 2016).

<sup>68</sup> Ambos K 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC' in Ambos et al (eds) *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace, and Development* (2009) 19.

<sup>69</sup> 'Can Truth Commissions Strengthen Peace Processes', International Center for Transitional Justice, at page 47, available at <[https://www.ictj.org/sites/default/files/ICTJ\\_TruthCommPeace\\_English\\_2016.pdf](https://www.ictj.org/sites/default/files/ICTJ_TruthCommPeace_English_2016.pdf)> (accessed on 9<sup>th</sup> April 2016).

<sup>70</sup> See chapter 4 and 5 of the Lusaka Peace Agreement (1999), available at <[http://peacemaker.un.org/sites/peacemaker.un.org/files/CD\\_990710\\_LusakaAgreement.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/CD_990710_LusakaAgreement.pdf)> (accessed on 9<sup>th</sup> April 2016).



Pretoria and Luanda Peace Accords in 2002.<sup>71</sup> The departure of foreign troops from the DRC allowed for a global discussion among Congolese on how to restore peace and security. The Inter-Congolese dialogue that took place in South Africa culminated into the signing of the Sun City Agreement on 19<sup>th</sup> April 2002.<sup>72</sup>

The agreement was the result of a dialogue that involved negotiators from the warring and non-warring parties; the DRC government under Joseph Kabila, the RCD, the MLC, the Mai Mai, and Unarmed Opposition. Among other things, the Sun City Peace Agreement resolved that the DRC should invoke some transitional justice measures to return to democracy and rule of law.

The proposed measures included: establishment of an international criminal court for Congo,<sup>73</sup> the creation of a truth commission,<sup>74</sup> establishment of a national human rights commission,<sup>75</sup> removal of special jurisdictions accorded to military courts,<sup>76</sup> and restitution of property unlawfully acquired.<sup>77</sup> For the negotiators, it was crucial to initiate a transitional justice process with a masala of mechanisms to deal effectively with the bloodiest conflict on earth since World War II.

However, it is crucial to concede that resource constraints and nepotistic internal wrangling in the DRC made it impossible for the State to introduce a working transitional justice policy. One specific challenge for transitional justice in the DRC was the unusually high number of both victims and perpetrators (Congolese citizens and foreign soldiers) who committed crimes reaching the threshold of core crimes under international law.

As a principle, impunity for crimes under international law is unacceptable and sovereign states are legally obligated to investigate and prosecute individuals responsible for the commission of such crimes,<sup>78</sup> and to ensure that victims receive reparations. The demand for accountability

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<sup>71</sup> Report of the Interim Chairperson of the Commission of The African Union on The Situation in The Democratic Republic of The Congo (DRC), Central Organ/MEC/AMB/2 (LXXXVI), 29 October 2002, available at <http://www.peaceau.org/uploads/86drc.pdf> (accessed 12 October 2018).

<sup>72</sup> See 'The Final Act of Inter Congolese Political Negotiations - Sun City Agreement' available at <<https://www.issafrica.org/cdDRCReader/bin/8final.pdf>> (accessed on 9<sup>th</sup> April 2016).

<sup>73</sup> Resolution No: ICD/CPR/05.

<sup>74</sup> Resolution No: ICD/CPR/04.

<sup>75</sup> Resolution No: ICD/CPR/08.

<sup>76</sup> Resolution No: ICD/CPR/06.

<sup>77</sup> Resolution No: ICD/CPR/02.

<sup>78</sup> Pasch J, 'State Obligation to Punish Core International Crimes and the Proposed Crimes Against Humanity Convention', in Bergsmo M and Tianying S (eds), *On the Proposed Crimes Against Humanity Convention* (2014)

presented overwhelming challenges to the actors of the peace process in Congo given the fact that the judiciary was legally and operationally incapable of dealing with such massive demand for justice.<sup>79</sup> The whole justice sector in the DRC had been incapacitated in all aspects.<sup>80</sup>

One critical aspect of the DRC transitional justice process was the creation of a truth commission. Members of the truth commission were appointed by parties to the Global and Inclusive Agreement on Transition in the DRC.<sup>81</sup> The commission lasted between 2003 and 2007. Its main mandate was to investigate socio-economic and societal conflicts in Congo since 1960 through to 2003 and to recommend reconciliatory measures including measures for victim's redress.<sup>82</sup> However, the commission failed to live to the expectations of the people of Congo who thought that the truth-seeking body would establish a clear historical picture of the conflict and recommend unifying and reparative remedial measures for the victims.

Instead, the commission closed its operations with the submission of its report to Parliament in 2007 without carrying out any meaningful truth-seeking investigations.<sup>83</sup> The dismal performance of the truth commission could be attributed to issues like: lack of objectivity on the part of

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FICHL Publication Series No. 18, available at <https://www.legal-tools.org/doc/d6a48a/pdf/> (accessed 4 October 2018).

<sup>79</sup> 'Violence against Women in Eastern Democratic of Congo: Whose Responsibility? Whose Complicity?' (2011) International Trade Union Confederation, p.27, available at [https://www.ituc-csi.org/IMG/pdf/ituc\\_violence\\_rdc\\_eng\\_lr.pdf.pdf](https://www.ituc-csi.org/IMG/pdf/ituc_violence_rdc_eng_lr.pdf.pdf) (accessed on 12 October 2018); Democratic Republic of the Congo, 1993–2003: Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Congo Between March 1993 and June 2003 (UN Mapping Report on Congo), para 929, available at [https://www.ohchr.org/Documents/Countries/CD/DRC\\_MAPPING\\_REPORT\\_FINAL\\_EN.pdf](https://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf) (accessed on 12 October 2018).

<sup>80</sup> 'Time for Justice is Now: New Strategy Needed in the Democratic Republic of Congo' (2011) Amnesty International, available at <https://www.amnesty.org/download/Documents/28000/afr620062011en.pdf> (accessed 12 October 2018); 'Victims of Sexual Violence Rarely Obtain Justice and Never Receive Reparation: Major Changes Needed to Fight Impunity' (2011) International Federation of Human Rights, p.45, available at [https://www.fidh.org/IMG/pdf/rapport\\_rdc\\_.pdf](https://www.fidh.org/IMG/pdf/rapport_rdc_.pdf) (accessed 12 October 2018).

<sup>81</sup> Global and Inclusive Agreement on Transition in the Democratic Republic of Congo (Pretoria Agreement), 16 December 2002, available <https://reliefweb.int/report/democratic-republic-congo/global-and-inclusive-agreement-transition-dr-congo-inter-congolese> (accessed 12 October 2018).

<sup>82</sup> Article 155 of the Transitional Constitution of Congo of 2003.

<sup>83</sup> Tunamsifu (2015) 72.

commissioners due to political sycophancy, poor capacity of its commissioners due to weak professionalism, and lack of material resources.<sup>84</sup>

The failure of the truth commission was a huge blow to the victims who were in dire need of truth and justice. Truth recovery is an important dimension to anti-impunity efforts in a society emerging from conflict.<sup>85</sup> Contemporary literature indicates that truth is best obtainable by a truth commission<sup>86</sup> and then supplemented by criminal prosecutions and reparations.

Courts of law alone are not expected to provide a clear and broad picture of the violent past because courts concentrate on the perpetrator.<sup>87</sup> For courts, the aim is to establish specific facts relating to the commission of crimes by particular individuals and therefore criminal trials tend to produce *microscopic truth* as opposed to *macroscopic truth* that results from restorative justice approaches.<sup>88</sup> Additionally, the strict nature with which criminal charges need to be proved may not provide room for the consideration of broader issues that do not relate to the charges.

In the wake of the conflict, the DRC needed a viable prosecutorial strategy that would target individuals who masterminded, carried out, and ordered the commission of crimes whether they were members of the military, belligerent foreign forces, political authorities, or local militia groups.<sup>89</sup> However, owing to an entrenched culture of impunity, corruption, limited investigative capacity, lack of material resources, and infrastructural defects; the DRC justice machinery could not deal with the perpetrators of atrocity crimes properly.<sup>90</sup>

Dealing with such an organised and large-scale criminality in a vast country like the DRC necessitated the presence of a strong and fully independent justice authority that would prosecute those bearing the hugest responsibility for the perpetration of crimes under international law.<sup>91</sup>

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<sup>84</sup> ‘Can Truth Commissions Strengthen Peace Processes’ (2014) , at pages 51-53, International Center for Transitional Justice.

<sup>85</sup> Smyth MB *Truth Recovery and Justice after Conflict: Managing Violent Past* (2007) 12.

<sup>86</sup> Hayner PB *Unspeakable Truths: Confronting State Terror and Atrocity* (2001) 15.

<sup>87</sup> Robinson D ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 *European Journal of International Law* 484.

<sup>88</sup> Drumbl MA *Atrocity, Punishment, and International Law* (2007) 176.

<sup>89</sup> UN Mapping Report on Congo, para 1014.

<sup>90</sup> UN Mapping Report on Congo, at pages 456 – 458.

<sup>91</sup> The term ‘crimes under international law’ is used as an umbrella term for core crimes namely, genocide, crimes against humanity, and war crimes. Such crimes are usually perpetrated in the context of a protracted armed conflict or widespread and systematic attacks on a civilian population.

Unfortunately, this was not the case.<sup>92</sup> Characteristically, Congo's conflict had a very complex perpetration terrain with perpetrators from state and non-state actors as well as foreign forces supporting both sides to the conflict.<sup>93</sup> That presented a critical challenge to the transitional prosecutions carried out by the military courts which have had jurisdiction over crimes under international law.

The courts suffered from all forms of interference from the government with the result that prosecutions were highly selective.<sup>94</sup> Moreover, investigations carried out by the DRC authorities were generally skewed and highly biased as they only targeted small fish and the opposition.<sup>95</sup> The government made sure that its allies and operatives were shielded from prosecutions and therefore only a few individuals were prosecuted.<sup>96</sup> It follows that, post-conflict prosecutions carried out by the military courts were largely unsuccessful in providing justice for the victims. Until today, judgments of the military courts suffer from a weak enforcement regime.

According to credible reports, victims have not been able to enforce reparation judgments handed down by the court.<sup>97</sup> Non-enforcement of court judgments constitute a violation of international human rights law.<sup>98</sup> Another blow to the victim's need for reparation in the DRC is the fact that

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<sup>92</sup> 'A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of Congo' (2004) International Center for Transitional Justice, p.24, available at <https://www.ictj.org/publication/first-few-steps-long-road-just-peace-democratic-republic-congo> (accessed 12 October 2018).

<sup>93</sup> UN Mapping Report on Congo, para 1015.

<sup>94</sup> 'Rebuilding Courts and Trust: An Assessment of the Needs of the Justice System in the Democratic Republic of Congo' (2009) at page 22, available at <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=54396461-F637-4842-AD27-416E63413AB9>> (accessed on 9<sup>th</sup> April 2016).

<sup>95</sup> 'Etats Généraux of the Justice System in the Democratic Republic of Congo: Recommendations on the Fight Against Impunity for Grave International Crimes' (2015) Human Rights Watch, p.2, available at <https://www.hrw.org/news/2015/04/27/etats-generaux-justice-system-democratic-republic-congo> (accessed 12 October 2018).

<sup>96</sup> 'Soldiers Who Rape, Commanders Who Condone : Sexual Violence and Military Reform in the Democratic Republic of Congo' (2009) Human Rights Watch, p.49, available at <https://www.hrw.org/report/2009/07/16/soldiers-who-rape-commanders-who-condone/sexual-violence-and-military-reform> (accessed 12 October 2018).

<sup>97</sup> 'Justice on Trial: Lessons from the Minova Rape Case in the Democratic Republic of Congo' (2015) Human Rights Watch, pp. 63-64, available at <https://www.hrw.org/report/2015/10/01/justice-trial/lessons-minova-rape-case-democratic-republic-congo> (accessed 12 October 2018); *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, ICC-01/04-01/06-3129, 03 March 2015 (Lubanga Reparations Appeal Judgment), para. 28.

<sup>98</sup> Article 2(3)(c) of the International Covenant on Civil and Political Rights.

the law limits reparations to compensation,<sup>99</sup> leaving out other broad issues like restitution, rehabilitation, and guarantees of non-recurrence.

The failure of domestic justice had the effect of raising support for the intervention of the ICC in the DRC.<sup>100</sup> People felt that the ICC would deal with the perpetrators in an equal manner as opposed to the biased military courts.

### **1.2.3 The Congo *Situation* at the ICC: The Focus on Ituri**

The intervention of the ICC in the DRC became a reality in March 2004 when President Kabila triggered a self-referral mechanism under the ICC Statute.<sup>101</sup> That happened two years after the DRC had become a member of the ICC Statute. In a letter to the ICC, Kabila admitted that the DRC was legally and operationally incapable of providing justice for victims of crimes under international law.<sup>102</sup> The self-referral effectively invited the ICC into the DRC to carry out investigations and prosecute individuals responsible for the commission of crimes under international law.<sup>103</sup>

However, it must be understood that the ICC intervention in the DRC is limited to crimes committed after the 1<sup>st</sup> of July 2002. As noted earlier, Congo's conflict dates from 1961 to 2003; a period characterised by the perpetration of atrocious human rights violations. The jurisdictional limitations of the ICC as regards crimes committed before 2002 underscores the importance of domestic prosecutions to close down the impunity gap.

The ICC opened its investigations of the Congo *situation* in June 2004 and the investigations focused on Ituri, a region in the Orientale province of Eastern Congo DRC.<sup>104</sup> The Second Congo

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<sup>99</sup> 'Victims of Sexual Violence Rarely Obtain Justice and Never Receive Reparation: Major Changes Needed to Fight Impunity' (2011) International Federation of Human Rights, pages 56-57, available at [https://www.fidh.org/IMG/pdf/rapport\\_rdc\\_.pdf](https://www.fidh.org/IMG/pdf/rapport_rdc_.pdf) (accessed 12 October 2018).

<sup>100</sup> Musila GM 'Between Rhetoric and Action: The Politics, Processes, and Practice of the ICC's Work in the DRC' (2009), Monograph 164, Institute for Security Studies.

<sup>101</sup> Article 14 of the ICC Statute.

<sup>102</sup> Letter of Referral from President Joseph Kabila to Prosecutor of the International Criminal Court, available at <https://www.issafrica.org/uploads/M164APPEND1.PDF> (accessed on 11<sup>th</sup> April 2016).

<sup>103</sup> Burke-White W 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo' (2005) 18 *Leiden Journal of International Law*.

<sup>104</sup> See Information on the Congo Situation available at <https://www.icc-cpi.int/drc> (accessed 11 July 2018); In international criminal law, the term 'situation' means a geographical area under investigation by the ICC and whose perpetrators of crimes under international law could be undergoing trial at the court.

War was largely concentrated on the Ituri region in which several regular armies of states and local rebel movements fought for its control.<sup>105</sup> Ituri is rich in mineral resources and due to that many internal and external antagonistic groups fought for its control.<sup>106</sup> The Ituri region is home to more than 18 ethnic groups but the devastating conflict that spanned from 1999 to 2003 saw three major tribes of Hema, Ngiti, and Lendu pitted against each other.<sup>107</sup>

Among other things, the international dimension of the Ituri conflict stems from the fact that the region shares borders with Rwanda, Uganda, and South Sudan.<sup>108</sup> As explained earlier, the devastating Ituri armed conflict broke out following the decision by Laurent-Désiré Kabila to remove Rwandans and Ugandans from the DRC.<sup>109</sup> That decision sparked the formation of rebel movements backed by Rwanda and Uganda, leading to a protracted and deadly armed conflict in the Eastern part of Congo DRC.<sup>110</sup>

In the *Lubanga* Judgment, it has been determined that the political vacuum that existed in Ituri was capitalised by foreign forces from Rwanda and Uganda who then fueled tribal antagonism between different ethnic groups.<sup>111</sup> In particular, the Uganda People's Defence Forces (UPDF), who camped in Bunia,<sup>112</sup> further fueled ethnic tensions by siding with the Hemas.<sup>113</sup>

The ethnic incitement by the Ugandans was manifested through military support to Hemas who in turn used the support to seize land from the Lendus.<sup>114</sup> The final straw to the Lendus political interests came into being when General Kazini of the UPDF appointed Adèle Lotsove Mugisa, a Hema, to govern Ituri under the immediate supervision of the Ugandans.<sup>115</sup> It is believed that the

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<sup>105</sup> *The Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, para 432 (*Katanga* Article 74 Judgment); Expert Report to the International Criminal Court by Roberto Garretón (Hereinafter 'The Garretón Report'), ICC-01/04-01/06-1655-Anx-tENG, 20 February 2009, at page 10.

<sup>106</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012 (*Lubanga* Article 74 Judgment) para 71.

<sup>107</sup> *Lubanga* Article 74 Judgment, paras 72-73.

<sup>108</sup> *Katanga* Article 74 Judgment, para 434.

<sup>109</sup> *Katanga* Article 74 Judgment, para 439.

<sup>110</sup> *Katanga* Article 74 Judgment, paras 439-441.

<sup>111</sup> *Lubanga* Article 74 Judgment, para 76.

<sup>112</sup> *Katanga* Article 74 Judgment, para 441.

<sup>113</sup> *Katanga* Article 74 Judgment, paras 442-443.

<sup>114</sup> The Garretón Report, ICC-01/04-01/06-1655-Anx-tENG, 15; *Katanga* Article 74 Judgment, para 443.

<sup>115</sup> *Lubanga* Article 74 Judgment, para 78; *Katanga* Article 74 Judgment, para 444.

armed conflict in Ituri was largely stirred up by the overtly divisive decision to place the region under Hemas and supporting them against other tribes.<sup>116</sup>

The strategic friendship between Hemas and foreign forces fighting for the control of Ituri was particularly detrimental to the interests of Lendus. Having settled in Ituri long before the arrival of Hemas from Uganda, Lendus were also side-lined by the Belgian colonialists who allowed Hemas to expand their influence through business control, easier access to education, and land ownership.<sup>117</sup> The confrontations between Hemas and Lendus led to the creation of tribal-based defence forces,<sup>118</sup> which would later be involved in the perpetration of egregious violations in Ituri.

At the ICC, it has been established that the ethnic militia groups that existed in Ituri between 2002 and 2003 waged indiscriminate attacks on defenceless civilians and, in the process, atrocious violations such as rape, murder, pillaging, looting, and destruction of property were committed.<sup>119</sup>

Although it would generally be inconceivable to view the ICC as a transitional justice mechanism for Congo, the manner and timing of its intervention rightly place the court as a strong alternative to weaker domestic prosecutions.<sup>120</sup> Despite a likelihood of fewer prosecutions as the Court only goes after those bearing the greatest responsibility for the commission of atrocity crimes,<sup>121</sup> its prosecutorial and investigative machinery is relatively stronger and friendlier towards the victims compared to some domestic courts. Likewise, the ICC Statute has an elaborate legal regime that ensures the victim's participation in all stages of the ICC proceedings.<sup>122</sup> The right of victims to

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<sup>116</sup> *Lubanga* Article 74 Judgment, para 79; *Katanga* Article 74 Judgment, para 444.

<sup>117</sup> The Garretón Report, ICC-01/04-01/06-1655-Anx-tENG, 15; 'Uganda in Eastern DRC: Fueling Political and Ethnic Strife', Human Rights Watch, March 2001, Volume 13 Number 2(A), at page 33, available at <https://www.hrw.org/report/2001/03/01/uganda-eastern-drc/fueling-political-and-ethnic-strife> (accessed 12 October 2018).

<sup>118</sup> *Lubanga* Article 74 Judgment, para 75.

<sup>119</sup> *Katanga* Article 74 Judgment, para 516; *Lubanga* Article 74 Judgment, para 138.

<sup>120</sup> Okafor OC and Ngwaba U 'The International Criminal Court as a Transitional Justice Mechanism in Africa: Some Critical Reflections' (2015) 9 *International Journal of Transitional Justice* 100.

<sup>121</sup> ICC Policy Paper on Case Selection and Prioritisation, paras 42 – 43, available at [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf) (accessed 12 October 2018).

<sup>122</sup> Victim participation at all stages of the ICC proceedings is guaranteed under Article 15 and 68(3) whereby the overall goal is to ensure that victim's rights and interests are not jeopardised by non-involvement.

*participate* is firmly embodied in the ICC Statute.<sup>123</sup> The victim participation framework is extensively dealt with in chapter three.

Although criticised for targeting small fish and for seeking to create conditions of impunity for government officials who had a less but critical connection to the Ituri conflict,<sup>124</sup> the ICC prosecutor decided to focus on Ituri, a region that was, at that time, subjected to all kinds of atrocities by the warring parties.<sup>125</sup> The section below offers some brief remarks on the Ituri cases at the ICC.

#### **1.2.4 Congolese Cases at the ICC: Some Remarks on Investigations and Charges**

The Congo *situation* is the first to be investigated by the ICC.<sup>126</sup> As stated earlier, the investigations focused on Ituri and especially on Lubanga's UPC (Union des Patriotes Congolais) and FPLC (Force Patriotique pour la Libération du Congo) that fought against Katanga's FNI (Front des Nationalistes Intégrationnistes) and FRPI (Force de Résistance Patriotique en Ituri).<sup>127</sup> The former military group represented Hemas while the latter stood for Lendu-Ngiti group. The goal of the UPC/FPLC under the leadership of Lubanga was to achieve political and military control over Ituri.<sup>128</sup>

Succinctly, the ethnic-based military groups were created to protect and foster antagonistic political and economic interests in Ituri and that triggered a devastating armed conflict.<sup>129</sup> For example, the Lendu-Ngiti coalition under the FRPI was specifically created to counter the

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<sup>123</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Separate and Dissenting Opinion of Judge René Blattman to Decision on victim's participation, ICC-01/04-01/06-1119, 18 January 2008, para. 13; ICC Policy Paper on Victim's Participation, ICC-OTP 2010.

<sup>124</sup> Mills K *International Responses to Mass Atrocities in Africa: Responsibility to Protect, Prosecute, and Palliate* (2015) 119-121.

<sup>125</sup> Van Woudenberg A 'Ethnically Targeted Violence in Ituri' in Malan M and Porto JG (eds) *Challenges of Peace Implementation. The UN Mission in the Democratic Republic of the Congo* (2004); Mbikavu EM (2012) 28-29; Vlassenroot K and Raeymaekers T 'The Politics of Rebellion and Intervention in Ituri: The Emergence of a New Political Complex?' (2004) 103 *Oxford Journal of African Affairs*.

<sup>126</sup> *Katanga* Article 74 Judgment, para 59.

<sup>127</sup> *Lubanga* Article 74 Judgment, paras 137-139.

<sup>128</sup> *Lubanga* Article 74 Judgment, paras 1136 and 1142;

<sup>129</sup> *Katanga* Article 74 Judgment, paras 568 and 578.



aggression of Lubanga's UPC in Ituri.<sup>130</sup> Explaining the interethnic dimension of the Ituri conflict in *Katanga*, the court noted that:

...The Lendu and the Ngiti saw all Hema as enemies and that they were generally driven by a desire for vengeance fuelled by ethnic hatred. In this regard, it submitted that the hatred of the Hema had developed within the Lendu and Ngiti communities, spread among the combatants and taken the form of acts of vengeance.<sup>131</sup>

Until now, ICC investigations into the Congo *situation* have yielded charges against four individuals. All the charges, including the individuals indicted, focused on the UPC and the FNI/FRPI, the two militia groups that existed in Ituri in the early 2000s.<sup>132</sup>

First, Thomas Lubanga Dyilo was charged as a co-perpetrator and convicted of the crime of recruiting children under the age of fifteen into the UPC/FPLC and using them as bodyguards and soldiers in an armed conflict in Ituri.<sup>133</sup> On the basis of evidence adduced before the court, Lubanga was found guilty on 14<sup>th</sup> March 2012.<sup>134</sup>

Lubanga's UPC/FPLC was responsible for a great deal of violence in that region. The FPLC (a militia group) was responsible for unleashing monstrous violence on defenceless women and children of Ituri and thereby occasioning deaths, loss of property through looting, destruction of properties, and violation of human dignity through the perpetration of sexual crimes on a large scale.<sup>135</sup>

The ICC determined that Lubanga, as a leader and commander of the UPC and FPLC respectively, co-perpetrated war crimes of conscripting, enlisting, and using children under the age of 15 to participate actively in hostilities from 1<sup>st</sup> September 2002 to 13<sup>th</sup> August 2003. He received a jail term of 14 years on the 10<sup>th</sup> of July 2012.<sup>136</sup>

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<sup>130</sup> *Katanga* Article 74 Judgment, para 578.

<sup>131</sup> *Katanga* Article 74 Judgment, para 696.

<sup>132</sup> *Lubanga* Article 74 Judgment, para 139.

<sup>133</sup> *Lubanga* Article 74 Judgment, paras 1354-1358.

<sup>134</sup> *Lubanga* Article 74 Judgment.

<sup>135</sup> Duroch F, McRae M, and Grais RF 'Description and consequences of sexual violence in Ituri province, Democratic Republic of Congo' (2011) *BMC International Health and Human Rights*.

<sup>136</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute ICC-01/04-01/06-2901, 10 July 2012.

Secondly, Germain Katanga, whose mode of liability was recharacterised by the court from indirect perpetration under Article 25(3)(a) to contribution to a group crime through ‘other means’ under Article 25(3)(d),<sup>137</sup> was convicted of the crimes of murder (both as a war crime and a crime against humanity), destruction of property, pillaging, and attacks against civilians.<sup>138</sup>

Thirdly, Mathieu Ngudjolo Chui, a Congolese of Lendu ethnicity, was arraigned before the ICC on 24<sup>th</sup> November 2009 to answer to war crimes and crimes against humanity allegedly committed through other persons (indirect co-perpetration) during the attack on Bogoro village on 24<sup>th</sup> February 2003.<sup>139</sup> On 18<sup>th</sup> December 2012, the ICC delivered its Article 74 judgment acquitting Chui of all the charges.<sup>140</sup>

Fourthly, Bosco Ntaganda is another UPC/FPLC commander to face charges at the ICC about crimes perpetrated in Ituri against non-Hema people in late 2002. As his trial nears conclusion at the time of writing, Ntaganda has been charged with numerous counts of war crimes and crimes against humanity allegedly committed through multiple modes of liability under Article 25(3) of the ICC Statute, including direct perpetration, indirect co-perpetration, ordering, inducing, and perpetration by other means.<sup>141</sup>

Amongst the four cases mentioned above, the Court has partly succeeded in only two cases (Lubanga and Katanga), and failed in the Chui case. Even though the administration of international criminal justice is not the sole responsibility of the ICC, the success of this global Criminal Court can only be measured by its work in eradicating impunity in conflict states. Eradication of impunity surely calls for prosecution of the right individuals (most responsible) and going for the right charges that represent the largest category of victimisation in a *situation* under investigation. That may not be the case for the Congo *situation* before the ICC.

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<sup>137</sup> *Katanga* Article 74 Judgment, at page 658.

<sup>138</sup> *Katanga* Article 74 Judgment, para 1691.

<sup>139</sup> Ngudjolo Chui Case Information Sheet available at <https://www.icc-cpi.int/drc/ngudjolo/Documents/ChuiEng.pdf> (accessed on 3 October 2018).

<sup>140</sup> *The Prosecutor v. Mathieu Ngudjolo*, Judgment pursuant to article 74 of the Statute (*Ngudjolo Chui* Article 74 Judgment), ICC-01/04-02/12-3-tENG, 26 December 2012, at page 197.

<sup>141</sup> Ntaganda Case Information Sheet available at <https://www.icc-cpi.int/drc/ntaganda/Documents/NtagandaEng.pdf> (accessed on 3 October 2018).

While anecdotal evidence indicates that the UPC/FPLC committed sexual and gender based crimes, the Prosecutor has been criticised for the exclusion of sexual violence charges in *Lubanga*.<sup>142</sup> In the *Chui* case, as noted above, the Prosecutor was unable to prove all the charges due to insufficient evidence. What does this entail for the victims? Successful criminal prosecutions at the ICC may have a beneficial impact on the victims regarding reparative justice as it solely depends on convictions. Acquittals or successful prosecutions that are not representative of the victimisation typologies suffered by the victims scuttles reparative justice. As expounded in chapter four, the scope and extent of reparations under Article 75 of the ICC Statute depend on the nature and breadth of charges preferred by the Prosecutor.

Therefore, it is critical for the Prosecutor to conduct effective investigations<sup>143</sup> of country *situations* before the ICC. It is for the Prosecutor to initiate such investigations.<sup>144</sup> Investigations must focus on obtaining evidence that is relevant in proving facts contained in an indictment.<sup>145</sup> Some cases fail on account of ineffective investigations by the Prosecutor. For example, in the *Chui* acquittal decision, the Court, while accepting that security fragility in a war-ravaged Congo DRC may have affected investigations,<sup>146</sup> poked holes into the Prosecutor's mediocre investigations that overlooked critical pieces of evidence.

In its measured criticism of the Prosecutor's work, the Court stated that the presence of forensic evidence could have helped its work in identifying the victims.<sup>147</sup> The Court also observed that testimonies from military commanders may have been critical for a good understanding of how the Bogoro attack was operationalised.<sup>148</sup> Similarly, the *Chui* acquittal decision noted that the trial could have been more effective if the Prosecutor visited places where the accused lived and prepared for the attack.<sup>149</sup> In the opinion of the Court, that could have ensured a better understanding of factual statements made before the Court. Also, the Prosecutor did not record a

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<sup>142</sup> Zidar A 'The ICC and its First Judgment in the Lubanga Case: One Giant Leap for Mankind, One Small Step for the Court?', SSRN Paper 2013, pp.12-13, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2519209](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2519209) (accessed 4 October 2018);

<sup>143</sup> Article 54(1)(b) ICC Statute.

<sup>144</sup> Article 53 ICC Statute.

<sup>145</sup> Article 54(1) ICC Statute.

<sup>146</sup> *Ngudjolo Chui* Article 74 Judgment, para 115.

<sup>147</sup> *Ngudjolo Chui* Article 74 Judgment, para 117.

<sup>148</sup> *Ngudjolo Chui* Article 74 Judgment, para 119.

<sup>149</sup> *Ngudjolo Chui* Article 74 Judgment, para 118.

statement of the accused at the time of investigations which could have been correlated to other testimonies recorded during the trial to determine their probative value.<sup>150</sup> Succinctly, it has been suggested by the Trial Chamber II that the lack of thorough investigations resulted in its acquittal verdict.<sup>151</sup>

The section below provides some preliminary insights into the reparation regime of the ICC to alert readers to some substantive issues that feature more extensively in the later chapters.

### **1.2.5 Reparation Decisions on the Congo Situation: An Interim Discussion**

Regarding reparative justice, on the 7<sup>th</sup> August 2012, the ICC Trial Chamber I issued the Court's first decision on reparation principles applicable in the Lubanga case.<sup>152</sup> The Court has since issued two other reparation decisions in *Katanga* and *Al Mahdi*.<sup>153</sup> To set the scene in this introductory section and considering that the other two reparation decisions closely follow *Lubanga*, an interim ground setting discussion below focuses on the Lubanga reparation decision. In a nutshell, it raises some substantive issues that have featured in *Lubanga* to pick them up for a more detailed discussion in the coming chapters.

The Lubanga reparation judgment was appealed to the Appeals Chamber of the ICC by the victims and the convicted person. In March 2015, the Appeals Chamber handed down its determination on the whole question of the convicted person's liability for reparations.<sup>154</sup> Among other things, the Appeals Chamber issued an amended order for reparations under which it stressed that the convicted person is legally obligated to remedy the harm caused by the crimes for which he was convicted.<sup>155</sup>

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<sup>150</sup> *Ngudjolo Chui* Article 74 Judgment, para 120.

<sup>151</sup> *Ngudjolo Chui* Article 74 Judgment, paras 116 and 123.

<sup>152</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations (*Lubanga* Reparations Judgment 2012), ICC-01/04-01/06-2904, 7 August 2012.

<sup>153</sup> *The Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute (*Katanga* Reparations Order 2017), ICC-01/04-01/07-3728-tENG, 24 March 2017; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order (*Al Mahdi* Reparations Order 2017), ICC-01/12-01/15-236, 17 August 2017.

<sup>154</sup> *Lubanga* Appeals Chamber Reparations Judgment (2015).

<sup>155</sup> *Lubanga* Appeals Chamber Reparations Judgment (2015), para 99; *Lubanga* Order for Reparations (2015), ICC-01/04-01/06-3129-AnxA 03-03-2015 2/20 NM A A2 A3, paras 20, 21, and 60.

Departing from the findings of the Trial Chamber, the Court insists that the order must be directed at the convicted person even when they are indigent.<sup>156</sup> Furthermore, the Court stresses that reparative justice is extremely crucial for victims of atrocity crimes under the jurisdiction of the Court and that the success of the ICC would arguably be judged on the basis of the success of its reparation regime.<sup>157</sup>

Irrespective of the individualised nature of reparation claims before the ICC, the reparation decision in *Lubanga* favours collective reparations over individual reparations.<sup>158</sup> While that preference is legally tenable under the ICC Statute,<sup>159</sup> it would be conceivably correct to hold that the Court arrived at this decision due to the convicted person's indigence and the limited resource base of the Trust Fund for Victims (Hereinafter "the Trust Fund or the TFV").

In the absence of the convicted person's resources, the Court requests the Trust Fund to advance its *other resources* to implement the reparations order.<sup>160</sup> The Court reminds the Trust Fund that it would still be legally tenable for it to claim the advanced resources from the convicted person;<sup>161</sup> that is, if the court will be able, in the future, to trace, seize, and confiscate assets belonging to Lubanga.<sup>162</sup> The question here is whether the TFV can sustainably be able to fund ICC reparations on behalf of indigent defendants in all the cases. Absent that, it is predictably impossible for the ICC to enforce its reparation orders through the TFV meaningfully.

About the modality of reparations, the Court holds that reparations should not be limited to restitution, compensation, and rehabilitation but they may also include transformative, preventative, or symbolic forms of redress.<sup>163</sup> To what extent can conviction-focused international crime reparations be transformative? Chapter four addresses this matter.

The Lubanga reparation judgment presents a pioneering opportunity for the ICC to test the viability of its reparations policy in a developing country such as the DRC that still grapples with a violent

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<sup>156</sup> *Lubanga* Appeals Chamber Reparations Judgment (2015), paras 69, 76, and 102-105.

<sup>157</sup> *Lubanga* Order for Reparations (2015), para 3.

<sup>158</sup> *Lubanga* Appeal Chamber Reparations Judgment (2015), para 140.

<sup>159</sup> Rule 97 (1), ICC Rules of Evidence and Procedure (ICC REP), ICC-PIDS-LT-02-002/13\_Eng, 2013.

<sup>160</sup> *Lubanga* Order for Reparations (2015), para 62.

<sup>161</sup> *Lubanga* Order for Reparations (2015), para 62.

<sup>162</sup> *Lubanga* Order for Reparations (2015), para 61.

<sup>163</sup> *Lubanga* Order for Reparations (2015), para 67.

past. Contemporary literature rightly praises the ICC for being a Criminal Court that offers an unprecedented opportunity for victim participation in its proceedings. Arguably, the ICC is the first permanent Criminal Court that is fully empowered to provide reparative justice for victims of gross human rights violations.

Despite having such unprecedented legal powers under the ICC Statute, it remains to be seen in practical terms the extent to which the Court will go in assisting victims of atrocity crimes to return to normal lives. The impending implementation of the *Lubanga* and *Katanga* reparation programs, through the Trust Fund, in the DRC will allow assessing the practical side (the utility aspect) of ICC reparations.

However, the *Lubanga* case and the Congo *situation* in general present specific and complex challenges for the ICC. Succinctly, three challenges are discussed below.

First, the DRC conflict has produced a large pool of victims and perpetrators, as well as *dual-identity* victims such as former child soldiers.<sup>164</sup> This legal problem is exacerbated by a lacuna in the *Lubanga* reparation judgment as regards dual or mixed-identity victims.<sup>165</sup> The judgment does not effectively address the critical issue of *mixed-identity victims*. The legal controversy surrounding child soldiers is exacerbated by the fact that, in the DRC, some communities do not comprehend child conscription as a crime. For example, as submitted by the TFV in *Lubanga* reparations case, many communities in the Eastern DRC regard child soldiers as heroes and therefore they do not perceive them as *victims* in the strictest meaning of the term.<sup>166</sup>

For example, in *Lubanga*, former child soldiers have been singled out as direct victims of the war crime of recruitment and use of child soldiers as fighters, bodyguards, cooks, and sex slaves in the Ituri conflict.<sup>167</sup> The child soldiers were largely drawn from *one ethnic community* in Ituri (Hema

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<sup>164</sup> Dual or complex identity victims is a term that has been used to define child soldiers as victims and perpetrators. For more on this; Morini C 'First victims then perpetrators: Child soldiers and International Law' (2010) 3 *Anuario Colombiana de Derecho Internacional, Numero Especial*, 187–208; Brits P and Michelle N 'The Criminal Liability of Child Soldiers: In Search of a Standard' (2012) 22 *Journal of Psychology in Africa* 467-472.

<sup>165</sup> For an understanding on complex-identity victims; see Moffett L 'Reparations for 'Guilty Victims': Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms' (2016) 10 *International Journal of Transitional Justice* 146-167.

<sup>166</sup> *Lubanga* Reparations Judgment (2012), para 44; *The Prosecutor v. Thomas Lubanga Dyilo*, Observations on Reparations in Response to the Scheduling Order of 14 March 2012 (*Lubanga* TFV Observations on Reparations), ICC-01/04-01/06-2872, 25 April 2012, para 145.

<sup>167</sup> Order for Reparations (2015), para 67 and 71.

people) and therefore there is a potential of recreating a highly polarised society in Ituri if collective reparations are only granted to former child soldiers belonging to one community.<sup>168</sup> Likewise, many Iturians have been discontented with the Lubanga verdict<sup>169</sup> at the ICC and because of this, some victims, for fear of reprisals from their communities, may not accept ICC reparations.<sup>170</sup>

Admittedly, there is no dispute especially in legal terms as regards the victim status of child soldiers. However, as the Court admits, reparation programmes need to take into account non-victimising cultural and social practices of a particular society when designing and planning for such programs.<sup>171</sup> In the Ituri conflict, the military confrontation was resorted to by the two competing communities (Hema and Lendu) to safeguard their political and economic interests. Consequently, members of the two communities felt the necessity to tolerate child conscription for the alleged wider good of their respective communities.

Thus, in the *Lubanga* reparation case, *the mixed-identity problem* of child soldiers needs to be contextualised through the historical, social, and cultural lens peculiar to the region of Ituri during and after the conflict to determine their place in the dispensation of reparative justice by the ICC. Unfortunately, the Court does not provide guidance on how to deal with *mixed-identity victims* in the *Lubanga* case. And since the reparations judgment excludes indirect victims who suffered from crimes committed by child soldiers, society may perceive ICC reparations as a reward for the perpetrators.<sup>172</sup> It follows that, advancing [collective] reparations to *mixed-identity victims* without first articulating their position in their respective communities may potentially lead to re-victimisation and creation of a new social conflict.<sup>173</sup>

Secondly, another challenge would relate to victim identification in the wake of, for example, the Lubanga trial that lasted nine years could be susceptible to a situation where many victims have relocated.<sup>174</sup> Some victims may have died, moved or relocated to distant regions in the DRC or

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<sup>168</sup> Goetz M 'Reparative Justice at the International Criminal Court: Best Practice or Tokenism?' in Wemmers JM *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (2014) 60.

<sup>169</sup> *Lubanga* TFV Observations on Reparations, ICC-01/04-01/06-2872, para 149.

<sup>170</sup> *Lubanga* TFV Observations on Reparations, ICC-01/04-01/06-2872, para 150.

<sup>171</sup> *Lubanga* Order for Reparations (2015), para 47.

<sup>172</sup> Manirabona and Wemmers (2014) 1003.

<sup>173</sup> Goetz (2014) 61.

<sup>174</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Second Report of the Registry on Reparations, ICC-01/04-01/06-2806, 1 September 2011, para 97.

abroad. Victim identification is crucial to the *completeness* of a reparations program. A reparation scheme becomes *complete* when meaningful reparations are provided to all the right victims who are eligible.<sup>175</sup>

Therefore, it is crucial that drivers of a reparation programme can identify and verify victim status through credible sources of information. Owing to the lengthy nature of ICC proceedings and the potential obstacles to obtaining evidence in a war-torn country such as the DRC,<sup>176</sup> there would be a huge challenge regarding the victims being able to produce *sufficient evidence* to prove their victimhood as required by the ICC.<sup>177</sup> Exemplary, the Trust Fund for victims has also admitted that the exact number of children recruited by Lubanga is not known.<sup>178</sup> Therefore, nailing down the whole issue of victim identification may go down to the methodology procedure adopted by the Trust Fund.

Thirdly, victim eligibility issues may affect the success of ICC reparations. As a matter of principle, only direct and indirect victims who suffered harm relating to, for example, the recruitment of child soldiers in the Ituri conflict would qualify for reparation in the Lubanga case.<sup>179</sup> Requiring a nexus between the victim, the harm, and the charges established may potentially lead to the creation of new victims by *exclusion* in reparation programmes. Arguably, since only child soldiers have been regarded as direct victims of Lubanga crimes, it follows that those who suffered from crimes perpetrated by child soldiers are excluded.<sup>180</sup>

The Registry of the ICC has also alluded to the possibility of the creation of *excluded victims* in the Lubanga reparation programme at the ICC.<sup>181</sup> Certainly, the looming creation of a new category of victims in the implementation of ICC reparations is linked to prosecutorial choices. The Prosecutor narrowly limited charges in *Lubanga* to the war crime of using child soldiers despite

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<sup>175</sup> ‘Rule of Law Tools for Post-Conflict States: Reparations Programs’ (2008), at page 15, available at <http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf> (accessed on 29 February 2016).

<sup>176</sup> Wiersing A ‘Lubanga and Its Implications for Victims Seeking Reparations under the International Criminal Court’ (2012) 4 *Amsterdam Law Forum* 25.

<sup>177</sup> On challenges to identifying victims; *The Prosecutor v. Thomas Lubanga Dyilo*, Redaction of Filing on Reparations and Draft Implementation Plan, ICC-01/04-01/06-3177-Red, 03 November 2015, paras 40 – 42 ; Manirabona and Wemmers (2013) 999.

<sup>178</sup> *Lubanga* TFV Observations on Reparations (2012), para.106.

<sup>179</sup> *Lubanga* Appeals Chamber Reparations Judgment (2015), paras 196-198.

<sup>180</sup> *Lubanga* Appeals Chamber Reparations Judgment (2015), para 52.

<sup>181</sup> *Lubanga* Second Report of the Registry on Reparations (2011), ICC-01/04-01/06-2806, para 5.



the fact that rebel soldiers from Lubanga’s FPLC committed other heinous violations including sexual crimes on a large scale.<sup>182</sup>

The ICC has held that victims of sexual and gender-based crimes could not benefit from an order for reparations against Lubanga as such crimes, apart from not being charged, were not considered as part of the gravity of the crime of child recruitment during sentencing.<sup>183</sup> The Court indirectly admits that other victims may be left out and that is why it ‘wrongly’ requests the Trust Fund to use its *assistance mandate* to extend reparations to those left out.<sup>184</sup> The term ‘assistance mandate’ refers to a role of the Trust Fund for Victims in using voluntary contributions and donations (other resources) to provide rehabilitative justice for victims under the jurisdiction of the ICC.<sup>185</sup>

Unlike the reparations mandate, the *assistance mandate* is not linked to a criminal conviction and thus, it was legally untenable for the Court to ask the Trust Fund to use its resources to “redress gaps in the eligibility for reparations that stem from the persecutor’s strategic choices and narrow charging”.<sup>186</sup> In light of the preceding, this study seeks to address the following critical issues and questions:

First, is the ICC legal regime adequately capable of providing *meaningful* reparations to the victims of crimes under international law?

Secondly, is the DRC legal system and post conflict justice supportive of reparative complementarity?

### **1.3 Objectives of the Study**

The overriding focus of the study is to investigate the role of the ICC in the provision of reparations to victims of core crimes in the DRC through criminal prosecutions of the perpetrators. Intrinsic to this objective is the desire to examine the potential impact of *judicial reparations* as a response

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<sup>182</sup> *Lubanga* Article 74 Judgment (2012), para 16; Mariniello T ‘Prosecutor v Thomas Lubanga Dyilo: The First Judgment of the International Criminal Court’s Trial Chamber’ (2012) 1 *International Human Rights Law Review* 137-147; Clark P ‘In the Shadow of the Volcano: Democracy and Justice in Congo’ (2007) 54 *Dissent* 34.

<sup>183</sup> *Lubanga* Appeals Chamber Reparations Judgment (2015), para 196.

<sup>184</sup> Order for reparations (2015), para 64.

<sup>185</sup> Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3, Regulations 47 and 48.

<sup>186</sup> *Lubanga* Reparations Draft Implementation Plan, ICC-01/04-01/06-3177-Red, paras 152 and 157.

to atrocity crimes in conflict or transitional states such as the DRC. Thus, the study has the following specific objectives:

First, to briefly provide a historical synopsis of the Congo conflict to create an understanding of the nature and magnitude of the violence that resulted in an intervention by the ICC in 2004.

Secondly, to critically analyse specific legal and factual issues relating to reparation principles applicable to Congolese cases at the ICC and to determine the potential contribution of the cases to the development of the future reparations jurisprudence at the ICC.

Thirdly, to briefly examine the DRC's domestic response to the conflict, in particular, its responsibility to repair (reparative complementarity) to determine its compatibility with international human rights law.

#### **1.4 Literature Survey**

There is an extremely large body of literature devoted to the Congo conflict. Sources of this literature emanate from books, journal articles, conference papers, media reports, reports by human rights NGO's, UN and government official reports, as well as court judgments. Many authors have invariably tried to offer a critical understanding of the reasons for the conflict ranging from a scramble over natural resources and protection of ethnic interests, to corruption, dictatorship, and proxy wars supported by foreign forces.<sup>187</sup> In an attempt to define the conflict, many commentators have rightly characterised the conflict as the worst humanitarian crisis since World War II for claiming more than 5 million lives owing to murder, famine, and war-related diseases.

One critical characteristic of the DRC conflict that is shared by many authors is the perpetration of sexual and gender-based crimes on a large scale.<sup>188</sup> Likewise, commentators agree that crimes under international law were perpetrated.

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<sup>187</sup> Turner T (2007); Ikambana P (2007); Reyntjens F (2009); Gondola D *The History of Congo* (2002); Nzongola-Ntalaja G *The Congo from Leopold to Kabila: A People's History* (2002); Renton D, Seddon D, and Zeilig L (eds) *The Congo: Plunder and Resistance* (2007); Clark (2002); Gerard E and Kuklick B *Death in the Congo: Murdering Patrice Lumumba* (2015); 'The Curse of Gold: Democratic Republic of Congo', Human Rights Watch (2005), available at [https://www.hrw.org/sites/default/files/reports/drc0505\\_0.pdf](https://www.hrw.org/sites/default/files/reports/drc0505_0.pdf) (accessed 13 October 2018).

<sup>188</sup> 'The War Within the War: Sexual Violence against Women and Girls in Eastern Congo', Human Rights Watch (2002); 'Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo', Human Rights Watch (2009).

The other bunch of literature on the DRC conflict relates to national and international responses to the conflict. During the transitional phase, there were calls for justice through a judicial mechanism of an international character and for truth-seeking through a truth commission. At the time, Congolese scholars and civil society campaigned for an international intervention in the provision of justice for past crimes in that they believed the local justice machinery was too corrupt and operationally incapacitated to carry out meaningful investigations and prosecutions.<sup>189</sup>

The view regarding the inability of the domestic courts to handle the aftermath of the violence was vindicated, at a later stage, by President Kabila's self-referral of the Congo *situation* to the ICC. Despite the intervention of the ICC, domestic prosecutions continued through military courts. However, as stated earlier, there is a substantial contribution of literature in this regard that point to a failure of the domestic justice system.

Impunity is still a problem in the DRC. The available literature has documented the failure of reparative justice through the courts in the DRC due to corruption, lack of political will, scarcity of government resources, access-limiting legal fees, the indigence of the convicted persons, weak laws, and lack of grassroots' awareness of reparative justice.<sup>190</sup>

With the promulgation of the UN Basic Principles on Reparations a decade ago, a body of literature has emerged covering broad issues relating to victims' rights to truth and reparations in the context of international human rights law and international criminal justice. Six years after the ICC handed down its first reparations judgment in the Lubanga case in 2012, a stream of literature has also

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<sup>189</sup> Musila (2009) 33-49.

<sup>190</sup> Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights (2011), available at <http://www.refworld.org/docid/4d708ae32.html> (accessed 13 October 2018); 'Protection and Reparation under Congolese Law for Survivors of Sexual and Gender-based violence: Situational Analysis and Prospects for Reform', ACORD DRC (2010), available at <http://www.acordinternational.org/silo/files/drc--protection-and-reparation-for-survivors-of-sexual-and-genderbased-violence.pdf> (accessed on 4<sup>th</sup> May 2016); 'Judgment Denied: The Failure to Fulfil Court Ordered Reparations for Victims of Serious Crimes in the DRC' ICTJ (2012), available at <https://www.ictj.org/publication/judgement-denied-failure-fulfill-court-ordered-reparations-victims-serious-crimes> (accessed on 13<sup>th</sup> April 2016); 'Rebuilding Courts and Trust: An Assessment of the Needs of the Justice System in the DRC', International Bar Association (2009); 'Barriers to Justice: Implementing Reparations for Victims of Sexual Violence in the DRC', Columbia School of International Public Affairs (2013), available at <https://phr.org/resources/barriers-to-justice-for-survivors-of-sexual-violence-in-the-drc/> (accessed 13 October 2018).

developed regarding the viability of reparation principles pronounced by the Court and the implications of the judgment for the victims of core crimes in the DRC.<sup>191</sup>

Since the work of the ICC in the DRC is still in progress, its corresponding literature on reparations is also still fragmented and developing gradually. Aptly put, a substantial part of the literature revolves around the prominence of victim's rights at the ICC that essentially glorifies the court for being victim-friendly and for being able to award reparations for the victims of crimes within the jurisdiction of the court.<sup>192</sup>

However, one controversial issue that stems from some sections of the prevailing literature is the preference for collective and transformative reparations. Generally, proponents of collective and transformative reparations have argued that the ICC must address victims' needs through reparation programs or measures that are capable restructuring a society's socio-political and economic conditions that prevailed before or during the conflict.<sup>193</sup>

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<sup>191</sup> Wiersing (2012); Durbach A and Chappell L 'Leaving Behind the Age of Impunity: Victims of Gender Violence and the Promise of Reparations' 16 (2014) *International Feminist Journal of Politics*; Dixon PJ 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' 10 (2016) *International Journal of Transitional Justice*; Stahn C 'Reparative Justice after the Lubanga Appeal Judgment: New Prospects for Expressivism and Participatory Justice or 'Juridified Victimhood' by Other Means?' 13 (2015) *Journal of International Criminal Justice*; Mégret F 'The Case for Collective Reparations before the ICC' in Wemmers JM *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (2014); Capone F An 'Appraisal of the Al Mahdi Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes against Cultural Heritage' (2018) *Journal of International Criminal Justice*.

<sup>192</sup> De Brower 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund and their Families' (2007) *Leiden Journal of International Law* 207-237; Stahn (2015); Amezcua-Noriega O 'Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections' (2011) *Transitional Justice Network, University of Essex*; Evans C 'Right to reparations in international law for victims of armed conflict: Convergence of law and practice?' (2010) PhD Thesis, London School of Economics and Political Science (United Kingdom); Travis H 'Reparations for Mass Atrocities as a Path to Peace: After Kiobel V. Royal Dutch Petroleum Co., Can Victims Seek Relief at the International Criminal Court?' (2015) 40 *Brook Journal of International Law*; Mégret F 'The International Criminal Court and the Failure to Mention Symbolic Reparations' (2008) SSRN Papers, available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1275087](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275087)> (accessed on 21 April 2016); Contreras-Garduño D and Fraser J 'The Identification Of Victims Before The Inter-American Court Of Human Rights And The International Criminal Court And Its Impact On Participation And Reparation: A Domino Effect?' (2015) *Intersentia*; Aubry S and Henao-Trip MI (Eds.) 'Collective Reparations and the International Criminal Court' (2011) *Transitional Justice Network, University of Essex*.

<sup>193</sup> Hoyle C and Ullrich L 'New Court, New Justice? The Evolution of Justice for Victims at Domestic Courts and at the International Criminal Court' (2014) 12 *Journal of International Criminal Justice* 692-693; Aubry and Henao-Trip (2011); Moffett L 'Reparations for Victims at the International Criminal Court: a new way forward?' (2017) 21 *The International Journal of Human Rights* 1204 – 1222.

However, some commentators have either neglected or overlooked some legal and factual difficulties which may arise from transformative and collective reparations within the ICC Statute framework. Collective reparations may pose some challenges stemming from, for example, substantive jurisdictional limitations of ICC reparations.<sup>194</sup> Such limitations include the following.

First, the ICC Statute requires a nexus between the convicted person's charges and the harm suffered by victims and the obligation to repair harm goes to the convicted person. As the prosecutorial policy of the ICC indicates that charges will always be narrow in scope, leaving out a large number of crimes; it means that the scope of reparations will be limited to the charges established and therefore a large section of victims will be left out of the court process.

Secondly, the conviction-focused reparation system of the ICC is susceptible to creating a pyramid of victims with unequal status as regards reparations; for example, qualified and non-qualified victims owing to acquittals (Ngudjolo Chui and Bemba cases), non-prosecution and termination of proceedings (Al-Bashir and Kenyatta cases), and narrow charging (Lubanga case).<sup>195</sup> The consequence of 'excluded victims', for example, will be to render collective reparations ineffective and potentially discriminatory.

The most critical question which this thesis attempts to answer is whether it would be prudent and possible for a criminal court to pursue reparations geared at solving societal inequalities with the resulting danger of confusing such reparations for development programmes to be implemented by governments.<sup>196</sup>

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<sup>194</sup> Aubry and Henao-Trip (2011), para 22 at page 9.

<sup>195</sup> On the distinction between victims of the *case* and victims of the *situation*, 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 (Public Redacted Version) ICC-01/04-101, 22 March 2006; Mégret F 'Reparations before the ICC: The Need for Pragmatism and Creativity' in Steinberg RH (ed) *Contemporary Issues Facing the International Criminal Court* (2016) 256 – 257.

<sup>196</sup> *The Prosecutor v. Germain Katanga*, Queen's University Belfast's Human Rights Centre (HRC) and University of Ulster's Transitional Justice Institute (TJI) Submission on Reparations Issues pursuant to Article 75 of the Statute, No. ICC-01/04-01/07, 14/05/2015, para 6; Trust Fund for Victims Draft Implementation Plan for collective reparations to victims, Submitted to the Amended Reparations Order of 3 March 2015 in the case against Thomas Lubanga Dyilo (ICC-01/04-01/06), ICC-01/04-01/06-3177-AnxA, para 70.

Thirdly, there is an enforcement problem that relates to the indigence of convicted persons as in the Lubanga case.<sup>197</sup> In *Lubanga*, the ICC has attempted to diffuse the problem by vicariously transferring the burden of enforcing collective reparations to the Trust Fund.<sup>198</sup> Among other things, that solution could potentially lead to a violation of legal rights of the convicted person as the court has suggested, for example, that defence has no right to scrutinise individual applications for reparations when a collective approach to reparations is preferred.<sup>199</sup> That may create a legal problem as, technically, the convicted person is still liable for reparations even though the implementer is the Trust Fund.

In an article that exposes critical limitations of the ICC reparation system, Moffett makes a case for the invocation of state responsibility through the doctrine of reparative complementarity under Article 75 of the ICC Statute.<sup>200</sup> He argues that reparative complementarity could be a solution to ‘limited reparations’ of the ICC.<sup>201</sup> Despite being a good proposal, the author does not offer substantive procedural avenues on how to operationalise state responsibility within the ICC Statute. This thesis deals with such an issue in a more detailed manner in chapter five.

The study seeks to enlarge the discussion on different and competing concepts of victim’s right to reparation in the context of international criminal law through the lens of international human rights law

## **1.5 Research Methodology**

The study is a desktop and library research conducted at Freie Universität Berlin and the Hebrew University of Jerusalem. It involves a documentary review and analysis of the relevant primary and secondary sources of information available electronically and in hard print.

## **1.6 Limitation of the Study**

The core theme of the study concerns the implementation of the right to reparation within the ICC Statute framework. The study focuses on the current Congolese cases under the jurisdiction of the

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<sup>197</sup> *Lubanga* Reparations Judgment (2012), para 269.

<sup>198</sup> *Lubanga* Reparations Order (2015) para 62; *Lubanga* Reparations Judgment (2012), para 273.

<sup>199</sup> *Lubanga* Appeals Chamber Reparations Judgment (2015), para.151.

<sup>200</sup> Moffet L ‘Reparative complementarity: ensuring an effective remedy for victims in the reparation regime of the International Criminal Court’ (2013) 17 *The International Journal of Human Rights* 368-390.

<sup>201</sup> Moffett (2013) page 383; Moffett (2017) 1214-1215.

ICC, especially the reparation judgments in *Lubanga* and *Katanga* cases. While it is expected that the ICC will deliver a reparation judgment in the Ntaganda case shortly, the conceptual issues that have been identified and discussed in the thesis pertain to reparation judgments in *Lubanga*, *Katanga*, and *Al Mahdi*.

It is crucial to state that the approach and line of argument adopted in this study relate to ICC reparation decisions handed down until November 2018. Since there are a number of cases pending at the ICC, it is expected that the ICC jurisprudence on reparative justice will keep changing in the future and therefore it would be proper to concede at the outset that facts analysed as well as opinions and conclusions developed under this study relate to developments at the ICC not beyond November 2018.

### **1.7 Outline of the Study**

The study has six chapters. The introductory chapter opens with a presentation of the evolution of the right to reparation under international law. Then, it offers a historical account of the conflict in the DRC with the ultimate aim of pointing to the reader that events that led to the intervention of the ICC in 2004 had their origin in the DRC's oppressive regimes and antagonistic societal relations right from the time of Belgian colonists to Mobutu's Zaire and beyond.

Chapter two discusses post conflict justice in the DRC with a focus on reparative complementarity (the responsibility to repair). On domestic reparations, the chapter covers the aspect of *guarantees of non-repetition* by looking at the structural and institutional reforms implemented by the DRC government in securing the protection of human rights and the promotion of accountability.

Chapter three provides a descriptive and critical analysis of the legal regime applicable to the participation of victims in the proceedings at the ICC. Central to the discussion is the Court's interpretation of Article 68(3) of the ICC Statute that grants a *qualified* right for the participation of victims in the proceedings.

Chapter four, the core, covers reparation judgments of the ICC that have been handed down until November 2018. The chapter provides a critical and measured analysis of the reparation principles adjudicated at the ICC to determine how they reflect on victim's right to receive *adequate, effective, and prompt* reparation as required under international law.

Chapter five presents ‘state-defendant reparative co-responsibility’ as a solution to the two identified shortcomings of the ICC reparation system; one, impecunious defendants, and two, resource constraints.

Chapter six closes the curtain to the thesis by offering conclusive recommendations on what should be done for the ICC to have a working reparation regime.



## CHAPTER TWO

### RESPONSIBILITY TO REPAIR: REPARATIVE COMPLEMENTARITY AND POST- CONFLICT JUSTICE IN THE DRC

#### 2.1 Introductory Remarks

The chapter gauges the extent to which the DRC has gone in complementing the ICC by closing down the impunity gap through prosecutions and reparations.<sup>202</sup> It is my submission that, in the fullness of time, the success of international criminal justice with respect to (the DRC) cases before the ICC will heavily depend on complementary justice efforts undertaken at the domestic level.<sup>203</sup> The chapter provides a reasoned account of reparative justice measures taken in the DRC about atrocity crimes perpetrated during the Congo Wars.

However, the chapter does not provide a comprehensive evaluation of the DRC justice system. It rather provides a general overview of the domestic response to the ICC crimes and the provision of reparations to the victims. The DRC reparations regime is assessed to determine its readiness, accessibility, and viability in providing redress to the victims.

While a larger portion of the chapter is devoted to the concept of *reparative complementarity* as an offshoot of the state's responsibility to repair, some sections indulge in a discussion of transitional justice issues, such as the truth commission and amnesties. Mindful of the necessarily limited reparations regime of the ICC, the chapter covers the aspect of 'reparative complementarity'—meaning national justice efforts geared at providing reparative justice to the victims of international crimes in the DRC. Aptly put, the reparative responsibility of the DRC can be traced to the government's human rights obligations under the 2006 Constitution. The government is obligated to protect people against human rights violations and to ensure that there is an enforceable legal mechanism for the promotion, protection, and enjoyment of rights.<sup>204</sup>

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<sup>202</sup> Squeezing the impunity gap is a major objective of the doctrine of complementarity in the ICC; see Bekou O 'The ICC and Capacity Building at the National Level' in Stahn C (ed) *The Law and Practice of the International Criminal Court* (2015) 1248.

<sup>203</sup> *Katanga* Reparations Order (2017), para 321.

<sup>204</sup> Article 16 and 52 of the 2006 Constitution of the DRC.

Also, public authorities have a positive obligation to ensuring that people's rights are promoted and protected.<sup>205</sup> The obligation to protect and ensure the enjoyment of rights is coupled with the obligation to investigate violations, prosecute perpetrators, and afford a remedy for the victims. Such an obligation, as per customary international human rights law, exists irrespective of whether the territorial state is the perpetrator of violations or not.<sup>206</sup>

Additionally, the UN Basic Principles on the Right to Reparations provides that 'victimhood' is independent of the identification and prosecution of perpetrators,<sup>207</sup> and territorial states are obligated to redress the victims upon the inability or unwillingness of the perpetrator to do so.<sup>208</sup>

Therefore, as stated in the UN report on the inquiry on Darfur, "states have the obligation to act not only against the perpetrators but also on behalf of victims".<sup>209</sup> In atrocity crime situations, acting for the victims would mean indiscriminate prosecutions of the perpetrators, setting up an impartial truth commission to provide an objective historical account of the violations, and the provision of effective redress to the victims.<sup>210</sup> The mentioned justice modalities need not be implemented simultaneously.

## **2.2 Post Conflict Justice: Has the Congolese State Acted on Behalf of the Victims?**

The aftermath of grave breaches of human rights would usually be a painful experience for any country. Given the gravity and intensity of the perpetration of past crimes in the DRC, the demands for justice are myriad and enormous, often unparalleled with the readiness and capability of the justice regime.<sup>211</sup> Since transitional justice principles are not universal to all conflict situations, adjustments around such principles to flexibly respond to particular conflict scenarios could be warranted.

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<sup>205</sup> Article 66 of the Constitution of the DRC.

<sup>206</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (Geneva, 25 January 2005), para 598 at page 151; UN Mapping Report on Congo, paras 1086-1087.

<sup>207</sup> UN Basic Principles on Reparations (2005), para 9.

<sup>208</sup> UN Basic Principles on Reparations (2005), para 16.

<sup>209</sup> UN Inquiry on Darfur (2005), para 590 at page 150; The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, Report of the UN Secretary General, S/2011/634, 12 October 2011, at para 26.

<sup>210</sup> The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General, S/2004/616, 12 August 2004, para 54 at page 18.

<sup>211</sup> Roht-Arriaza N 'Measures of Non-Repetition in Transitional Justice: The Missing Link?' 2016, *University of California Hastings Research Paper No.171*, at page 2; available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2746055](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2746055) (accessed 20th November 2017).

Consequently, conflict states tend to find themselves in a delicate situation when trying to find a balance between different competing interests, for example, peace versus justice, to produce a working transitional justice policy.<sup>212</sup> As it will be demonstrated later, the ‘peace-building rhetoric’ advocated by the international community has ultimately failed to deliver **substantive** justice outcomes for the victims in the DRC.

While some mechanisms could be utilised to achieve the basic goals of transitional justice (reconciliation, truth, and justice for the victims), it is argued that a human rights compliant transitional justice regime must incorporate at least four international human rights law precepts. Such precepts include a state’s obligation to investigate breaches and pursue criminal justice for core crimes; objective truth-seeking regarding the violations; providing effective redress to the victims; and an introduction of preventative measures to ensure non-recurrence of atrocities.<sup>213</sup> Furthermore, active victim participation in transitional justice processes is essential for a successful transitional justice policy.<sup>214</sup>

Until now, the DRC has not had a holistic **national** transitional justice policy that provides for coherent measures for dealing with a very long and painful history of atrocity crimes.<sup>215</sup> Nevertheless, one could posit that the post-conflict internationally negotiated pact, namely the Global and All Inclusive Agreement of December 2002<sup>216</sup> and the Sun City Agreements of April 2003, constitute the ‘transitional justice content’ for the DRC.<sup>217</sup>

Being an end product of the protracted Inter-Congolese Dialogue, the Sun City Agreements embody resolutions on multi-dimensional post-atrocity justice mechanisms that include: the

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<sup>212</sup> Sriram CL and Pillay S (eds) *Peace versus Justice?: the Dilemma of Transitional Justice in Africa* (2009); Van Der M and Lykes MB ‘Transitional Justice Processes as Teachable Moments’ (2016) 10 *International Journal of Transitional Justice* 361-365.

<sup>213</sup> *Transitional Justice and Social, Economic, and Cultural Rights* (Geneva 2014), UN Publication HR/PUB/13/5, at page 5, available at <http://www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf> (accessed 19th November 2017).

<sup>214</sup> Méndez JE ‘Victims as Protagonists in Transitional Justice’ (2016) 10 *The International Journal of Transitional Justice* 1-5.

<sup>215</sup> UN Mapping Report on Congo, para 1005.

<sup>216</sup> Global and Inclusive Agreement on Transition in the DR Congo: Inter-Congolese Dialogue - Political negotiations on the peace process and on transition in the DRC (16 December 2002).

<sup>217</sup> The Final Act of the Inter-Congolese Dialogue (The Sun City Agreement) is available at [https://peacemaker.un.org/sites/peacemaker.un.org/files/CD\\_030402\\_SunCityAgreement.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/CD_030402_SunCityAgreement.pdf) (accessed 20th November 2017); UN Mapping Report on Congo, paras 980-981.

creation of a truth commission to create a historical record on the violations;<sup>218</sup> establishment of an international criminal court to prosecute atrocity crimes;<sup>219</sup> restoring the rule of law and democratic governance;<sup>220</sup> disarmament of the rebel forces;<sup>221</sup> creation of a new national army;<sup>222</sup> war reparations;<sup>223</sup> restitution of pillaged and plundered properties;<sup>224</sup> creation of a human rights observatory;<sup>225</sup> measures for cultural integration and peaceful coexistence;<sup>226</sup> reconstruction of destroyed towns;<sup>227</sup> reforming military justice;<sup>228</sup> demobilisation and reintegration of child soldiers;<sup>229</sup> and rebuilding of social service institutions.<sup>230</sup>

Such transitional justice solutions as embodied in the Sun City Agreements were expected to be implemented by the transitional government under President Joseph Kabila. The transitional period officially ended after the 2006 elections.<sup>231</sup> The transition agreement specifically stated that the transition period shall end with the election of a new President.<sup>232</sup> Looking back on the achievements of the transitional government during that period (2002–2006), one can safely conclude that there have not been any meaningful gains for the victims. A 2007 UN Security Council Report concluded that transitional justice had not been implemented as prescribed by the transition agreement.<sup>233</sup>

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<sup>218</sup> Resolution No: DIC/COR/04.

<sup>219</sup> Resolution No: DIC/CPR/05.

<sup>220</sup> Resolution No: DIC/CPJ/03.

<sup>221</sup> Resolution No: DIC/CDS/02.

<sup>222</sup> Resolution No: DIC/CDS/04.

<sup>223</sup> Resolution No: DIC/CEF/01.

<sup>224</sup> Resolutions No: DIC/CPR/01 and DIC/CEF/02.

<sup>225</sup> Resolution No: DIC/CHSC/08.

<sup>226</sup> Resolution No: DIC/CHSC/06.

<sup>227</sup> Resolution No: DIC/CHSC/04.

<sup>228</sup> Resolution No: DIC/CPJ/06.

<sup>229</sup> Resolution No: DIC/DCS/03.

<sup>230</sup> Resolution No: DIC/CHSC/01.

<sup>231</sup> Klosterboer B and Hartmann-Mahmud L 'Difficult to Repair: Applying African Models for Transitional Justice to Peace and Restoration Prospects in the Democratic Republic of the Congo' (2013) 3 *African Conflict and Peacebuilding Review* 59; Autesserre S *The Trouble with the Congo: Local Violence and the Failure of International Building* (2010) 232.

<sup>232</sup> Global and Inclusive Agreement on Transition in the DR Congo: Inter-Congolese Dialogue - Political negotiations on the peace process and on transition in the DRC at para IV.

<sup>233</sup> Twenty-third Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2007/156, para 23.

It is submitted that the failure of transitional justice in the DRC hinges on the typology of conflict resolution model adopted during the peace talks at the behest of the international community. The dominant narrative was that the DRC was a ‘failed state’ and therefore the transition model adopted was meant to **rebuild** the state through ending belligerents, disarming rebel groups, sharing state power, introducing democratic elections and a new constitutional dispensation.<sup>234</sup> Clearly, victim’s justice was not a priority. Thus, with the help of international intervention, the transitional government somewhat succeeded in ending major belligerents and introducing constitutional democracy in Congo.<sup>235</sup>

Despite those gains, there has been little success in peace-building and transitional justice.<sup>236</sup> Arguably, the major undoing in Congo’s transition is the minimal attention to victims’ justice coupled with the insignificant strengthening of rule of law institutions, most of which have failed to make war lords and political elites account for their atrocities. That echoes Stearns who argues that “the Congolese peace process has actually been remarkably successful at reuniting the country and forging a political settlement among belligerents. But it has been much less successful at reforming state institutions and holding political elites accountable for their behavior”.<sup>237</sup>

Of the transitional justice solutions embodied in the Sun City Accord, only a truth commission, *selective* prosecutions, and amnesties were pursued by the government, with little or no success in ending impunity. The Global and All Inclusive Agreement provided for the creation of a Truth Commission (TRC) for “re-establishing the truth, and promoting peace, justice, forgiveness and national reconciliation”.<sup>238</sup> Through Organic Law No. 04/17 of 30 July 2004, the TRC had a lengthy mandate of undertaking its truth-seeking investigative task about crimes committed between 1960 and 2003.

Nevertheless, contrary to its mandate and legitimate expectations of the Congolese people, the TRC failed to yield any substantive results in terms of conducting objective and results-oriented investigations regarding the grave crimes that have been committed in the DRC since

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<sup>234</sup> Daley P ‘Challenges to Peace: Conflict Resolution in the Great Lakes Region of Africa’ (2006) 27 *Third World Quarterly* 304.

<sup>235</sup> Autesserre (2010) 232-233.

<sup>236</sup> Autesserre (2010) 233-234.

<sup>237</sup> Stearns JK ‘The Democratic Republic of the Congo: An Elusive Peace’ in Khadiagala GM *War and Peace in Africa’s Great Lakes Region* (2017) 44.

<sup>238</sup> Resolution No: DIC/COR/04 at para 1, page 87 of the Final Act of the Inter-Congolese Dialogue.

independence.<sup>239</sup> Consequently, many scholars have slammed the work of Congo's truth commission as merely 'cosmetic'.<sup>240</sup>

Aptly put, the TRC failed because it had a highly politicized membership incorporating people who were hugely complicity in atrocity crimes,<sup>241</sup> in addition to a lengthy investigative mandate involving crimes spanning over a period of 43 years. As a result of political partiality in the way the truth commission was constituted, atrocities perpetrated by the powerful warlords were largely overlooked during the investigations.<sup>242</sup>

Amnesties have also been cited as an important component of the transition in the DRC, without which there could have been no ceasefire. The transition agreement provided that "to achieve national reconciliation, amnesty shall be granted for acts of war, political and opinion breaches of the law, with the exception of war crimes, genocide, and crimes against humanity".<sup>243</sup>

Accordingly, a law was enacted in 2005 that allowed amnesty for belligerency and political crimes but not for atrocity crimes.<sup>244</sup> A similar law was also enacted in 2009 to pardon perpetrators of the insurgency in the Kivus.<sup>245</sup> It is crucial to note that the amnesty laws were in line with international law for not allowing amnesty for crimes under international law. Being violations of *jus cogens* norms, war crimes, genocide, and crimes against humanity must be prosecuted.<sup>246</sup>

In as much as the amnesty regime was meant to make war lords lay down their arms and reconcile with their opponents, there were little gains in accountability. The government's policy of granting amnesty and co-opting rebel commanders into the regular national army did not help matters but

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<sup>239</sup> Hayner P and Davis L 'Difficult Peace, Limited Justice: Ten Years of Peace Making in the DRC' (2009) *International Center for Transitional Justice* 22, available at <https://ictj.org/sites/default/files/ICTJ-DRC-Difficult-Peace-2009-English.pdf> (accessed 14 October 2018); UN Mapping Report on Congo (2010), para 1064.

<sup>240</sup> Klosterboer and Hartmann-Mahmud (2013) 58; Goodman J 'The Grease in the Gears: Impunity in the Democratic Republic of Congo and the Opportunity for Peace' (2010) 32 *Loyola of Los Angeles International and Comparative Law Review* 217.

<sup>241</sup> Weaver A 'Truth and Justice? Towards Comprehensive Transitional Justice in Uganda and the Democratic Republic of Congo' (2016) Dissertation, University of Nebraska, at pages 30-32; UN Mapping Report on Congo, para 1064; Goodman (2010) 217.

<sup>242</sup> Klosterboer and Hartmann-Mahmud (2013) 68.

<sup>243</sup> Global and Inclusive Agreement on Transition in the DR Congo: Inter-Congolese Dialogue - Political Negotiations on the Peace Process and on Transition in the DRC' at para III (8).

<sup>244</sup> Organic Law No.05/023 of 2005.

<sup>245</sup> Klosterboer and Hartmann-Mahmud (2013) 68.

<sup>246</sup> Thompson JB *Universal Jurisdiction: The Sierra Leone Profile* (2015) 70-71.

only deepen the culture of impunity in Congo. For example, Bosco Ntaganda, a former rebel commander and now a defendant at the ICC, abused his amnesty by leaving the regular army and forming the M-23 that unleashed monstrous attacks on civilians in the Eastern part of the DRC.<sup>247</sup> He is now at the ICC facing charges relating to war crimes and crimes against humanity.<sup>248</sup>

It is argued that the non-inclusion of core crimes in the amnesty laws does not in itself enhance accountability for violations and justice for the victims.<sup>249</sup> To end impunity and ensure a rule of law, the transitional government should have discharged its obligations under international law by robustly investigating and prosecuting persons who were the *most responsible* for the egregious violations.

As many commentators and reports argue, such an obligation has not been discharged satisfactorily by the DRC.<sup>250</sup> Admittedly, some prosecutions have been carried out but they are few, inconsequential, and disproportionate to the scale and intensity of violations perpetrated during the conflict.<sup>251</sup> For example, most of the perpetrators of the war crime of rape, which has been extensively committed in the DRC, have not been investigated and charged.<sup>252</sup> This miscarriage

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<sup>247</sup> Klosterboer and Hartmann-Mahmud (2013) 72.

<sup>248</sup> Bosco Ntaganda Case Information Sheet available at <https://www.icc-cpi.int/drc/ntaganda/Documents/NtagandaEng.pdf> (accessed 11 December 2017).

<sup>249</sup> Hayner P and Davis L ‘Difficult Peace, Limited Justice: Ten Years of Peace Making in the DRC’ (2009) , at page 40.

<sup>250</sup> Tsabora J ‘Prosecuting Congolese War Crimes’ (2011) 23 *Peace Review* 163-165; Reyntjens (2009) 7; Pham P and Vinck P ‘Ownership and Participation in Transitional Justice Mechanisms: A Sustainable Human Development Perspective from Eastern DRC’ (2008) 2 *The International Journal of Transitional Justice* 401; Imoedemhe OC *The Complementarity Regime of the International Criminal Court: National Implementation in Africa* (2017) 96-100; See ‘The Repression of International Crimes by Congolese Jurisdictions’ by Le Club des Amis du Droit du Congo, available at [http://iccnow.org/documents/CAD\\_TheRepressionofInternationalCrimes\\_Dec2010\\_EN.pdf](http://iccnow.org/documents/CAD_TheRepressionofInternationalCrimes_Dec2010_EN.pdf) (accessed 9 December 2017); Twenty-third report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2007/156, paras 35-36.

<sup>251</sup> UN Mapping Report on Congo (2010) para 1013; Candeias et al ‘The Accountability Landscape in Eastern DRC Analysis of the National Legislative and Judicial Response to International Crimes (2009–2014)’ (2015) *International Center for Transitional Justice* pages 34-35, available at [https://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Prosecutions-2015\\_1.pdf](https://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Prosecutions-2015_1.pdf) (accessed 14 October 2018).

<sup>252</sup> See UN report entitled ‘Progress and Obstacles in the Fight against Impunity for Sexual Violence in the Democratic Republic of Congo’ (2014) para 4 at page 3. Available at <https://monusco.unmissions.org/sites/default/files/UNJHRO%20-%20Report%20on%20Fight%20against%20Impunity%20Sexual%20Violence%20-%20April%202014%20-%20ORIGINAL%20VERSION.pdf> (accessed 23<sup>rd</sup> November 2017).

of justice could be attributed to the fact that the transition agreement lacked effective accountability mechanisms for prosecutions of the violations.<sup>253</sup>

As for reparations to the victims, much of the scholarship and reports seem to agree that the DRC has failed to discharge her reparative obligation toward the victims.<sup>254</sup> Congolese law allows for the state to be held liable for reparations on account of wrongdoing of its agents. Despite that, credible reports indicate that the government has been unwilling to enforce court judgments on reparations.<sup>255</sup> The non-enforcement of such judgments and the inability or unwillingness of the DRC to redress the victims is an assault on the victim's right to an effective remedy. Such a situation causes *re-traumatisation*, in addition to what the victims have already undergone or suffered from the violations.

It is submitted that post-conflict justice in the DRC did not result in anything significant for the victims. Transitional justice was not a priority for the local and international actors. That could be attributed to the conflicting transitional justice dynamics that defined the transition in the DRC. Believing that state failure was a major reason for the instability in the DRC,<sup>256</sup> the international community preferred 'state reconstruction or rebuilding' as a guiding principle for transitional justice initiatives.<sup>257</sup>

The state reconstruction model revolved around issues like democratic governance, power sharing, and state security, with very little direct impact on justice for the victims. That is why the

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<sup>253</sup> Goodman (2010) 216; Hayner P and Davis L 'Difficult Peace, Limited Justice: Ten Years of Peace Making in the DRC' (2009) *International Center for Transitional Justice* 15.

<sup>254</sup> 'Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights' (2011), paras 6-7 at page 49.

<sup>255</sup> UN Mapping Report on Congo (2010) paras 1092-1094; 'Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights' (2011) para 125; REDRESS, Submission to the Committee on The Elimination of Discrimination Against Women for Consideration of the Combined 6th And 7th Report of The Democratic Republic of the Congo, 21 June 2013, paras 21-23 at page 5, available at <http://www.redress.org/downloads/publications/redress-final-draft-submission-to-cedaw-on-drc-20june2013.pdf> (accessed 26th November 2017); Parmar S and Mushiata G 'Judgment Denied: The Failure to Fulfil Court-Ordered Reparations for Victims of Serious Crimes in the Democratic Republic of the Congo' (2012) *The International Center for Transitional Justice*, available at <https://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Reparations-2012-ENG.pdf> (accessed 26th November 2017);

<sup>256</sup> Lemarchand (2003) 29; Turner (2007) 10-11.

<sup>257</sup> Arnould V 'Transitional Justice in Peacebuilding: Dynamics of Contestation in the DRC' (2016) 10 *Journal of Intervention and State Building* 332.



international actors did not support any transitional justice mechanism that seemed a threat to their stabilisation objectives and also resource intensive.

That explains the failure to establish an ad hoc tribunal as the international community feared that it could destabilise the country. However, it is posited that international geopolitical factors could have considerably influenced the non-preference of strong judicial mechanisms for the DRC, which was not the case for Sierra Leone. Sierra Leone's Special Court was established and supported by the international community, including major powers such as the US and the UK.<sup>258</sup> So, why were calls for an ad hoc tribunal for the DRC ignored by the international community? The DRC conflict involved many domestic and international actors with differing interests and complicity levels. It is believed that the US and UK secretly supported the invasion of the DRC by Rwanda and Uganda.<sup>259</sup>

While that assertion would in itself be insufficient to pin the blame solely on such global powers, it could still be a distant reason for the go-slow attitude of the international community on the establishment of a special court for the Congo conflict. Likewise, it would be fair to note here that many international (western) companies have been implicated in a UN Report on illegal exploitation of natural resources during the Congo conflict.<sup>260</sup> The exploitation provided money for the war.

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<sup>258</sup> Perriello T and Wierda M 'The Special Court for Sierra Leone Under Scrutiny' (2006), *International Center for Transitional Justice* 12, available at <http://hrlibrary.umn.edu/instreet/SCSL/Case-studies-ICTJ.pdf> (accessed 11 December 2017).

<sup>259</sup> Turner (2007) 12; French HW 'Kagame's Hidden War in the Congo' (2009), *The New York Review of Books*, available at <http://www.nybooks.com/articles/2009/09/24/kagames-hidden-war-in-the-congo/> (accessed 10 December 2017); Ismi A 'The Congo Still Ravaged by U.S.-Funded Conflict and Plunder' (2014), *Global Research*, available at <https://www.globalresearch.ca/the-congo-still-ravaged-by-u-s-funded-conflict-and-plunder/5375098> (accessed 11 December 2017); The Shameless Vacuity of Susan Rice's Black Boosters (2012), Black Agenda Report, available at <https://www.blackagendareport.com/content/shameless-vacuity-susan-rices-black-boosters> (accessed 11 December 2017); *Report: U.S. Arms to Africa and the Congo War, World Policy Institute - Research Project*, <http://www.worldpolicy.org/projects/arms/reports/congo.htm> (accessed 11 December 2017); Ray E 'US Military and Corporate Recolonization of the Congo' (2000), *Covert Action Quarterly*, available at [http://www.thirdworldtraveler.com/Africa/US\\_Recolonization\\_Congo.html](http://www.thirdworldtraveler.com/Africa/US_Recolonization_Congo.html) (accessed 11 December 2017).

<sup>260</sup> Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (2002), S/2002/1146; Kern K 'Corporate Complicity in Congo's War' (2006), *Tikkun Magazine*, available at [https://www.cpt.org/work/africa\\_great\\_lakes/corporate\\_complicity](https://www.cpt.org/work/africa_great_lakes/corporate_complicity) (accessed 10 December 2017).

A strong judicial mechanism backed by the international community such as Sierra Leone's Special Court would have implicated complicity neighbouring countries and international corporations, given that there is massive evidence on the role of the US backed Rwanda and Uganda in the perpetration of international crimes in the DRC.<sup>261</sup> Being a strategic nation in the Great Lakes region and with enormous natural reserves of minerals like Coltan, the superpowers might have feared that robust prosecutions could either reignite the conflict and or harm their strategic trade and political interests in the DRC and the Great Lakes region as a whole. Presumably, robust criminal prosecutions could have exposed the complicity of Western powers in the Congo conflict.

Meanwhile, the DRC government was not on the same page with the international community on the approach to transitional justice. The government perceived transitional justice as a *tool* for conflict management, thereby employing a chameleon-style approach to justice and accountability for political expediency.<sup>262</sup>

Explaining the conflict management approach to transitional justice, Arnould states that:

The Congolese government has thus acted as a transitional justice promoter at one level (advocacy for international prosecutions) while simultaneously resisting other transitional justice measures through acts of non-cooperation (TRC), neglect (domestic courts), and the adoption of measures curtailing justice efforts (amnesties and rebel co-optation policy).<sup>263</sup>

Therefore, lack of a coherent transitional justice framework in the DRC resulted in promoters and resisters of certain transitional justice processes, both pursuing distinct transitional justice goals.<sup>264</sup> DRC's transition could have produced substantive justice outcomes if the 'state reconstruction model' succeeded in building credible public institutions.

However, Lake argues that the institution-building policy supported strongly by the international community failed to produce independent public institutions due to the subversive tendencies of

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<sup>261</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, para 207, 211, and 220; UN Mapping Report on Congo (2010), paras 565 and 578; Letter dated 12 November 2012 from the Chair of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council (2012), S/2012/843, paras 10-18, 23-24, and 156-160.

<sup>262</sup> Arnould (2016) 326-329.

<sup>263</sup> Arnould (2016) 329.

<sup>264</sup> Arnould (2016) 334.

the war elites for their “strategic or conflict-related ends”.<sup>265</sup> A recent study that focused on the war-torn Eastern region of the DRC indicates that the failure or success of accountability programs hinged on their impact on strategic conflict-related interests of the war lords.<sup>266</sup> Therefore, rule of law programmes that threatened the interests of warlords were not supported by the elite, resulting in unsuccessful implementation.

In a nutshell, it is posited that transitional justice in the DRC did not produce successful accountability measures on account of the following reasons. First, there was weak support from the international community. Due to geopolitics and strategic interests of major powers, the international community was mostly interested in creating a functioning government in the DRC with little emphasis on justice for the victims.<sup>267</sup>

For example, it was feared that an emphasis on prosecutions would upset the warring factions and trigger another conflict that would make the DRC unpalatable to foreign investment in the mining sector. That explains why calls for the establishment of an ad hoc tribunal for the DRC were not taken seriously as the case was, for example, for Rwanda and Sierra Leone.

Secondly, the transitional justice process in Congo had a very minimal participation of the affected local population as it was dominated by domestic and international elites.<sup>268</sup> That points to the lack of preference for effective accountability measures due to the weak representation of the victims in the planning of transitional justice. Peace talks that eventually resulted in a transition agreement had little or no meaningful input from the victims and civil society. This is inconsistent with the fact that local consultations are crucial for a working transitional justice policy.<sup>269</sup>

Thirdly, the transition agreement had weak justice and accountability mechanisms.<sup>270</sup> For example, the truth commission in the DRC was only established as an institution for “supporting democracy”<sup>271</sup>, and supposedly not as a quasi-judicial investigative body. That may explain why

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<sup>265</sup> Lake M ‘Building the Rule of War: Postconflict Institutions and the Micro-Dynamics of Conflict in Eastern DR Congo’ (2017) 71 *International Organisation* 282.

<sup>266</sup> Lake (2017) 283.

<sup>267</sup> Autesserre (2010) 235-237; Arnould (2016) 332-333; Goodman (2010) 221.

<sup>268</sup> Klosterboer and Hartmann-Mahmud (2013) 60-61.

<sup>269</sup> ‘The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies’ (2004) S/2004/616, para 19.

<sup>270</sup> Hayner and Davis (2009) 15; Goodman (2010) 216.

<sup>271</sup> The Transition Agreement at para V (4).

the truth commission never investigated a single case. In fact, as per the transition agreement, accountability was not one of the objectives of the commission.<sup>272</sup> The commission had only four objectives, namely: rebuilding the country; reconciliation; creating a new national army; holding democratic elections, and establishing structures for a new political order.<sup>273</sup>

In conclusion, this section does not seek to overstate the significance of justice over peace. Peace and justice are mutually reinforcing and complementary, with justice providing accountability and return to the rule of law. Without being oblivious to the fact that war fatigue could have influenced the prioritisation of peace-building over justice, it is submitted here that the embedment of impunity-friendly provisions in the transition agreement has had a catastrophic impact on post-conflict accountability. That situation does not help the victims. The provision of justice for the past atrocity crimes in the DRC has not been proportionate to the gravity of the conflict.

Many crimes remain unpunished and few victims, if any, have been redressed. Therefore, the inability and unwillingness of the government to act signify its indifference towards the plight of millions of victims, some of whom have already died. Clearly, the government has not acted on behalf of the victims and there is a need for the DRC to strengthen its reparative obligation to complement international criminal justice.<sup>274</sup>

### **2.3 Theoretical Justifications for Reparative Complementarity**

This section presents theoretical considerations for reparative complementarity from the standpoint of human rights law as contextualised in state responsibility parameters. Reparation is a needs-based right that requires an enormous amount of resources, especially in post-conflict situations. With large numbers of victims in atrocity crime contexts, the ICC may not be able to provide meaningful reparation to the victims unless such redress efforts are complemented by states and non-state actors.<sup>275</sup>

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<sup>272</sup> The Transition Agreement, para II (Transition Objectives).

<sup>273</sup> The Transition Agreement, para II.

<sup>274</sup> Tunamsifu SP 'Transitional Justice and Peacebuilding in the Democratic Republic of the Congo' (2015), available at <http://www.accord.org.za/ajcr-issues/transitional-justice-and-peacebuilding-in-the-democratic-republic-of-the-congo/> (accessed 10 December 2015).

<sup>275</sup> *Lubanga* Reparations Judgment (2012), para 278.

In support of the doctrine of reparative complementarity, I posit social-political and economic reasons as well as human rights concepts to justify the necessity of involving states in the ICC reparations system.

States, compared to other actors, have a higher threshold of responsibility for the supply side of human rights. They are the ultimate protector and giver of human rights.<sup>276</sup> States have the means to prevent violations and to ensure the enjoyment of the rights.<sup>277</sup>

By contrast, individuals have an obligation to respect human rights but they may lack the means and capacity to prevent violations and to ensure the enjoyment of rights on a macro-level scale (conflict situations). Thus, while the international law provides for reparative responsibility on the part of violators, whether states or individuals, it is argued that states bear the ultimate reparative obligation to redress macro-level violations of human rights in conflict countries.<sup>278</sup>

Placing the ultimate reparative obligation on states in conflict circumstances, does not obscure the reparative responsibility of the defendants towards the victims of international crimes. Arguably, the defendant-based reparation regime at the ICC that places an obligation on individual perpetrators to provide reparations to millions of victims may never work if the reparative liability is not shared with territorial states.<sup>279</sup> It is under such circumstances that a UN report proposed the establishment of a compensation commission to provide redress to millions of atrocity crime victims in Darfur, as a complementary measure to the ICC.<sup>280</sup>

Post-conflict reparations should not be viewed as ordinary reparation (compensation) claims in regular national criminal or civil proceedings. Reparations in response to gross violations are usually massive. They are extremely multi-faceted and resource-intensive, covering numerous areas ranging from restoration of property rights, healing societal relations, rebuilding social

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<sup>276</sup> *Zimbabwe Human Rights NGO Forum vs. Zimbabwe*, ACHPR (2006) para 147; *Florence Amunga Omukanda & another v Attorney General & 2 others* [2016] eKLR at para 60; See UN report entitled 'Role of Local Government in the Promotion and Protection of Human Rights – Final Report of the Human Rights Council Advisory Committee' (2015), A/HRC/30/49, at para 17.

<sup>277</sup> Delbruck J 'International Protection of Human Rights and State Sovereignty' (1982) 57 *Indiana Law Journal*.

<sup>278</sup> UN Darfur Inquiry Report, para 598.

<sup>279</sup> Moffett (2013) 383.

<sup>280</sup> UN Darfur Inquiry Report, para 590.

infrastructures, reforming public institutions of governance, to repairing individual harms and remedying lost opportunities of the victims.

As observed in the *Duch* case at the Extraordinary Chambers in the Courts of Cambodia (the ECCC), such redress undertakings may never be implemented effectively under defendant-based judicial settings.<sup>281</sup> For them to succeed, they must be supported by state reparation programmes that have a wider implementation base covering many victims at a go and dealing with numerous types of victimisations demands.

In the absence of state-led reparative interventions, the ICC's individualistic and defendant-focused approach to reparations may result in a huge gap between entitlements and realities for the victims. For the ICC to be able to deliver meaningful reparations for the victims, the court must disentangle itself strategically from the restrictive operational and legal shackles of its reparation formula that pins responsibility on indigent defendants by encouraging domestic reparations programs in conflict states. State administrative reparation projects are important since judicial reparations per se have been proven to be insufficient in some conflict countries.<sup>282</sup>

Besides the economic side of reparations, the necessity of reparative complementarity would come up in the context of non-economic reparations such as reconciliation. Arguably, reparations should also look beyond the victim (the micro side of redress) by healing relations in a society (the macro dimension of reparations).<sup>283</sup> That argument is supported by the ICC Appeals Chamber in *Lubanga* reparations order in which the court held that one of the objectives of reparations is to pacify societal relations through reconciliation amongst the victims, perpetrators, and the effected communities.<sup>284</sup> Healing community relations after protracted conflicts may not be accomplished by a Criminal Court like the ICC in the absence of cooperation from governments.

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<sup>281</sup> Judgment (*Kaing Guek Eav alias Duch*), Case File/Dossier No. 001/18-07-2007/ECCC/TC, Extraordinary Chambers in the Courts of Cambodia, 26 July 2010, paras 674-675 (hereinafter *Duch* Trial Chamber Judgment 2010).

<sup>282</sup> Dicker N 'Development Aid for Reparations in the Solomon Islands' in Jeffery R (ed) *Transitional Justice in Practice: Conflict, Justice, and Reconciliation in the Solomon Islands* (2017) 210.

<sup>283</sup> Wierda M and De Greiff P 'Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims' *International Center for Transitional Justice* (2011) at page 6, available at <https://www.ictj.org/sites/default/files/ICTJ-Global-ICC-TrustFund-2004-English.pdf> (accessed 14 October 2018).

<sup>284</sup> *Lubanga* Reparations Order (2015) at paras 71 and 72.

In any case, criminal trials and proceedings are very confrontational and adversarial. Thus, although such proceedings could have reparation measures linked to them, as the case is with the ICC, they do not primarily aim at promoting reconciliation; their outcomes are more inclined to achieve, among other aims, retribution and deterrence.

The success of ICC reparations will depend on the extent to which conflict states could be able and willing to initiate domestic redress projects to complement those of the ICC.<sup>285</sup> With the first three reparation judgments in *Lubanga*, *Katanga*, and *Al Mahdi*, the court has largely opted for collective reparations,<sup>286</sup> with minimal symbolic compensatory individual reparations in *Katanga* and *Al Mahdi*.<sup>287</sup>

The preference for collective reparations has been largely motivated by resource-related reasons than victim-cantered issues, entailing that active participation of states in the implementation of reparations is foreseeable and needed although the Court avoids mentioning that explicitly in the judgments. Given that only a minimum number of victims apply for reparations, and due to the scarcity of resources, the ICC has rightly held that collective reparations have a greater utility impact as compared to individual awards.<sup>288</sup>

Furthermore, considering the difficulty with identifying victims in atrocity crimes situations and the fact that in some cases only hundreds out of millions did apply for reparations,<sup>289</sup> collective reparations could extend to the unidentified group of victims and afford redress to myriad categories of victimisation.<sup>290</sup> In *Al Mahdi*, for example, the court noted that it had received only 139 reparation applications (0.19%) out of possible 70,000 victims from Timbuktu in Mali.<sup>291</sup>

However, collective reparations are hard to implement. They require enormous economic resources, accurate and timely demographic identification of the victims, and extensive

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<sup>285</sup> *Katanga* Reparations Order (2017), para 321.

<sup>286</sup> *Lubanga* Reparations Order (2015), para 53; *Katanga* Reparations Order (2017) para 281; *Lubanga* Appeals Chamber Reparations Judgment, para 143; *Al Mahdi* Reparations Order (2017), para 84.

<sup>287</sup> *Katanga* Reparations Order (2017) para 306; *Al Mahdi* Reparations Order (2017) paras 81, 133 and 134.

<sup>288</sup> *Katanga* Reparations Order (2017) paras 289-292; *Al Mahdi* Reparations Order (2017) para 82; *Lubanga* Appeals Chamber Reparations Judgment, para 140; *Lubanga* Reparations Judgment (2012), para 274.

<sup>289</sup> In the *Katanga* case, there were only 341 applicants, out of which only 297 were eligible, *Katanga* Reparations Order (2017) paras 32 and 287.

<sup>290</sup> *Lubanga* Reparations Judgment (2012), para 219.

<sup>291</sup> *Al Mahdi* Reparations Order (2017) para 141.

consultations with the victims at the grassroots level. That can hardly be accomplished by the ICC alone, governments must do their part to support the court. Thus, a successful implementation of the preferred collective reparations calls for an extensive involvement of territorial states, the modality of which has not been set out by the ICC in its judgments.

The section below unpacks the doctrine of *reparative complementarity* in the context of the ICC Statute system and international human rights law.

## 2.4 The Notion of Reparative Complementarity under the ICC Statute

Criminal prosecutions at the ICC as well as the issuance of reparation orders against convicted persons under Article 75 of the ICC Statute do not obviate the responsibility of states under international law regarding the conduct of investigations, prosecutions, and punishment of the perpetrators, and the provision of reparation to the victims of core crimes.<sup>292</sup> Thus, criminal convictions of the DRC nationals such as Lubanga and Katanga and orders for reparations against them by the ICC do not absolve the DRC of its reparative responsibility towards the victims under international law.<sup>293</sup> Furthermore, the DRC as a *state of commission* concerning the crimes is fully responsible for providing redress for all the persons in its territory who were affected by the gross violations of human rights.<sup>294</sup>

A state's international responsibility for reparations could arise in three scenarios. The first scenario is under state responsibility rules whereby violations perpetrated by government agents could give rise to claims for reparation by individuals and states.<sup>295</sup> The second scenario is under customary international criminal law whereby *jus cogens* violations (core crimes) must be investigated and prosecuted, and the territorial state must provide reparations to victims.<sup>296</sup> The

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<sup>292</sup> Article 1 of the ICC Statute.

<sup>293</sup> Articles 25(4) and 75(6) of the ICC Statute; *Lubanga* Reparations Judgment (2012), para 257; *Lubanga* Reparations Order (2015), para 4; *Katanga* Reparations Order (2017) para 323.

<sup>294</sup> "State of Commission" is an international criminal law terminology meaning a state in whose territory crimes under international law have been perpetrated. For that, see Werle (2009) at page 69; Bellelli R 'The Establishment of the System of International Criminal Justice' in Bellelli R (ed) *International Criminal Justice: Law and Practice from the Rome Statute to Its Review* (2010) at page 6; UN Darfur Inquiry Report, para 598.

<sup>295</sup> Schabas WA *An Introduction to the International Criminal Court 4ed* (2011) 362; Wyler E and Castellanos-Jankiewicz LA 'State Responsibility and International Crimes' in Schabas WA and Bernaz N *Routledge Handbook of International Criminal Law* (2011) 394-395.

<sup>296</sup> Bassiouni CM 'Accountability for Violations of International Humanitarian Law and other Serious Violations of Human Rights' *Post-conflict Justice* 6 (2002).



third scenario is under international human rights law whereby people must be protected by governments against human rights violations, failure of which gives rise to an obligation to repair (reparations).<sup>297</sup>

Generally, the principle of non-impunity for international crimes (*jus cogens* violations)<sup>298</sup> and the political responsibility of governments to promote and secure ‘human security’ place the ultimate responsibility for reparations on sovereign states.<sup>299</sup>

It is now widely accepted among scholars and supported by international legal instruments and jurisprudence that the traditional goal posts of the doctrine of state responsibility applicable to inter-state claims have been shifted by the universality of victim’s human right to redress, enabling victims to claim reparations against both individuals and states.<sup>300</sup>

That legal proposition is further energised by the UN Human Rights Committee interpretation of the obligation of states in enforcing the right to a remedy under the International Covenant on Civil and Political rights (ICCPR). In its general comment number 31, the Committee argues that the victim’s right to an effective remedy would be undischarged in the absence of reparations.<sup>301</sup>

Thus, the State’s obligation towards the victims under Article 2(3) of the ICCPR cannot be discharged through investigations and prosecutions alone. There must be reparations for the

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<sup>297</sup> Paragraphs IX (15) and III (4) of the UN Basic Principles on Reparations; Moffet (2013) 369-370; Watkins J ‘The Right to Reparations in International Human Rights law and the Case of Bahrain’ (2009) 34 *Brooklyn Journal of International Law* 359.

<sup>298</sup> The *customary nature* of crimes under international law qualifies them as “*jus cogens* crimes” which makes it mandatory for states to investigate and prosecute perpetrators of core crimes; Materu SF *The Post-Election Violence in Kenya: Domestic and International Legal Responses* (2015) 2 at page 115.

<sup>299</sup> Crimes under international law pose a danger to human security in general and that is why they have been deemed to be a concern to the international community as a whole (see Preamble to the ICC Statute). The term ‘human security’ is taken to mean the protection of rights and freedoms that are essential for the existence of mankind. For that, see a UN publication entitled ‘Human Security in Theory and Practice’ at page 5, available at [http://www.un.org/humansecurity/sites/www.un.org/humansecurity/files/human\\_security\\_in\\_theory\\_and\\_practice\\_english.pdf](http://www.un.org/humansecurity/sites/www.un.org/humansecurity/files/human_security_in_theory_and_practice_english.pdf) (accessed 26 April 2017).

<sup>300</sup> Van Boven T ‘Victims’ Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines’ in Ferstman et al (eds) *Reparations for Victims of Genocide, War Crimes, and Crimes against Humanity: Systems in Place and Systems in the Making* (2009) 26; UN Darfur Inquiry Report, paras 595-597; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136, paras 152 and 153.

<sup>301</sup> UN Human Rights Committee General Comment No.31 on the international Covenant on Civil and Political Rights, CCPR/C/21/Rev.1/Add. 1326 May 2004, para 16; Van Boven (2009) 25.

victims. And that is why the current international criminal justice, unlike Nuremberg trials, has recognised the insufficiency of prosecutions (retributive justice) by also embracing reparative justice.<sup>302</sup>

Approaching the notion of ‘reparative complementarity’ from the discourse of political sovereignty and human rights, one could also argue that conflict states bear the non-derogable responsibility for restoring and ensuring ‘human security’ in their territories through, for example, the provision justice (reparations) to the victims. In particular, crimes under international law pose a grave danger to human security due to their devastating macro-level impact on society as a whole.

The scars and losses from ‘macro-level destruction’ of ICC crimes cannot possibly be repaired through streamlined prosecutions at the ICC that only deal with specific incidents and a limited number of individuals and charges. For example, in *Lubanga*, the Appeals Chamber could not consider harm emanating from sexual violence for reparations as sexual crimes were not charged or even considered as part of gravity of the proved crimes during sentencing.<sup>303</sup> The defendant-based reparation regime carried out by the ICC must be complemented by domestic reparative justice mechanisms.<sup>304</sup>

While most of the international criminal justice literature has obsessively associated the doctrine of complementarity with prosecutorial obligations of states about ICC crimes,<sup>305</sup> it is argued that ‘reparative complementarity’ is also explicitly provided for under the ICC Statute.

It is submitted that the legal basis for reparative complementarity is captured through the double application of Articles 25(4) and 75(6) of the ICC Statute to mean that: a convicted person’s

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<sup>302</sup> Article 75 ICC Statute; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Establishing the Principles and Procedures to be Applied to Reparations, ICC-01/04-01/06, 7 August 2012, para 177.

<sup>303</sup> *Lubanga* Reparations Judgment (2012), paras 196-199.

<sup>304</sup> Moffet (2013) 368.

<sup>305</sup> El Zeidy MM *The Principle of Complementarity in International Criminal Law: Origin, Development, and Practice* (2008); Bergsmo M (ed) *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (2010); Ambos K ‘Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik’ in Kaleck et al (eds) *International Prosecution of Human Rights Crimes* (2007) 65; Novak A *The International Criminal Court: An Introduction* (2015) 53 – 55; Schabas (2011) 190-194; Cryer et al *An Introduction to International Criminal Law and Procedure 2ed* (2010) 64; Clapham A ‘Issues of Complexity, Complicity and Complementarity: From the Nuremberg Trials to the Dawn of the New International Criminal Court’ in Sands P (ed) *From Nuremberg to the Hague: The Future of International Criminal Justice* (2003) at page 63; Werle (2009) at page 82.

responsibility for reparations and an award of reparation to victims by the ICC do not obviate State's reparative obligation to the victims or scuttle rights of victims under the domestic or international law.<sup>306</sup> That has also been affirmed in the Court's reparation jurisprudence.<sup>307</sup>

However, it is submitted that the prosecution-based principle of complementarity under the ICC Statute is asymmetrical to reparative complementarity as the latter is not subjected to the admissibility principles espoused under Article 17 of the ICC Statute. A case will be inadmissible at the ICC if there are active domestic proceedings that deal with the same defendant and substantially the same incident forming the basis of charges.<sup>308</sup>

As opposed to criminal proceedings, a victim's reparation claim will still be admitted and determined by the court even when such a victim has already received some reparations domestically.<sup>309</sup> However, in awarding reparations at the ICC, as noted in *Lubanga* and *Katanga*, the Court may consider reparation benefits already granted to victims in other jurisdictions to ensure fairness and guard against discrimination.<sup>310</sup>

To minimize overlaps and clashes between ICC prosecutions and domestic prosecutions, a case is not admissible at the ICC if the same is under active and genuine investigations or prosecutions at the domestic level (the complementarity threshold).<sup>311</sup> However, the same rule would not apply to reparations as the provision of reparation to victims under the ICC reparation regime does not affect the rights of victims under national laws.<sup>312</sup>

Thus, reparative justice undertakings at the national level may run parallel to reparation proceedings at the ICC regarding the same conduct, same perpetrator, and same category victims. That said, the ICC reparative complementarity is *sui generis* for having a horizontal and

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<sup>306</sup> Moffet (2013) 380-382; Article 25(4) of the ICC Statute says: "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law", and Article 75(6) provides: "Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law".

<sup>307</sup> *Lubanga* Reparations Judgment (2012) para 257; *Lubanga* Reparations Order (2015) para 4; *Katanga* Reparations Judgment (2017) para 323; *Al Mahdi* Reparations Order (2017) para 36.

<sup>308</sup> ICC Policy Paper on Case Selection and Prioritisation (2016) paras 30 – 31.

<sup>309</sup> *Lubanga* Reparations Order (2012), para 181.

<sup>310</sup> *Lubanga* Reparations Order (2012), para 201; *Katanga* Reparations Order (2017) paras 319 – 320.

<sup>311</sup> Article 17(1) ICC Statute.

<sup>312</sup> Article 75(6) ICC Statute.

supplemental relationship with domestic jurisdictions which would not be the case for prosecutions.

Similarly, the doctrine of *reparative complementarity* is also manifested through a multi-level involvement of states in the ICC reparation framework. The ICC reparations system is composed of a five-pronged potential participatory arrangement that seeks to strategically involve governments in enforcing reparation orders issued by the court.

While a general reading of the ICC statute would reveal a limited role of states in reparation proceedings, a closer observation of the whole ICC legal regime indicates that governments are indeed central to the successful implementation of reparation judgments. According to the Statute and Rules of the Court, states could participate in effectuating reparations under the following circumstances:

- (a) By commenting on expert reports on reparations.<sup>313</sup> The Court is obligated to hear states and consider their submissions in its reparation decision.<sup>314</sup>
- (b) In the implementation of reparation decisions. The ICC is legally empowered to order an implementation of reparations orders through national authorities or inter-governmental organisations such as the AU, UN, or EU.<sup>315</sup> This approach has not been preferred yet with the first three reparations decisions (Lubanga, Katanga, and Al-Mahdi) as implementation duties have been assigned to the Trust Fund for Victims.<sup>316</sup> However, in *Al Mahdi*, the voluntary involvement of UNESCO (a multilateral organization) in rebuilding Timbuktu historical sites in Mali was appreciated and recognized by the court.<sup>317</sup>
- (c) Enforcement of reparation decisions. States have a critical role in facilitating the execution of reparation orders at the domestic level.<sup>318</sup> That includes monitoring of the defendant's economic situation for forfeiture.<sup>319</sup>

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<sup>313</sup> Rule 97(2) of REP.

<sup>314</sup> Article 75(3) ICC Statute.

<sup>315</sup> Rule 98(4) of REP.

<sup>316</sup> *Katanga* Reparations Order (2017) para 330; *Lubanga* Reparations Order (2015) para 62; *Al Mahdi* Reparations Order (2017) para 138.

<sup>317</sup> *Al Mahdi* Reparations Order (2017) para 63.

<sup>318</sup> Article 75(5) ICC Statute; *Lubanga* Reparations Order (2015) para 50; *Katanga* Reparations Order (2017) paras 324 and 329.

<sup>319</sup> *Katanga* Reparations Order (2017) para 329; *Lubanga* Reparations Order (2012), paras 276-277.

- (d) Informational reparations, publicity of reparation proceedings and decisions. The ICC depends on national authorities to facilitate outreach activities on reparations sponsored by the ICC<sup>320</sup>, as well as deterrent educational measures regarding the negative implications of past crimes for the society.<sup>321</sup>
- (e) Provision of reparation resources. The first three reparation orders issued by the court will be implemented through the TFV that garners its financial resources mainly from states by way of voluntary contributions.<sup>322</sup> Interestingly, by 2016, the TFV recorded five Western European States as major contributors, with zero contribution from conflict states.<sup>323</sup> So far, no reparation resources have been obtained from the convicted defendants as both have been adjudged indigent.

While reparations judgments have doctrinally held that reparations are conviction-based and liability attaches to the perpetrator,<sup>324</sup> the state's participatory regime for reparations explained above places the ultimate responsibility for reparations on governments. That buttresses an international human rights law precept that states should provide redress for victims when defendants are unable or otherwise unwilling to do so.<sup>325</sup>

Notwithstanding that convicted persons such as *Lubanga*, *Katanga*, and *Al-Mahdi* have been held responsible for reparations for victims of their crimes, the most pragmatic side of reparative justice at the ICC indicates that resources will always come from states. That has been the case so far with resources of the Trust Fund being expended on redress for victims in *situation* countries, with little or no contribution from the conflict states.

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<sup>320</sup> Rule 96 of ICC REP; *Lubanga* Reparations Order (2015) paras 51 and 52; *Katanga* Reparations Order (2017) para 345.

<sup>321</sup> *Lubanga* Reparations Order (2012), para 239.

<sup>322</sup> Article 79 ICC Statute and Regulation 20 of the TFV Regulations; See Trust Fund for Victims 2016 Annual Report at pages 28-29, available at [http://www.trustfundforvictims.org/sites/default/files/imce/Annual%20Report-2016\\_ENG\\_September\\_Online.pdf](http://www.trustfundforvictims.org/sites/default/files/imce/Annual%20Report-2016_ENG_September_Online.pdf) (accessed 29<sup>th</sup> November 2017).

<sup>323</sup> Trust Fund for Victims 2016 Annual Report at pages 30-31.

<sup>324</sup> *Al Mahdi* Reparation Order (2017) para 50.

<sup>325</sup> UN Basic Principles on Reparations (2005), para 16.

Thus, the utility impact of ICC sponsored reparation projects on the DRC victims can only be maximized if the Court works with the government and civil society organisations in implementing reparations, both economic and non-economic redress measures.<sup>326</sup>

## **2.5 Why is Reparative Complementarity Critical for the (DRC) Victims?**

The previous section has provided theoretical underpinnings of the doctrine of reparative complementarity. This part presents factors that show the need for state-run redress measures for the victims by looking at specific legal and factual issues that limit the victims' participatory base and accessibility to redress under the ICC reparation regime. It, thus, advances pragmatic justifications as to why *domestic reparations* are crucial for the victims of atrocious crimes in conflict states. It will be shown that reparative complementarity is necessary, since the ICC reparation system is limited both regarding the scope and its capacity to deliver.

### **2.5.1 Effects of Prosecutorial Discretion in Preferring Charges**

The defendant-centered reparation responsibility under the ICC system means that the scope of reparations regarding victims covered will always depend on the scope of charges preferred by the Prosecutor.<sup>327</sup> The narrower the scope of the preferred charges, the more limited the scope of reparations that can be claimed by the victims. Hence, a wider scope of charges representative of the largest category of victimization will surely result in a wider category of eligible victims. For example, in *Lubanga*, the Appeals Chamber held that the convicted person would not be held accountable for reparations to victims of sexual crimes because such crimes were not charged and that no sexual harm was proved to stem from the crimes of Lubanga.<sup>328</sup>

That trend of placing victims into the eligible and non-eligible divide when it comes to reparations will continue since the ICC may never be able to prosecute all the perpetrators of core crimes due to jurisdictional principles, resource constraints, and investigative huddles.

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<sup>326</sup> *The Prosecutor v Germain Katanga*, Defence Observations on Reparations, ICC-01/04-01/07, 14 May 2015, para 105; Civil Parties' Co-Lawyers' Joint Submissions, Extra Ordinary Chambers in the Courts of Cambodia, Case No.001/18-07-2007-ECCC/TC, para 44.

<sup>327</sup> Article 75(2) ICC Statute; *Lubanga* Reparations Order (2015) paras 20 and 21; McCarthy C 'The International Criminal Court's Regime of Victim Redress: Non-punitive Responses to Crimes under the Rome Statute' in Mulgrew R (ed) *Research Handbook on the International Penal System* (2016) 418.

<sup>328</sup> *Lubanga* Appeals Chamber Reparations Judgment (2015) para 198.

Thus, apart from the fact that prosecutorial choices are necessary and understandable on account of scarce resources and limited operational and legal capacity of the ICC, the Prosecutorial discretion of the Prosecutor will continue to affect victim's accessibility to redress given that victims have no say in the framing of charges.<sup>329</sup> Such unintentional discrimination of victims stemming from selective charging may re-traumatise the victims, thereby going against the principle of 'do no further harm' on the part of the ICC.<sup>330</sup>

Also, the primary focus (interest) of the Prosecutor is never on the victims but the accused person. And neither the ICC nor the victims' representative has the mandate to dictate the scope of the charges preferred by the Prosecutor.

In a bid to avoid 'double victimization' of the victims, the ICC has come up with a solution whose implementation is uncertain and therefore unreliable. Considering that sexual crimes were committed extensively but they could not be linked to Lubanga charges, and the ensuing conviction to warrant reparations by him, the Court has attempted to cure the injustice occasioned to the ineligible victims by requesting the Trust Fund to provide some reparations to them by invoking its 'assistance mandate' powers under Regulation 50(a) of the Trust Fund Regulations.<sup>331</sup> However, such a solution may still not be able to cure the overall injustice experienced by victims whose victimisation was not covered by the indictment and judgment.

The assistance extended to the victims by the Trust Fund is not reparation per se as it is not done in response to a court order. The Lubanga case is a painful example of how prosecutorial selectivity, whether warranted or unwarranted, can scuttle the victim's right to a remedy especially when the non-litigated ICC crimes represent the largest portion of victimisations in a given conflict.<sup>332</sup> Sexual crimes were extensively perpetrated in the DRC (Ituri) by both militia groups controlled by Lubanga and government forces.

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<sup>329</sup> Pena M and Carayon G 'Is the ICC Making the Most of Victim Participation' (2013) 7 *International Journal of Transitional Justice* 529-531.

<sup>330</sup> *Lubanga* Reparations Judgment (2012), para 192.

<sup>331</sup> *Lubanga* Appeals Chamber Reparations Judgment, para 199; *Lubanga* Reparations Order (2015), para 64. The 'assistance mandate' denotes a situation whereby the trust fund for victims voluntarily provides redress to the victims, not in consequence of a court judgment – and therefore, strictly speaking, not reparations.

<sup>332</sup> Aptel C 'Prosecutorial Discretion at the ICC and Victim's Right to Remedy: Narrowing the Impunity Gap' (2012) 10 *Journal of International Criminal Justice* 1367-1370.

## 2.5.2 Certain Right's Violations Not Redressable Under ICC Reparations

Apart from the fact that it would be practically impossible for the ICC to prosecute for all the violations in a given situation,<sup>333</sup> there are violations of a certain category of rights that, even when prosecuted, could not be redressed effectively through conviction-based reparations. For example, violations of economic, social, and cultural rights can hardly be remedied under criminal prosecution settings through reparation orders against defendants.

A classic example to this point is the *Duch* case whereby, in response to the victims' request for reparations relating the provision of social services (education and healthcare), the ECCC held that, while it does not have the mandate to grant reparations against the state of Cambodia,<sup>334</sup> such redress measures would be practically unenforceable against the convicted person.<sup>335</sup>

In particular, the court stated that: "although victim needs in these areas are undisputed, they are inherently incapable of satisfaction through an order against the Accused, and the requests in their current form cannot provide the basis of enforceable orders against KAING Guek Eav".<sup>336</sup>

Furthermore, international criminal justice and even post conflict justice in most transitions have paid little or no attention to war crimes relating to socio-economic and cultural rights.<sup>337</sup> For example, until now, *Al Mahdi* is the only conviction for destruction of cultural property at the ICC.<sup>338</sup> That may not necessarily entail that crimes against cultural properties have not been committed in other *situation* under investigation at the ICC.

The empirical evidence from the ICC's work proves that crimes against property are less prosecuted compared to crimes against persons.<sup>339</sup> While crimes against people are graver than those perpetrated against property,<sup>340</sup> the non-prosecution of the latter for whatever reasons

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<sup>333</sup> ICC Policy Paper on Case Selection and Prioritisation (2016), para 5.

<sup>334</sup> *Duch* Trial Chamber Judgment, Case File/Dossier No. 001/18-07-2007/ECCC/TC, paras 663.

<sup>335</sup> *Duch* Trial Chamber Judgment, Case File/Dossier No. 001/18-07-2007/ECCC/TC, para 674.

<sup>336</sup> *Duch* Trial Chamber Judgment, Case File/Dossier No. 001/18-07-2007/ECCC/TC, para 675.

<sup>337</sup> Schmid E 'War Crimes Related to Violations of Economic, Social, and Cultural Rights' (2011) 71 *ZaöRV* 523-541.

<sup>338</sup> *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15, 27 September 2016, para 63.

<sup>339</sup> Materu (2015) 195 – 200.

<sup>340</sup> *Al Mahdi* Sentence Decision (2016), para 77; *The Prosecutor V. Germain Katanga*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/07-3484-tENG-Corr, 23 May 2014, paras 42 – 43.



presents a disadvantage to the victims at the time of reparation claims. For example, until now, *Katanga* is the only case at the ICC with a conviction for the war crime of pillaging.<sup>341</sup>

As for *Al Mahdi*, which is also at the reparations stage, the Malian government has joined forces with UNESCO to rebuild the Timbuktu mausoleums and historic monuments that were destroyed during the war.<sup>342</sup> The reparative actions of the government of Mali reflect the essence of reparative complementarity, domestic redress activities that should be undertaken in advance of, or in parallel with, the ICC justice efforts.

### **2.5.3 State's Guarantees of Non-Repitition Impossible Under Criminal Reparations**

Some categories of reparations, as understood under international human rights law, such as 'guarantees of non-repetition',<sup>343</sup> may not be available from the Court orders of a Criminal Court such as the ICC. None of the existing or past international criminal tribunals has had the mandate of granting reparations against states.

Guarantees of non-recurrence are preventative and forward looking post-violation measures that seek to reform institutions of governance, security forces, and oppressive laws to clamp down avenues for continued or repetitive violations. The UN Human Rights Committee has held that the state's obligation to institute preventative reparation measures against repetitive violations of rights is central to the victim's right to an effective remedy under Article 2 of the ICCPR.<sup>344</sup>

Unlike the ICC reparations that are essentially victim-centered, post-conflict interventionist reparation measures in the form of 'guarantees of non-repetition' are not necessarily victim-specific or injury-responsive but focus on the society as a whole.<sup>345</sup> Legislative reforms are one dimension of such reparations. Human rights courts like the Inter-American Court of Human Rights and human rights observatory bodies like the UN Human Rights Committee have, on

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<sup>341</sup> *Katanga* Article 74 Judgment, at page 659.

<sup>342</sup> See 'Work begins on repairing and rebuilding Timbuktu's cultural heritage' available at <http://en.unesco.org/news/work-begins-repairing-and-rebuilding-timbuktu%E2%80%99s-cultural-heritage> (accessed on 2<sup>nd</sup> June 2017); see also 'Timbuktu mausoleums in Mali rebuilt after destruction' available at <http://www.bbc.com/news/world-africa-33587325> (accessed on 2nd June 2017).

<sup>343</sup> UN Basic Principles on Reparations (2005) para 23.

<sup>344</sup> UN Human Rights Committee General Comment 31, CCPR/C/21/Rev.1/Add. 13 of 26 May 2004 at para 17.

<sup>345</sup> UN Human Rights Council's Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, A/HRC/30/42 of 7 September 2015, at para 19; Roht-Arriaza (2016) at page 31.

several occasions, directed states to enact laws to ensure effective redress for violations and to prevent further abuse of people's rights.<sup>346</sup> However, the ICC has no jurisdiction over states on matters reparation and therefore it may not be legally tenable for it to order such measures against states.

Thus, it is submitted that, under domestic reparation schemes, states could be able to complement victim-focused reparations ordered by the ICC through institutional and legal reforms that focus on the community as a whole. Even in the absence of violations reaching the level of ICC crimes, governments have an obligation under human rights law to ensure that there is a clear and an enforceable legal framework for the people to enjoy human rights.

In the *Velasquez Rodriguez* case, the Inter-American Court of Human Rights held that:

The second obligation of the States Parties is to 'ensure' the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.<sup>347</sup>

However, such an obligation becomes more critical in post-conflict times when there is an urgent need for redress for the victims. Victims in conflict societies place significant importance on both economic and non-economic reparations, with the latter encompassing operational, legal, and structural changes to public institutions to make them friendly to human rights. One good example for such a proposition is the Kenyan Truth Commission in which a significant majority of victims who recorded statements with the Commission opined that "legal and institutional reforms" be part of reparations at the national level.<sup>348</sup>

#### **2.5.4 Certain Reparations Require State Intervention for Successful Implementation**

There are certain types of reparations that, given their nature and implementation requirements, could not be operationalised through court orders against defendants. Such redress measures include 'satisfaction', a blanket term for non-economic reparations such as public memorials,

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<sup>346</sup> Puente SG 'Legislative Measures as Guarantees of Non-repetition: a Reality in the Inter-American Court and a Possible Solution for the European Court' (2009) 49 *Revista IIDH* pages 79-84; Human Rights Committee Communication No. 1885/2009, CCPR/C/110/D/1885/2009 of 5 June 2014, para 10.

<sup>347</sup> *Velasquez Rodriguez* Judgment (1988) at para 166.

<sup>348</sup> The Final Report of the Truth, Justice, and Reconciliation Commission of Kenya 4 (2013), Chapter III at page 101, available at <http://digitalcommons.law.seattleu.edu/tjrc/> (accessed on 8 June 2017).

searches for the disappeared, exhumations, commemorations for the victims, as well as state apologies.<sup>349</sup>

Despite being symbolic and non-compensatory, such redress undertakings may require significant financing and administrative logistics that may never be met by indigent defendants and, in consequence of that, courts may not grant them for lack of enforceability.<sup>350</sup>

Exemplary to this scenario is the *Duch* case in which victims asked for a public commemoration day and an official state apology as reparations. Despite acknowledging that the requested reparations would relieve the moral harm collectively suffered by the victims, the ECCC did not grant them for being unenforceable against the defendant and for being within ‘state prerogatives’.<sup>351</sup>

That exemplifies the fact that many reparation requests of the victims could be rejected by international criminal tribunals not because of being unimportant, but for lack of enforceability.<sup>352</sup> As noted by the ECCC, courts are keen to avoid unenforceable orders as they would undermine judicial authoritativeness and frustrate the victims.<sup>353</sup>

Therefore, victim’s reparations request that, although valid and appropriate, seek to bind governments will always be rejected by international criminal courts or tribunals for lack of jurisdiction, as we have seen with the ECCC.<sup>354</sup>

For example, in response to a request for state apology, the Supreme Court Chamber of the Extra Ordinary Chambers in the Courts of Cambodia held that, “while government apology or acknowledgment of responsibility is an internationally practiced form of reparation, it cannot be ordered within the ECCC legal framework”.<sup>355</sup> However, when victims’ redress requests do not

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<sup>349</sup> UN Basic Principles on Reparations (2005) at para 22.

<sup>350</sup> *Appeal Judgement (KAING Guek Eav)*, Case File 001/18-07-2007/ECCC/SC , Extraordinary Chambers in the Courts of Cambodia, 3 February 2012, paras 702-703.

<sup>351</sup> Judgment (*Kaing Guek Eav alias Duch*), Case File/Dossier No. 001/18-07-2007/ECCC/TC, Extraordinary Chambers in the Courts of Cambodia, 26 July 2010, para 671.

<sup>352</sup> *Appeal Judgement (KAING Guek Eav)*, Case File 001/18-07-2007/ECCC/SC , Extraordinary Chambers in the Courts of Cambodia, 3 February 2012, para 717.

<sup>353</sup> *Duch* Appeal Judgment, Case File 001/18-07-2007/ECCC/SC, paras 680 and 695.

<sup>354</sup> *Duch* Appeal Judgment, Case File 001/18-07-2007/ECCC/SC, paras 712 – 713.

<sup>355</sup> *Duch* Appeal Judgment, Case File 001/18-07-2007/ECCC/SC, para 679.

seek to bind governments directly, courts could be prepared to issue non-binding reparation orders encouraging governments and other third-parties to participate in their enforcement.<sup>356</sup>

### 2.5.5 Conviction-Based Reparations Limit Benefits for the Victims

Acquittals are bad news for the victims as they would be unable to claim reparations from the defendants. There will not be ICC reparations for victims of *Ngudjolo Chui* crimes as he was acquitted by the court,<sup>357</sup> even though egregious crimes were perpetrated in Bogoro (Ituri-DRC).<sup>358</sup> A crucial legal point here is that when an individual is acquitted of particular charges, it only means that the Prosecutor has failed to prove charges in accordance with the required evidentiary threshold, i.e. ‘beyond reasonable doubt’.<sup>359</sup> Factually, it does not necessarily imply that crimes were not committed.<sup>360</sup>

That is why, in *Ngudjolo’s* acquittal decision and *Katanga’s* conviction decision, the Court reasoned that, “...finding an accused person not guilty does not necessarily mean that the Chamber considers him or her to be innocent. Such a finding merely demonstrates that the evidence presented in support of the accused’s guilt has not satisfied the Chamber “beyond reasonable doubt”.”<sup>361</sup>

Owing to the distinctive nature of penal and reparation proceedings at the ICC,<sup>362</sup> an argument has been fronted that an acquittal should not be used as a roadblock to victim’s reparation claims since a completely different standard of proof and mode of liability applies to reparation claims.<sup>363</sup> Although the ICC Statute does not provide for the standard of proof for reparations, the

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<sup>356</sup> *Duch* Appeal Judgment, Case File 001/18-07-2007/ECCC/SC, paras 680 and 692.

<sup>357</sup> *Ngudjolo Chui* Article 74 Judgment, para 516; *The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”, ICC-01/04-02/12 A, 27 February 2015, para 296.

<sup>358</sup> Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the Appeals Chamber decision upholding the acquittal in the *Ngudjolo Chui* case (26 February 2015), available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-27-02-2015-drc> (accessed 30<sup>th</sup> November 2017).

<sup>359</sup> Criminal standard of proof is provided for under Article 61 of the ICC Statute; *Lubanga* Article 74 Judgment (2012) para 92; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute ICC-01/05-01/08-3343, 21 March 2016, paras 215 – 216.

<sup>360</sup> *Ngudjolo Chui* Article 74 Judgment, para 36.

<sup>361</sup> *Ngudjolo Chui* Article 74 Judgment (2012) para 36; *Katanga* Article 74 Judgment, para 70.

<sup>362</sup> *Katanga* Reparations Order (2017), para 16.

<sup>363</sup> *The Prosecutor v. Germain Katanga*, United Nations Joint Submission on Reparations, ICC-01/04-01/07, 14 May 2015, paras 60-61.

jurisprudence of the court is unanimous that a standard lesser to that of criminal trials should be used.<sup>364</sup> Going by the required nexus between the harm suffered and crimes proved in court, it becomes clear that some victims who participated in the trial may not participate in reparation cases if their claims relate to an injury or loss caused by unproved crimes.<sup>365</sup> That is a limitation of the ICC reparation system.

However, victim's ineligibility for reparations on account of acquittals could be a great injustice to a certain category of victims considering that the unproved crimes may at times represent the largest category of victimisation in a given situation. In the Congo *situation*, sexual and gender-based crimes were extensively perpetrated<sup>366</sup> and millions of victims have not been redressed until now.

However, due to the Prosecutor's failure to meet the evidentiary standards and legal technicalities, both *Lubanga* and *Katanga* were acquitted of such egregious crimes.<sup>367</sup> In *Katanga*, the court only convicted him of murder, pillaging, and destruction of property as crimes against humanity and war crimes despite there being massive evidence of sexual violence committed by his Ngiti militia group.<sup>368</sup>

The court could not criminally impute such crimes on *Katanga*, who was held responsible for *accessoryship* perpetration under Article 25(3)(d) of the ICC Statute.<sup>369</sup> While it is factually undisputed that sexual crimes were committed, the court could not legally establish that *Katanga* had operational control over the group (Ngiti militia) that perpetrated such crimes<sup>370</sup> and the 'common purpose' element could not be established on the part of the perpetrator soldiers.<sup>371</sup>

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<sup>364</sup> *Lubanga Appeals Chamber Reparations Judgment*, para 81; *Katanga Reparations Order* (2017) paras 45-51; *Lubanga Reparations Order* (2015) para 22; *Al Mahdi Reparations Order* (2017) para 44.

<sup>365</sup> *Duch Appeal Judgment*, Case File 001/18-07-2007/ECCC/SC, para 483.

<sup>366</sup> Banwell S 'Rape and Sexual Violence in the Democratic Republic of Congo: A Case Study of Gender-based Violence' (2014) 23 *Journal of Gender Studies* 45-58.

<sup>367</sup> *Katanga Article 74 Judgment* (2014) at page 659;

<sup>368</sup> *Katanga Article Judgment* (2014) paras 958, 991, 999, 1023, and 1167.

<sup>369</sup> *Katanga Article 74 Judgment* (2014) paras 1363, 1420, 1618, and 1693.

<sup>370</sup> *Katanga Article 74 Judgment* (2014) paras 1363 and 1420.

<sup>371</sup> *Katanga Article 74 Judgment* (2014) para 1693.

## 2.5.6 Impossible to Identify All Eligible Victims at the ICC

Owing to procedural technicalities and the distance between *situation victims* and the ICC, it may not be feasible to promptly identify all the eligible victims for reparation purposes. That is why only a few hundreds have managed to formally participate in the ICC proceedings and eventually apply for reparations despite the fact that the Congo *situation* has produced millions of victims.

In *Al Mahdi*, the court noted that: “the number of applications received in the present case pales in comparison to the number of persons who were in fact harmed”.<sup>372</sup> Thus, in atrocity crime prosecutions, it is virtually impossible to identify the actual number of victims successfully.<sup>373</sup> That underscores the significance of reparative complementarity as it would be possible to identify potential victims through less bureaucratic and non-judicial state administrative reparation programmes.

## 2.5.7 Longevity of Prosecutions Necessitates Prompt Interventions for the Victims

The longevity of ICC prosecutions negatively affects a timely delivery of reparations to the victims as required under international human rights law.<sup>374</sup> As reparations should await convictions, empirical evidence indicates that victims will have to wait for many years to receive redress from the ICC. Apart from protracted criminal proceedings, ICC reparation proceedings have also been lengthy. For example, in *Lubanga* and *Katanga*, victims obtained final reparation orders five and three years respectively after the conviction decision.<sup>375</sup> That runs counter to the insistence of prompt reparations in the Court’s reparation judgments.<sup>376</sup> Trials of *Lubanga*, *Katanga*, *Chui*, and *Bemba* have lasted eight, seven, four, and eight years respectively.<sup>377</sup>

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<sup>372</sup> *Al Mahdi* Reparations Order (2017) para 141.

<sup>373</sup> *Lubanga* Reparations Judgment (2012) para 219; *Al Mahdi* Reparations Order (2017) para 141.

<sup>374</sup> UN Basic Principles on Reparations (2005) para 15.

<sup>375</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution’s Response to the Defence’s request for suspension of the reparations proceedings (ICC-01/05-01/08-3513), ICC-01/05-01/08, 13 April 2017, para 6.

<sup>376</sup> *Al Mahdi* Reparations Order (2017) para 33; *Lubanga* Reparations Order (2015) para 44.

<sup>377</sup> *Lubanga* Case Information Sheet available at <https://www.icc-cpi.int/drc/lubanga/Documents/LubangaEng.pdf> (accessed 3 December 2017); *Katanga* Case Information Sheet available at <https://www.icc-cpi.int/drc/katanga/Documents/KatangaEng.pdf> (accessed 3 December 2017); *Chui* Case Information Sheet available at <https://www.icc-cpi.int/drc/ngudjolo/Documents/ChuiEng.pdf> (accessed 3 December 2017); *Bemba* Case Information Sheet available at <https://www.icc-cpi.int/car/bemba/Documents/BembaEng.pdf> (accessed 3 December 2017).

Specifically, Lubanga was arraigned on 26 January 2009, convicted on 14 March 2012, and a final reparations order against him was handed down on 3 March 2015 (9 years after his arrest).<sup>378</sup> At the time of writing, victims of Lubanga crimes are yet to receive court-ordered reparations for crimes committed fifteen years ago. The same applies to Bemba who was convicted on 21 March 2016, six years after the trial began on 22 November 2010.<sup>379</sup> However, on 8<sup>th</sup> June 2018, the Appeals Chamber of the ICC acquitted Bemba of all the charges.<sup>380</sup>

*Al Mahdi* is the only case at the ICC that lasted two years. He was surrendered to the ICC on 26 September 2015, his trial began on 22 August 2016, and a reparation decision against him was handed down on 17 August 2017.<sup>381</sup> And that could be attributed to the fact that, for the first time in the history of the ICC,<sup>382</sup> *Al Mahdi* pleaded guilty to the ‘war crime of attacking protected objects’,<sup>383</sup> thereby enabling a speedier conclusion of the case.<sup>384</sup>

Therefore, international trials may never be shorter due to the complex nature of their investigations and prosecutions. That justifies the need for pro-active redress measures by conflict states to ensure that reparations are delivered to the victims in good time.<sup>385</sup>

## 2.5.8 Temporal Limitations of Defendant-Focused Reparations

The ICC’s temporal jurisdiction is limited to post 2002 crimes<sup>386</sup>, since the ICC Statute became operational on 1<sup>st</sup> July 2002.<sup>387</sup> Consequently, in the absence of state reparations, millions of victims of pre 2002 atrocity crimes may not be eligible for ICC reparations on account of

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<sup>378</sup> Lubanga Case Information Sheet.

<sup>379</sup> Bemba Case Information Sheet.

<sup>380</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, ICC-01/05-01/08-3636-Red, at page 4.

<sup>381</sup> *Al Mahdi* Case Information Sheet available at <https://www.icc-cpi.int/mali/al-mahdi/Documents/Al-MahdiEng.pdf> (accessed 3 December 2017).

<sup>382</sup> *Al Mahdi* Sentence Decision (2016), para 21.

<sup>383</sup> *Al Mahdi* Sentence Decision (2016), para 7.

<sup>384</sup> *Al Mahdi* Sentence Decision (2016), para 28.

<sup>385</sup> Puttick M and Sandoval C ‘Reparations for the Victims of the Conflict in Iraq: Lessons Learned from Comparative Practice’ (2017), pages 15-16, available at <http://www.refworld.org/pdfid/5a1812b44.pdf> (accessed 5 December 2017).

<sup>386</sup> Article 11(1) ICC Statute.

<sup>387</sup> *Katanga* Article 74 Judgment (2014) para 14.

jurisdictional limitations.<sup>388</sup> Furthermore, even for the post 2002 international crimes, the ICC may never be able to prosecute for all the egregious violations in a given *situation* as that would contradict its complementarity regime.<sup>389</sup> The ICC is supposed to function, not as a first instance Court for core crimes prosecutions, but as a complementary mechanism to domestic prosecutions.<sup>390</sup>

## 2.6 Chapter Conclusion

The chapter has provided a synopsis of transitional justice in the DRC to determine where the country stands as regards reparative justice for the victims. As demonstrated, reparative complementarity is desirable to seal the gaps, both legal and factual, of the ICC reparation regime. Post conflict justice in the DRC has been unsuccessful in providing substantive justice to the victims. Prosecutions have been fewer, inconsequential, and unproportionate to the gravity of crimes. Furthermore, the domestic reparations regime is not up to the standards recognised under international law. Reparations judgments have been unenforceable in the DRC and that trend is unlikely to change in the near future.

Human rights standards demand that victims receive effective and prompt reparations. There is an urgent need for the DRC to act for the victims effectively as required under international law. Victim's wounds and losses have remained un-redressed for nearly thirty years now. That is a violation of an internationally recognised right to a remedy, inclusive of which is a right to prompt reparations.

Noting the potentially chronic limitations of the ICC reparation system described hereinabove, it is submitted that ICC reparations judgments must be fully implemented by states under the guise of 'reparative complementarity'. Implementation of human rights (reparations) is not satisfied through laws and judgments alone. Human rights are fully implemented through laws as well as

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<sup>388</sup> *The Prosecutor v. Germain Katanga*, Queen's University Belfast's Human Rights Centre (HRC) and University of Ulster's Transitional Justice Institute (TJI) Submission on Reparations Issues pursuant to Article 75 of the Statute, ICC-01/04-01/07, 14/05/2015, para 72.

<sup>389</sup> Article 17 of the ICC Statute; ICC Policy Paper on Case Selection and Prioritisation (2016) at para 5; Kemp G 'The Implementation of the Rome Statute in Africa' in Werle G et al *Africa and the International Criminal Court* (2014) 62; Novak A *The International Criminal Court: An Introduction* (2015) 54.

<sup>390</sup> Bassiouni MC 'The Permanent International Criminal Court' in Lattimer M and Sands P (eds) *Justice for Crimes against Humanity* (2003) 181.



an operational delivery of particular rights. It is now time for states to operationalise the right to reparations by delivering meaningful reparations to the victims.

As noted, both the ICC and the ECCC have rejected victim's redress demands, not for being inappropriate or unjustified, but because they are incapable of being enforced against defendants. In addition, owing to jurisdictional demands, international criminal courts and tribunals are unable to shift the enforcement obligation of reparation orders from convicted defendants to governments.

It is therefore argued that the only viable solution to such huddles could be state-led administrative reparations or reparations by the international community and NGOs. The ECCC has come to a similar conclusion. In the *Duch* case, the Supreme Court Chamber noted that:

The Supreme Court Chamber recognises the suffering of the victims as well as their right to obtain effective forms of reparation under internationally established standards. It further notes that the Civil Party Appellants, and CPG2 in particular, have advanced numerous requests that represent, in general terms, appropriate forms of reparation for the harm suffered (for instance, the provision of medical and psychological treatment for direct and indirect victims, naming public buildings after victims and installation of informative plaques, holding commemorative ceremonies, and erection of memorials such as pagodas, pagoda fences and monuments). Nevertheless, due to the constraints stemming from the ECCC reparation framework as outlined above, these specific requests cannot be granted. Considering that several requests have been rejected also on the basis of KAING Guek Eav's indigence, and while appreciating that some of them have been adequately specified, the Supreme Court Chamber encourages national authorities, the international community, and other potential donors to provide financial and other forms of support to develop and implement these appropriate forms of reparation.<sup>391</sup>

Why should victims bear the burden of the defendants' indigence? It appears that indigence is becoming a chronic disease for the international criminal court's reparations. The impact of indigence is already felt by the victims as most of their reparations requests are rejected by the Courts for being prone to unenforceability.

As a consequence, the prevailing reparations discourse at the ICC and the ECCC are dominated by the language of possibilities and not entitlements. When solving the reparations puzzle, the courts do not look at 'what is needed' for the victims as their only concern is 'what is possible' for the victims. For example, in assessing reparations awards to victims, the ICC has been using words like "to the extent achievable".<sup>392</sup> The indigence of defendants tends to scuttle victims reparative 'entitlements' by opting for what can possibly be done resource wise.

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<sup>391</sup> *Duch Appeal Judgment*, Case File 001/18-07-2007/ECCC/SC, para 717.

<sup>392</sup> *Al Mahdi Reparations Order* (2017) para 28; *Lubanga Reparations Order* (2015) paras 68 and 71.

To ensure an effective operationalisation of reparations for atrocity crime victims, there is a need for the courts and other justice actors to move from ‘what is possible’ to ‘what is needed’. That can only be done through effective reparative justice mechanisms at the domestic level. Importantly, for a country like DRC where crimes took place decades ago, prosecutions may not be feasible at this juncture.

Truth and reparative justice could serve the victims better. Therefore, it is proposed that the DRC should establish a new truth commission to provide a clear and credible record of past crimes. Additionally, the government should establish administrative reparation programmes covering as many victims as possible and representative of the largest category of victimisation such as sexual and gender based crimes in the Congo conflict.

## CHAPTER THREE

### LEGAL MECHANICS OF VICTIM'S ROLE IN THE ICC: TOKENISTIC OR SUBSTANTIVE PARTICIPATION?

#### 3.1 Introductory Remarks

The chapter seeks to provide a descriptive and critical analysis of the legal regime applicable to the participation of victims in the proceedings at the ICC. Unlike the ad hoc tribunals created in the 1990s to prosecute and punish perpetrators of core crimes under international law,<sup>393</sup> the ICC offers an unprecedented<sup>394</sup> opportunity for victims to participate in its proceedings.<sup>395</sup>

The ICC legal framework seeks to transform victims from mere trial witnesses to participants capable of tendering evidence, questioning witnesses, and making submissions on factual and legal issues arising in a case. Securing such a unique position for the involvement of victims in the administration of international criminal justice has been lauded as a major development of public international law.<sup>396</sup>

The ICC Statute captures the aspirations and wishes of the international community by committing to providing justice to victims of atrocity crimes by ensuring that their voices are heard in the proceedings. Article 68 (3) of the ICC Statute requires that victims should be allowed to state their

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<sup>393</sup> Pena and Carayon (2013) 519; Garkawe S 'Victims and the International Criminal Court: Three Major Issues' (2003) 3 *International Criminal Law Review* 345–46; 'Victims' Rights before the ICC: The Evolution of Victim's Access to Justice' (2005) FIDH, at page 2 and 24, available at [https://www.fidh.org/IMG/pdf/4-CH-I\\_Background.pdf](https://www.fidh.org/IMG/pdf/4-CH-I_Background.pdf) (accessed 16 January 2017).

<sup>394</sup> Gillett M 'Victim Participation at the International Criminal Court' (2009) 16 *Australian Law Journal* 30.

<sup>395</sup> 'Victim Participation before the International Criminal Court', War Crimes Research Office (American University Washington College of Law) 2007, pages 8 - 14. Available at [https://www.wcl.american.edu/warcrimes/documents/12-2007\\_Victim\\_Participation\\_Before\\_the\\_ICC.pdf](https://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf) (accessed 12 January 2017).

<sup>396</sup> Haslam E 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?' in McGoldrick et al (eds) *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 315; Pena M et al (2013) 519 and 521; *Situation in the Democratic Republic of the Congo*, Public Redacted Version Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06 and a/0224/06 to a/0250/06, para 6, ICC-01/04, 25 June 2007.

‘views and concerns’ at various stages of Court proceedings whenever their ‘personal interests’ are at stake.

Thus, victims of atrocity crimes under the jurisdiction of the ICC have a legal right to participate in the proceedings.<sup>397</sup> Judge Blattmann has rightly stated that “victim’s participation is not a concession of the Bench, but rather a right accorded to victims by the Statute”.<sup>398</sup> According to the jurisprudence of the ICC, there are some specific procedural rights accorded to victims by law (*ex lege* rights),<sup>399</sup> in addition to rights which could be granted to them by the court either *proprio motu* or upon an application through legal representatives for victims.<sup>400</sup> Thus, one could aptly opine that there are two categories of victim’s participatory rights at the ICC: first, *ex lege* rights, and secondly, court-granted rights under Article 68 (3).

However, despite the mandatory language under Article 68(3) that victims *shall* be allowed to participate in court proceedings whenever their interests are affected, the law is silent on the modalities of such participation. The said provision reads:

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.

It is left to the Judges of the ICC to determine the time, manner, and extent of the victim’s participatory rights at various stages of court proceedings.<sup>401</sup>

In 16 years since the Court became operational in 2002, various Judges have interpreted Article 68 (3) differently, giving rise to inconsistent and unpredictable legal framework on victim’s participation at the ICC. The Assembly of States Parties (the ASP) has rightly opined that the ICC

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<sup>397</sup> Article 68 (3) of the ICC Statute:

<sup>398</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Separate and Dissenting Opinion of Judge Rene Blattman, ICC-01/04-01/06-1119, 18 January 2008, para 13.

<sup>399</sup> Such rights could be found under Articles: 15 (3), 19(3), 75(3), and 82 (4) ICC Statute; See also Rules 72(2) and 119(3) of ICC REP.

<sup>400</sup> *The Prosecutor v. Bosco Ntaganda*, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/04-02/06, 15 January 2014, para 81; *The Prosecutor V. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta And Mohammed Hussein Ali*, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/09-02/11, 26 August 2011, paras 98 – 99.

<sup>401</sup> Haslam (2004) 323; Pena M et al ‘Is the ICC Making the Most of Victim Participation’ (2013) 520.

victim's participation regime needs to be harmonised to become predictable and efficient.<sup>402</sup> Currently, the ICC is seized with 26 cases which are on different stages and ten situations.<sup>403</sup>

Until now, the Court has generally granted the victims various participatory rights including the right to: make oral and written submissions; access case records; tender evidence; challenge relevance or admissibility of evidence; present views and concerns; participate in appeals; examine witnesses and attend public and private hearings.

Although victim's participatory rights are somehow homogenous in various cases at the ICC, there are substantive and procedural variations regarding the scope and manner of exercise of such rights in different cases. As we shall see at a later stage, some Judges have unreasonably limited victim's participatory rights while others have been liberal enough to interpret the law in light of Article 21 (3) of the ICC Statute that requires consideration of human rights.

While both schools of thought could be right in their interpretation approaches, Judges are required, under Article 68(3), to ensure that qualified victims are given the chance to participate and that such participation must not affect fair trial principles (impartiality and expeditiousness) as well as rights of the accused. It could happen that balancing the two conflicting but important requirements under Article 68 (3) may affect both the accused and the victims either positively or negatively. More to that, some Judges have called for strict adherence to fair trial principles in determining the scope of participation rights accorded to victims. For example, Judge Blattmann has argued that the ICC should not allow victim's participatory rights to overshadow accused's right to a fair and an impartial trial.<sup>404</sup>

Ultimately, the level of victim's participation at the ICC will depend on a Judge's interpretation of the Statute and Rules of Procedure and Evidence considering the need to strike a balance between victim's right to participate and accused's right to fair trial. In my opinion, the test to be applicable in granting or refusing to grant certain participatory rights to victims should be that

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<sup>402</sup> Report of the Bureau on Victims and Affected Communities, Trust Fund for Victims and Reparations (2014), ICC-ASP/13/32, page 5. Available at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP13/ICC-ASP-13-32-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-32-ENG.pdf) (accessed 13 January 2017).

<sup>403</sup> See information on ICC cases and Situations available at: <https://www.icc-cpi.int/Pages/cases.aspx> (accessed 10 October 2018).

<sup>404</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Separate and Dissenting Opinion of Judge Rene Blattman, ICC-01/04-01/06-1119, 18 January 2008, para 30 at page 59.

participatory rights could be restricted or refused only when the restrictions or refusals are imperatively justified by:

- (a) The need to prevent prejudice to or inconsistency with, the rights of accused persons; and
- (b) The need to guard against the unfair and impartial trial.

Most importantly, Article 68(3) and other provisions of the ICC Statute must neither be interpreted to favour victims nor curtail rights of both the victims and the accused person. The said article should be interpreted and applied in accordance with human rights norms recognised under international law.<sup>405</sup> That is the jurisprudence of the Appeals Chamber of the ICC.<sup>406</sup>

To be on the safe side, the ICC must not employ restrictive interpretative methods that are likely to render Article 68(3) less useful to the victims in their quest for truth, justice, and reparations. As stated by Judge Wyngaert, the ICC must always and in all circumstances whether normal, exceptional or unprecedented, apply and interpret the law according to international human rights norms.<sup>407</sup> Applying human rights norms to the victims would likely result in real, meaningful and results-oriented participation. Victims should be capable of achieving substantive judicial results as opposed to merely symbolic achievements.

Admittedly, the ICC has a noble but arduous task of ensuring that victims of atrocity crimes are accorded meaningful and effective participatory rights as opposed to tokenistic participation that does not promote and secure their internationally recognised human rights to truth, justice, and reparation. For participation to be substantive and not tokenistic, it is submitted that the victim's participation policy at the ICC needs to embrace the following human rights norms (referred to as principles of substantive participation):

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<sup>405</sup> Article 21 (3) of the ICC Statute; *Bemba* Article 74 Judgment, para 82; *The Prosecutor V. Thomas Lubanga Dyilo*, 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, ICC-01/04-01/06 (OA4), 14 December 2006, para 36.

<sup>406</sup> *The Prosecutor V. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release, ICC-01/05-01/08 OA, 16 December 2008, para 28.

<sup>407</sup> *The Prosecutor v. Germain Katanga*, Dissenting opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3405-Anx, 01 October 2013, para 20 at page 12.

- (a) The principle of non-revictimisation of victims in the course of legal and administrative procedures designed to provide relief to victims.<sup>408</sup>
- (b) The principle of equal and effective access to justice.<sup>409</sup>
- (c) The principle of access to information enabling victims to pursue justice in the Court effectively.<sup>410</sup>

Therefore, this chapter provides a critical analysis of the ICC legal regime for victims to determine its compatibility with the principles above. It focuses on the victim's role in the investigation, pre-trial confirmation hearings, trial, sentencing, and the reparation's stage. An opinion as to whether the ICC policy on victim's participation is tokenistic or substantive is made considering an analysis of the court's jurisprudence and legal texts against 'the principles of substantive participation' and the jurisprudence of regional human rights courts.

### **3.2 Article 68 (3): Requirements for Participation and Related Issues**

Article 68(3) provides a legal basis for participation of victims at various stages of proceedings at the ICC. Apart from stating that participation should be granted upon fulfilment of certain conditions, the article is not a substantive provision in the sense of conferring specific rights on victims. It is just an enabling provision allowing ICC Judges to create or prescribe participation rights for the victims.

As earlier alluded to, the scale of involvement of victims at the ICC depends on the discretion of Judges. It is for the Judges to determine the extent to which victims can go in their quest for justice. Since participation rights are not pre-determined by the law, there is a need for taking a liberal approach to interpreting Article 68(3) to make it responsive to the aspirations of victims. As stated by the Pre-Trial Chamber I in the *Situation of the Democratic Republic of Congo*, victim's participation is crucial in the fight against impunity.<sup>411</sup>

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<sup>408</sup> UN Basic Principles on Reparations, para 10. For the purpose of this chapter, I refer to them as "principles of substantive participation".

<sup>409</sup> UN Basic Principles on Reparations, A/RES/60/147, para 11 (a).

<sup>410</sup> UN Basic Principles on Reparations, A/RES/60/147, para 11 (c).

<sup>411</sup> *Situation in the Democratic Republic of 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 – 01/04, 17 January 2006.

The law on victim participation at the ICC requires that victims whose personal interests are likely to be affected should be allowed to intervene by presenting their views and concerns in court proceedings if such involvement doesn't scupper rights of the accused and fair trial principles. Since core crimes tend to produce millions of victims, the ICC Statute envisages that participation of victims could be effected through legal representatives.<sup>412</sup> As victim participation hinges upon a judicial decision, let us now turn to a discussion on the ICC jurisprudence on the acquisition of victim status.

### 3.2.1 Acquisition of a Victim Status at the ICC: Who is a Victim?

The ICC Statute does not contain a definition of the term 'victim'.<sup>413</sup> However, Rule 85 of the Rules of Evidence and Procedure provides:

- (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.

For a person to qualify and participate as a victim at the ICC, their application must be assessed in light of the provisions of Article 68(3), Rule 85 (defining a victim), and Rule 89 (procedure for submission and handling of victim's applications).

Reading Article 68(3), one must prove that there are *personal interests* at stake in certain proceedings at the ICC and the Court, once satisfied of that, must ensure that participation is *appropriate* in accordance with fair trial principles and respect for rights of the accused. Therefore, victim participation process at the ICC begins at Rule 89(1) whereby a person who wishes to participate in the proceedings must hand in a written application to Registrar.<sup>414</sup>

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<sup>412</sup> Article 68(3) ICC Statute.

<sup>413</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, Separate Opinion of Judge Georgios M. Pikis, ICC-01/04-01/06 OA8, 13 June 2007, para 13.

<sup>414</sup> Rule 89(1) of the ICC REP; *The Prosecutor v. Bosco Ntaganda*, Decision on Victims Participation in Trial Proceedings, ICC-01/04-02/06-449, para 22; *Lubanga* Article 74 Judgment, para 14(iii) at page 16.



Two mandatory conditions must be fulfilled before a person can be admitted as a victim at the ICC. First, proof of victimhood as per Rule 85<sup>415</sup> and secondly, the presence of personal interests that are affected or likely to be affected by certain proceedings.<sup>416</sup> The court may, either *proprio motu* or upon being moved by the parties, reject a person's application to participate in the proceedings if the criteria under Article 68(3) and Rule 85 have not been met.<sup>417</sup>

Generally, all chambers of the ICC have been unanimous as to the basic criteria for participation of victims at the ICC. Persons who seek participation in the trial have been required to show that:<sup>418</sup>

- (a) They are natural or legal persons (institutions or organisations);
- (b) They have suffered harm stemming from a crime under the ICC Statute;
- (c) The harm suffered relates to an incident that is part of the charges; and
- (d) There is a nexus between the harm suffered and crimes charged.

For the purpose of proving identity, victims have been allowed to file both official and unofficial documents ranging from passports, marriage and birth certificates, driver's licence, voter cards, to political membership cards, school records, baptism certificates, letters from local authorities, health records, and testimonies signed by two credible persons.<sup>419</sup>

The ICC has been flexible enough in allowing victims to file whatever document they could find to prove their identity because obtaining official papers could be difficult if not impossible in conflict countries.<sup>420</sup> The court will then assess the information supplied by victims to determine whether they have met conditions enumerated above. As the ICC Statute is silent on the standard

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<sup>415</sup> *The Prosecutor v. Bosco Ntaganda*, Decision on Victims Participation in Trial Proceedings, ICC-01/04-02/06-449, para 42.

<sup>416</sup> *The Prosecutor V. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 61; *Lubanga* Article 74 Judgment, para 14(v) at page 17.

<sup>417</sup> Rule 89(2) of the ICC REP.

<sup>418</sup> *Bemba* Article 74 Judgment, para 20; *The Prosecutor v. Bosco Ntaganda*, Decision on Victims Participation in Trial Proceedings, ICC-01/04-02/06-449, para 43.

<sup>419</sup> *The Prosecutor V. Thomas Lubanga Dyilo*, Decision on victims' participation, ICC-01/04-01/06-1119, paras 87 – 89.

<sup>420</sup> *The Prosecutor v. Bosco Ntaganda*, Decision on Victims Participation in Trial Proceedings, ICC-01/04-02/06-449, para 45.

of proof applicable to victim applications,<sup>421</sup> the chambers of the court have unanimously decided that such an assessment is only to be done based on the *prima facie* evidentiary standard.<sup>422</sup>

### 3.2.2 The Requirement of Nexus Between Harm and Charges

‘Harm’ is not defined in the ICC Statute. The earliest decision on victim participation at the ICC in the *Lubanga* case made use of Article 21(3) by invoking the UN Basic Principles on Reparations to define the term harm.<sup>423</sup> The Trial Chamber I used principle 8 of the UN Basic Principles on Reparations to hold that: ... “a victim may suffer, either individually or collectively, from harm in a variety of different ways such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights”.

Furthermore, since Rule 85(a) does not require individuals to suffer direct harm from crimes as opposed to legal persons, the Trial Chamber I ruled that victims could be both direct or indirect victims.<sup>424</sup>

On nexus between harm and charges, the Court stated that the involvement of victims in proceedings at the ICC should not be restricted to the charges since no such limitation is harboured under Rule 85(a).<sup>425</sup> The reasoning behind that finding of the Court was that Rule 85 only requires that harm suffered be a result of a crime under the ICC Statute which is to be conceptualised based on jurisdictional and legal limitations under Articles 5, 11, and 12.<sup>426</sup> However, in deciding on the participation of victims in the *Lubanga* trial, the Trial Chamber I reasoned that it would not be

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<sup>421</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, ICC-01/04-01/06-1119, para 99 at page 34.

<sup>422</sup> *Lubanga* Article 74 Judgment, para 15 at page 19; *The Prosecutor v. Bosco Ntaganda*, Decision on Victims Participation in Trial Proceedings, ICC-01/04-02/06-449, para 30.

<sup>423</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, ICC-01/04-01/06-1119, para 35 at page 13.

<sup>424</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, ICC-01/04-01/06-1119, para 91 at page 30.

<sup>425</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, ICC-01/04-01/06-1119, para 93 at page 30.

<sup>426</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation ICC-01/04-01/06-1119, para 94 at page 30.

‘meaningful participation’ or ‘in the interests of justice’ if victims whose harm and interests are unrelated to charges facing Lubanga were allowed to participate.<sup>427</sup>

Since the production of evidence and examination of factual and legal issues in Court depend on the scope of charges, interests of victims whose harm is unrelated to the charges may not be relevant to the case, rendering participation meaningless. Two issues may arise from the reasoning and determination of the Court regarding participation.

First, the *general participation* of victims at the situation stage could happen without one having to prove a connection between harm and charges.<sup>428</sup> Secondly, when investigations of a *situation* result in formal charges for individuals most responsible for the commission of crimes, the case narrows down to particular individuals, events, and incidents which in turn affects a wider participatory base for victims otherwise available at the *situation* stage. Thus, the participation of ‘situation victims’ becomes limited and necessarily aligned to charges which have a side-effect of locking out victims whose harm and interests are irrelevant to such charges.

Judge Blattmann dissents from the majority, believing that participation of victims at the ICC should always be aligned to cases since the Court’s jurisdiction is to be found based on cases brought before it as per Article 19.<sup>429</sup> The Judge rejects the general scope employed by the majority in extending the status of victim to persons who can prove that they suffered harm from a crime under international law. For him, competency of the Court (jurisdictional scope) should serve as a founding criterion in deciding on the status of persons seeking participation as victims at the ICC.<sup>430</sup> That, if jurisdictional limits under Article 19 are not adhered to, then there is a danger of extending the status of victim to persons unrelated to the situation or case.<sup>431</sup>

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<sup>427</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, ICC-01/04-01/06-1119 para 95 at page 30.

<sup>428</sup> At the situation stage, the prosecutor conducts investigations in a particular country and makes decisions on who are most responsible for the perpetration of ICC crimes. Thus, assuming that victims could be allowed to participate at the investigation stage, there would be no need to require that their harms should have nexus to specific crimes since the charges are yet to be framed.

<sup>429</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, Separate and Dissenting Opinion of Judge René Blattmann, ICC-01/04-01/06-1119, para 7 at page 51.

<sup>430</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, Separate and Dissenting Opinion of Judge René Blattmann, ICC-01/04-01/06-1119, para 8 at page 52.

<sup>431</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, Separate and Dissenting Opinion of Judge René Blattmann, ICC-01/04-01/06-1119, para 9 at page 52.

It is submitted that Judge Blattmann's dissenting opinion is overly critical of the majority decision. While it is crucial to note here that the Trial Chamber did not allow participation of victims unrelated to situation or charges, it nonetheless argued that the ICC statute does not have a provision that restricts participation to charges only. As Judge Pikis stated, the meaning of victims under Rule 85 covers all persons who suffer harm from a crime under the ICC Statute.<sup>432</sup> However, in the interests of justice and for the purpose of achieving efficiency on the part of victims seeking to participate, only those who suffered harm related to charges could participate.

The Decision of the Trial Chamber was appealed to the Appeals Chamber of the ICC by the Prosecutor and Defence. One of the issues that came up in the appeal was whether the ICC Statute and Rule 85 restrict the participation of victims to charges only. The Appeals Chamber, siding with the Trial Chamber, acknowledged that neither the statute nor Rule 85 restrict the participation of victims to crimes charged.<sup>433</sup>

However, the Appeals Chamber indicated that Rule 85 should be interpreted by contextualising other provisions that operationalise the involvement of victims at the ICC. Using Article 31 of the Vienna Convention on the Law of Treaties and, in particular, "the object and purpose principle" of interpretation, the chamber reasoned that the combined effect of Article 68(3) and Rule 89(1) is to restrict participation to charges.<sup>434</sup> As participation under Article 68(3) is dependent upon the existence of *personal interests* on top of proving victimhood, an application to participate in a trial under Rule 89(1) may require demonstration of personal interests touching on charges under consideration.<sup>435</sup>

The purpose of a trial is to assess the evidence and apply the law to determine culpability. How can one be able to objectively show that their interests are affected by a certain criminal trial if

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<sup>432</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, Separate Opinion of Judge Georghios M. Pikis, ICC-01/04-01/06 OA8, para 13.

<sup>433</sup> *The Prosecutor V. Thomas Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 54.

<sup>434</sup> *The Prosecutor V. Thomas Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 61.

<sup>435</sup> *The Prosecutor V. Thomas Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 62.

harm suffered is unrelated to charges? And for sake of judicial economy and protection of victims, those with irrelevant interests should not be allowed to participate.

One may be inclined to subscribe to the reasoning of the Appeals Chamber on the necessity of proving a nexus between harm and charges for participating victims. The Trial Chamber strictly interpreted Rule 85 in neglect of other provisions of the statute and the rules. Rule 85 is not a rights-giving provision, it only defines the term ‘victim’. For operationalisation of Article 68(3), a rights-giving provision, one should submit an application under Rule 89(1) which requires a connection between harm, personal interests, and charges.

### **3.2.3 Personal Interests – What are They?**

As stated above, the ICC Statute places a special emphasis on proof of personal interests for victims seeking participation at various stages of Court proceedings. Arguably, it is a requirement aimed at weeding out potential victims who may have interests that are foreign to cases before it. However, neither the Statute nor the Rules of Procedure and Evidence provide for a definition of the term ‘personal interests’.

One may have to look through the Court’s jurisprudence to determine what those interests could be. Victims of crimes under international law may not have homogenous interests as their needs and concerns could be different. Core crimes tend to cause devastating destructions of all kinds ranging from personal, social, cultural, economic, institutional, and political harm. Thus, given that various interests of people could be ruined by gross violations of human rights and considering that human needs differ on account of age, gender, and culture, it is natural that a vast majority of those interests may not be protected by a court of law, especially a criminal court.

The ICC, being an international criminal court with limited territorial and temporal jurisdiction, may not be able to afford juridical protection for ‘all the interests’ which could be important to the victims. The court’s primary duty is to determine the culpability of persons alleged to be responsible for genocide, war crimes, crimes against humanity, and aggression. The legal formalities applicable to a criminal trial and the unavoidable focus on relevant evidence and facts

may not create a room for protection of a wider category of interests that are unrelated to the evidence and facts under consideration.<sup>436</sup>

Ideally, most of the interests related to the social, economic, and cultural life of victims may not be amenable to protections envisaged under Article 68(3) of the ICC Statute. For victim's interests to be afforded protection under Article 68(3), it must be a specific interest related to issues before the Court in a particular case.<sup>437</sup> The Court has rejected as 'general and insufficient' for one to ask for participation just because they have an interest in the outcome of trial or proceedings.<sup>438</sup> According to Judge Pikis, the legitimacy of victim participation is derived from having personal interests that are affected in a particular stage of the proceedings.<sup>439</sup>

Haslam argues that victims need to prove the existence of "judicially recognisable personal interest" to participate.<sup>440</sup> The Prosecutor of the ICC, echoing Haslam, has also argued that the involvement of victims at the ICC cannot be based on *blanket personal interests* that have no bearing on issues under consideration by the court.<sup>441</sup> Expectedly, the Prosecutor does not specifically provide information on what those interests could be. One may not be able to provide a conclusive definition of what constitutes 'personal interests' given that victims have multiple interests dependent on their social, political, cultural, economic, and psychological status, as well as the nature of victimisation.

Similarly, victim's interests could necessarily hinge on a particular stage of proceedings and factual or legal issues under consideration. Aptly, it could be stated that there is no 'one size fits

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<sup>436</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, ICC-01/04-01/06-1119, para 97 at page 33.

<sup>437</sup> Haslam (2004) 324.

<sup>438</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, ICC-01/04-01/06-1119, para 96 at page 33.

<sup>439</sup> *The Prosecutor V. Thomas Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Partly Dissenting opinion of Judge G.M. Pikis, ICC-01/04-01/06 OA 9 OA 10, para 17 at page 42.

<sup>440</sup> Haslam (2004) 326.

<sup>441</sup> *Situation in Uganda*, Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation, para 30, ICC-02/04, 28 February 2007; *Situation in the Democratic Republic of the Congo*, Public Redacted Version Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06 and a/0224/06 to a/0250/06, ICC-01/04, 25 June 2007, para 19.

all' definition of a victim's interests. As the ICC is mandatorily required to base its judgment on the evidence adduced before it,<sup>442</sup> one could argue that victim's interests (whatever they are) must relate to the evidence or issues under scrutiny by the Court.<sup>443</sup> One crucial point must be underscored here. For victim's views and concerns to be judicially considered, they must get to the Judges in the form of evidence.

So, what could constitute personal interests under the ICC Statute? From the discussion above, the victim's personal interests must be those which could be justiciable under the ICC Statute or international human rights law. Such interests can only be amenable to judicial protection if they are recognised by the Statute or international (human rights) law.

In a decision of the Appeals Chamber concerning a victim's application to participate in an appeal, Judge Sang-Hyun Song has suggested that victim's personal interests may *qualify* for protection by the ICC only if such interests are recognised by the ICC Statute or international human rights jurisprudence.<sup>444</sup> Similarly, Judge Pikis, in his dissenting opinion over a decision by the Appeals Chamber on victims in the *Kony* case, has stated that "interests are defined by reference to the rights and obligations of a victim".<sup>445</sup>

As neither the ICC Statute nor international law contains an exhaustive and conclusive description of such interests, it is left to judicial adjudication to determine what those interests are. From various decisions of the ICC, the following 'interests' have been discerned to be relevant for the victims:

(a) An interest in having charges that are reflective of the harm suffered by victims;<sup>446</sup>

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<sup>442</sup> Article 74(2) of the ICC Statute.

<sup>443</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, ICC-01/04-01/06-1119, para 97 at page 33.

<sup>444</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, Separate opinion of Judge Sang-Hyun Song, ICC-01/04-01/06 OA8, 13 June 2007, paras 11 and 16.

<sup>445</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Decision on the Participation of Victims in the Appeal, Dissenting opinion of Judge Georghios M. Pikis, ICC-02/04-01/05 OA2, 27 October 2008, para 16.

<sup>446</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, Separate Opinion of Judge Georghios M. Pikis, ICC-01/04-01/06 OA8, 13 June 2007, para 16.

- (b) An interest in being protected and supported in exercising their role in the proceedings;<sup>447</sup>
- (c) An interest in receiving reparations;<sup>448</sup>
- (d) An interest in achieving justice by the prosecution of perpetrators;<sup>449</sup>
- (e) An interest in asserting their dignity and seeking recognition as victims;<sup>450</sup>
- (f) An interest in the determination of the truth regarding violations and harm suffered;<sup>451</sup> and
- (g) An interest in ensuring that evidence on their harm is not neglected.<sup>452</sup>

It must be clearly stated that the right to reparation is a statutory right for the victims under the ICC statute.<sup>453</sup> Victim's road to receiving reparations is dependent on a guilty verdict for the accused.

Consequently, an interest in reparations should not obscure the importance of other broader interests of the victims.<sup>454</sup> Judge Pikis has opined that, "participation of a victim at the trial is not a pre-requisite for claiming reparations".<sup>455</sup> It is particularly so as victims not participating in a trial may still be able to participate in reparation proceedings and obtain reparations.

In conclusion, for victims to be able to participate in any proceedings at the ICC, they must demonstrate that they have legally protected personal interests that are affected or likely to be affected in certain proceedings. In addition, such interests must be relevant to the evidence and factual or legal issues under interrogation by the Court. The question of 'relevance' cuts across all

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<sup>447</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Separate Opinion of Judge Georghios M. Pikis, para 16, ICC-01/04-01/06 OA8.

<sup>448</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, ICC-01/04-01/06-1119, para 98 at page 34; *The Prosecutor v. Thomas Lubanga Dyilo*, Separate opinion of Judge Sang-Hyun Song, ICC-01/04-01/06 OA8, para 13.

<sup>449</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Separate opinion of Judge Sang-Hyun Song, ICC-01/04-01/06 OA8, para 13.

<sup>450</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, ICC-01/04-01/06-1119, para 97 at page 33.

<sup>451</sup> *The Prosecutor v. Germain Katanga And Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, 22 January 2010, para 59.

<sup>452</sup> *The Prosecutor V. Thomas Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 99.

<sup>453</sup> Article 75 of the ICC Statute.

<sup>454</sup> *The Prosecutor v. William Samoei Ruto And Joshua Arap Sang*, Decision on Victims' Representation and Participation, ICC-01/09-01/11-460 , 3 October 2012, para 10.

<sup>455</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Partly Dissenting opinion of Judge G.M. Pikis, ICC-01/04-01/06 OA 9 OA 10, para 18.



stages of the proceedings before the Court irrespective of whether it is pre-trial, trial, sentencing, or reparations stage.

More importantly, for involvement in trial proceedings, the Appeals Chamber has held that victims must establish a concrete nexus between harm suffered, personal interests, and charges.<sup>456</sup> Since the Court is explicit on the requirement of a nexus between harm, personal interests, and charges in the trial stage, one can safely argue that such nexus may not be required for pre-trial proceedings.<sup>457</sup> Due to the unpredictability of charges during pre-trial stages, it may be ridiculous to demand that victims establish such nexus.

### **3.2.4 Appropriateness: At Which Stage Can Views and Concerns Be Presented by Victims?**

Article 68(3) of the ICC Statute demands that victims with proven personal interests be allowed by the Judges to present their ‘views and concerns’ at a stage of proceedings deemed to be *appropriate* and in a manner not repugnant to the rights of the accused and fair trial principles.<sup>458</sup> The law does not create a procedure for the Judges to follow in determining the appropriateness of involvement of victims in the proceedings. As discussed, the ICC Statute does not define the term ‘personal interests’. The court has a very broad discretion in deciding about when and in what manner to allow victims to participate.<sup>459</sup>

The only caveat for the involvement of victims in the proceedings, whatever stage it may be, is that such participation must not trump rights of the accused and fair trial rights under Article 66 and 67 of the ICC Statute.<sup>460</sup> According to the Appeals Chamber, even when the victim’s personal interests are proved and found to be relevant, Judges must still determine whether their

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<sup>456</sup> *The Prosecutor V. Thomas Lubanga Dyilo*, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 65.

<sup>457</sup> Pre-trial stage could include the investigation stage as well as confirmation of charges proceedings.

<sup>458</sup> *Situation in the Republic of Kenya*, Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya, ICC-01/09, 3 November 2010, para 10.

<sup>459</sup> Chung HC ‘Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise’ (2008) 6 *Northwestern Journal of International Human Rights* 466; *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Decision on the Participation of Victims in the Trial Proceedings, ICC-02/05-03/09-545, 20 March 2014, para 15.

<sup>460</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Separate Opinion of Judge Georghios M. Pikis, ICC-01/04-01/06 OA8, paras 17 and 18.

involvement will result in a miscarriage of justice.<sup>461</sup> Clearly, Judges have a far-reaching latitude in deciding when and how to let the victims access proceedings of the ICC.

The language used in Article 68(3) insinuates that victims should be allowed to speak in Court whenever their interests are at stake. However, it looks like participation could only be allowed if it complies, and not at variance, with the rights of the accused.

According to the ICC Statute, the accused person has a right: to be presumed innocent until proven guilty; to be informed of the charges and tried fairly and publicly; to be accorded ample time and the necessary facilities to prepare his defence, and to be tried impartially and without undue delay.<sup>462</sup> Such are the minimum guarantees of a fair trial that must be observed for the accused person at the ICC.<sup>463</sup>

While Article 68(3) requires the Court to heed to fair trial guarantees when deciding about the involvement of the victims, the jurisprudence of the ICC indicates that Judges have been mostly concerned with extra-legal factors. For example, in the *Bemba* case, Judges, without valid legal or factual reasons, trimmed down the number of victims seeking to personally present evidence and views from seventeen to eight on the account that proceedings would be lengthy.<sup>464</sup> That was not withstanding the fact that thousands of victims were authorised to participate in the Bemba case.

As we shall see at a later stage, factors which are not purely legal have been invoked to limit interventions by the victims at the ICC. In some decisions, Judges have emphasised that any interventions by the victims must not be *ultra vires* the case of the Prosecutor. They must not present views and evidence beyond the confines of the case.<sup>465</sup>

However, in most of the decisions on the participation of victims, Judges seem to be extremely concerned about resource-based reasons instead of legal conditions under Article 68(3). The speed

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<sup>461</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, ICC-01/04-01/06 OA8, para 28.

<sup>462</sup> Article 66 and 67 of the ICC Statute.

<sup>463</sup> Article 67(1) ICC Statute.

<sup>464</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Second Order Regarding the Applications of the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2027, 21 December 2011, paras 11 and 12.

<sup>465</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims' Representation and Participation, ICC-01/09-01/11-460, para 14.

of proceedings appears to be a major concern for most of the Judges at the ICC. In numerous decisions, victim's participatory rights have been limited for the sake of expediting proceedings.<sup>466</sup>

It is submitted that Article 68(3) must be interpreted meaningfully to ensure that victims have an independent voice at the ICC. Victim's right to be heard is firmly enshrined in international human rights law. Article 68(3) is meant to provide agency for victims at the ICC given the history of marginalisation of victims in past international criminal proceedings. The requirement for observation of fair trial rights of the accused must not be used as a pretext for scuttling victim's interventions at the ICC based on utilitarian considerations.

In many decisions, Judges have underscored the need to ensure that proceedings are not derailed by lengthy interventions by the victims.<sup>467</sup> Yes, accused persons are entitled to speedy proceedings and Judges are required to ensure that trials are not unduly delayed.<sup>468</sup> Since the law is against *undue delays*, it follows that reasonable delays caused by the victims were foreseen by the drafters of the Statute and therefore legal.

However, in 2009 in *Katanga*, Judge Bruno Cotte misapplied the requirement for "expeditious proceedings" by introducing extra-statutory factors in assessing victim's applications to present evidence or views in court.<sup>469</sup> In 2012, the Trial Chamber III in *Bemba* also decided to unduly restrict victim's right to present views and testify in court by imposing strict criteria that victim's testimony must bring up 'new information' and substantially contribute to the ascertainment of truth.<sup>470</sup>

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<sup>466</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Second Order Regarding the Applications of the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2027, para 9.

<sup>467</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2138, 22 February 2012, para 21; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims' Representation and Participation, ICC-01/09-01/11-460, para 11.

<sup>468</sup> Article 67(1)(c) and 64(2) ICC Statute.

<sup>469</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, ICC-01/04-01/07-1665, 20 November 2009, para 30.

<sup>470</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2138, para 23.

As a result, a few victims were unlawfully denied the chance to testify or speak in court as the court ruled that their testimony was of negligible effect and was likely to be repetitive.<sup>471</sup> Similarly, other victims were not allowed to testify on account that the harm suffered was not representative of the harm suffered by the majority of victims.<sup>472</sup>

In the *Bemba* case, the Court instructed the legal representative of victims to select victims whose testimony and views were representative of personal interests affecting a greater majority of victims.<sup>473</sup> Interestingly, in some instances, the Court allowed victims who had applied for tendering evidence to instead give their views as the evidence which they had sought to give was deemed either repetitive or insignificant.<sup>474</sup>

In the *Ntaganda* case, the Trial Chamber V has adopted the approach of the *Bemba* and *Katanga* cases in dealing with victim's applications to tender evidence or present views and concerns. In a 2017 decision, the chamber denied some victims a chance to present evidence because the evidence sought to be presented deemed to be cumulative of the Prosecutor's evidence and it could not supply new information to the court.<sup>475</sup>

Despite the fact that the "cumulative evidence" threshold has been invoked in numerous court decisions to block victims from testifying, one victim in the *Ntaganda* case was allowed to testify because his evidence, despite being repetitive to the Prosecutor's evidence, offered "unique information" on the conduct of *Ntaganda* in the perpetration of mass killings.<sup>476</sup> Similarly, a victim

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<sup>471</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2138, paras 38 and 53.

<sup>472</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2138, paras 36 and 49.

<sup>473</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Second Order Regarding the Applications of the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2027, para 12.

<sup>474</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2138, paras 38, 41, and 54.

<sup>475</sup> *The Prosecutor V. Bosco Ntaganda*, Decision on the Request by the Legal Representative of the Victims of the Attacks for Leave to Present Evidence and Victims' Views and Concerns, ICC-01/04-02/06-1780-Red, 10 February 2017 paras 31, 38, and 40.

<sup>476</sup> *The Prosecutor V. Bosco Ntaganda*, Decision on the Request by the Legal Representative of the Victims of the Attacks for Leave to Present Evidence and Victims' Views and Concerns, ICC-01/04-02/06-1780-Red, para 31.

whose evidence was partly repetitive was allowed to testify as his evidence was representative of a larger group of victims because it touched on a range of crimes perpetrated by the UPC fighters.<sup>477</sup>

### **3.2.5 Critique of the Victim Participation Regime on the Tendering of Evidence**

Whenever victims sought to give evidence or views, the Judges have demanded that such evidence and views must be “representative of a larger group of victims”, “make a genuine contribution to the ascertainment of the truth” and “bring to light substantial new information” which is relevant to issues before the court.<sup>478</sup> Such criteria invented by the Court have no legal force under the ICC Statute.<sup>479</sup>

The Statute does not require that victim’s evidence must be new and of high probative value for it to be admissible. The only requirement is for the Court to satisfy itself that the applicant is a victim whose personal interests have been affected and to determine an appropriate stage for them to give evidence or views. Also, the victim’s testimony and views should only be rejected when there are genuine legal and or factual reasons to believe that their presentation will violate fair trial standards or rights of the accused.<sup>480</sup>

Arguably, it is wrong for the Court to invoke extraneous considerations in limiting the use of Article 68(3) by the victims. The decisions rendered by the Judges in the *Bemba* and *Katanga* cases are unjustified under the ICC Statute. In agreement with Judge Steiner, I reason that the

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<sup>477</sup> *The Prosecutor V. Bosco Ntaganda*, Decision on the Request by the Legal Representative of the Victims of the Attacks for Leave to Present Evidence and Victims’ Views and Concerns, ICC-01/04-02/06-1780-Red, para 25.

<sup>478</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2138, paras 22, 24 and 25; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, ICC-01/04-01/07-1665, para 30.

<sup>479</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2140, 23 February 2012, para 28.

<sup>480</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2140 , para 26.

Court is not empowered to alter the victim's right to participate but to satisfy itself of the conditions set out under Article 68(3) and to determine modalities of participation.<sup>481</sup>

The requirement for expeditiousness under Article 64(2) should not be used to justify road blocks to victim's path to the courtroom.<sup>482</sup> Any impediments to victims' rights under Article 68(3) must have a finding under the law. In cases discussed, the Court wrongly invented some qualifying criteria for victim's participation in the proceedings, in addition to statutory conditions under Article 68(3).<sup>483</sup>

In some situations, victim's testimony which is otherwise cumulative with evidence already adduced can still help the Court understand better the pattern of victimisation and the gravity of perpetration of crimes.

For example, victim a/0555/08 in the *Bemba* case was denied the chance to give evidence on account that her evidence was ineffectual to the determination of truth and irrelevant to the charges.<sup>484</sup> The victim was abducted and raped by MLC soldiers (Bemba forces) in the Central African Republic and was later relocated to the DRC with the soldiers. She claimed to have suffered physical and psychological harm from the rape and abduction. The evidence of that victim could have been crucial in explaining the typology of perpetration of rape, pillage, and abduction crimes by the troops and about the general pattern of criminality.<sup>485</sup> More importantly, the victim came from a locality from which no live evidence was produced by the Prosecutor.

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<sup>481</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2140, para 18.

<sup>482</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2140, para 23.

<sup>483</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2140, para 14.

<sup>484</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2138, paras 34-36.

<sup>485</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2140, paras 28 – 31.

Likewise, victim a/0542/08 in *Bemba* wanted to testify about rape. Her evidence was also rejected for being repetitive of evidence already adduced by Prosecution.<sup>486</sup> However, her evidence was important in highlighting the widespread nature of the perpetration of such crimes by MLC troops as she was from a locality from which no evidence was produced by the Prosecutor.<sup>487</sup>

Interestingly, the Court allowed the victim to give “views and concerns” as the harm suffered was representative of a greater part of the victims.<sup>488</sup> In her dissenting opinion, Judge Steiner faults the ruling of the majority for being unreasonable as the victim’s evidence was of good probative value and should have been allowed.<sup>489</sup> In denying victims the chance to testify and instead directing them to present views, the Court effectively reduces the victim’s chance of influencing Court decisions as views are not part of the trial evidence and cannot be relied on by the Judges.<sup>490</sup>

What comes out clearly from the decisions cited above is that some Judges are more concerned with the utilitarian value of victim’s evidence and views than ensuring that victim’s independence is upheld. In international criminal trials where you have large numbers of victims seeking participation, it may sound pragmatic for the Judges to look for “usefulness and genuineness” when it comes to victim’s testimony.

Truly, time and resources may not be enough for the ICC to allow all the victims to testify or present views in person. Limiting personal testimonies of victims could be ideal for the sake of

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<sup>486</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2138, para 38.

<sup>487</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2140, paras 32-34.

<sup>488</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2138, para 39.

<sup>489</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2140, para 35.

<sup>490</sup> Article 74(2) of the ICC Statute; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Request by Victims a/ 0225/06, a/0229/06 and a/0270/07 to Express their Views and Concerns in Person and to Present Evidence During the Trial, ICC-01/04-01/06-2032-Anx, 26 June 2009, para 25.

judicial economy and avoidance of protracted proceedings.<sup>491</sup> Owing to the victim's inalienable right to be heard, the Court must not lock out victims whose evidence or views appear unhelpful to them in the adjudication of cases.

Critical to the decision of the majority in blocking some victims from personal appearance in Court for tendering evidence and presenting views, Judge Steiner held that:

In my view, the strict limitations imposed by the Majority to the presentation of evidence by victims and the "case-by-case" analysis of the victims' right to present their views and concerns reflect a utilitarian approach towards the role of victims before the Court, which has no legal basis and appears to unreasonably restrict the rights recognised for victims by the drafters of the Statute.<sup>492</sup>

I agree with Judge Steiner that the Court should not be obsessed with judicial consequentialism of the victim's evidence and or views.<sup>493</sup> It is a duty of the Court to look for 'usefulness' of the evidence when assessing the whole body of evidence after it has been adduced and not to prevent certain evidence from being presented simply because it may not help it arrive at its decisions.

Although Article 68(3) does not create fair trial rights for the victims, the Court is required, under Article 68(1), to treat victims fairly and with dignity. Denying them an independent voice in the Court because utilitarian considerations may blunt their participation in the proceedings. Participation should be able to achieve substantive outcomes for the victims as opposed to merely symbolic gains that have no impact on them.

In the *Bemba* case, more than 5000 victims participated in the Trial. One would ask, what would be the justification of allowing only seven victims out of thousands of victims to personally present opinions and tender evidence in Court? Allowing fifty victims out of five thousand to testify and

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<sup>491</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2140, para 20.

<sup>492</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2140, para 11.

<sup>493</sup> It should not be about the practical outcome of the victim's evidence and opinions as regards judicial work (Utilitarianism) but it should be about allowing victims to give evidence and views as per Article 68(3) of the ICC Statute and then determine the probative value of such submissions or testimonies when making a final decision (Judgment).



present views cannot lead to *undue delay* contemplated under the law.<sup>494</sup> The seven victims who wanted to testify in the *Bemba* case would, if they had been allowed, have spent eighteen hearing days comparable to one hundred and seventy seven days spent by the Prosecution.<sup>495</sup>

Lastly, trials which are unduly prolonged may occasion an injustice for the defendants. A trial becomes unfair if it is not expeditious and it could also be unfair even when it is expeditious.<sup>496</sup> At the ICC, there is no empirical evidence that victim's interventions have prolonged trials. For example, the Lubanga trial lasted nine years mainly due to prosecutorial reasons. Thus, 'fairness' remains an essential element of fair trial requirements under international law.

For both sides to a criminal case, the Court must strike a delicate balance to ensure that proceedings are fair and expeditious to all including the victims who are slowly creating a third force in criminal trials at the ICC. An international criminal trial should not be an exercise that marginalises the victims by extending unsubstantiated rights to the Prosecutor and the defendant. In his separate opinion in the Appeals Chamber decision on victims, Judge Song stated that: "The jurisprudence of the ECHR indicates that criminal proceedings may well be considered fair and consistent with the rights of the accused even if the participation of victims is relatively far-reaching".<sup>497</sup>

### **3.2.6 Victim's Evidence and Article 66(2) Obligation of the Prosecutor**

In the previous section, we have seen that victims participating in the proceedings at the ICC could be allowed to tender evidence. This part seeks to examine the legal dynamics relating to the adduction of evidence by the victims in relation to prosecutorial obligations under the ICC Statute.

Of interest in this discussion is Article 66(2) of the ICC Statute that says: "The onus is on the Prosecutor to prove the guilt of the accused". Now, if victims can lead evidence, would it amount

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<sup>494</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2140, para 21.

<sup>495</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Sylvia Steiner on the Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2140, para 21.

<sup>496</sup> Robinson PL 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia' (2000) 11 *European Journal of International Law* 583.

<sup>497</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, Separate Opinion of Judge SANG-HYUN SONG, para 25.

to a duplication of prosecutorial tasks? Another issue that may come up is whether the submission of evidence by the victims presents a danger to fair trial safeguards available to the accused under the ICC Statute.

The ICC's first determination of the victim's role in the production of trial evidence was the 2008 *Lubanga* decision on the participation of victims. The Trial Chamber I held that the right to present evidence is not a preserve of the parties as the Court can exercise its powers under Article 69(3)<sup>498</sup> to request the submission of evidence that would enable it to establish the truth.<sup>499</sup>

Furthermore, the Court decided that victims may put questions to witnesses if "their personal interests are engaged by the evidence under consideration".<sup>500</sup> On admissibility matters, the Court implied that victims could be allowed to challenge the admissibility of evidence through the provisions of Article 68(3) and 69(4) of the ICC Statute.<sup>501</sup> However, the decision fell short of addressing the legal implications of allowing victims to tender evidence, in particular, about the disclosure and burden of proof issues.

The Trial Chamber decision was appealed by the Defence and the Prosecutor. One of the issues in the appeal was whether it would be legally justified for the participating victims to submit evidence on the guilt or innocence of the accused and to challenge the admissibility of evidence.<sup>502</sup> In the Appeal, the Prosecutor charged that it was legally wrong for the Trial Chamber I to allow victims to tender evidence because they are not parties to the proceedings and the right to lead evidence on guilt or innocence rests with the parties (Defence and Prosecution).<sup>503</sup>

In addition, the Prosecutor observed that allowing victims to tender evidence on guilt or innocence would result in shifting the burden of proof which is exclusively the province of the Prosecutor

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<sup>498</sup> Article 69(3) of the ICC Statute says: "The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth".

<sup>499</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims' Participation, ICC-01/04-01/06-1119, para 108.

<sup>500</sup> The Court relied on Rule 93(1); *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims' Participation, ICC-01/04-01/06-1119, para 108.

<sup>501</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims' Participation, ICC-01/04-01/06-1119, para 109.

<sup>502</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 66.

<sup>503</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, paras 69 and 71.

under Article 66(2).<sup>504</sup> In agreement with the Prosecutor, the Defence also argued that the victims, not being parties, had no right to lead evidence on guilt or innocence and it would amount to double prosecution if they were allowed to do so.<sup>505</sup>

Specifically, the Defence opined that the said double prosecution<sup>506</sup> would trump the principle of equality of arms, an essential component of fair trial guarantees. Additionally, the Defence submitted that the absence of disclosure obligations for the victims under the ICC Statute justified that victims had no right to lead evidence on the guilt or innocence of the defendant.<sup>507</sup>

In response to appeal arguments raised by the Prosecution and the Defence, the Legal Representative of the victims argued that victims have an indirect avenue under Article 68(3) and Rule 91(3) for them to submit evidence touching on the guilt or innocence of the accused.<sup>508</sup> Similarly, the victim's lawyer opined that issues of guilt or innocence affect the victims and therefore they should be allowed to make interventions that do not affect the specific roles of the parties.<sup>509</sup>

From the arguments of the appellants, the thrust of the appeal was whether victims as *participants* in criminal proceedings are equal to the *parties* in the sense of having a right to lead evidence on guilt or innocence of the accused person. In disposing of the main ground of appeal, the Appeals Chamber reiterated that, considering some provisions of the ICC Statute,<sup>510</sup> it emerges that the right to lead evidence on the guilt or innocence of the accused and to challenge the admissibility of evidence belongs to the Parties.<sup>511</sup>

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<sup>504</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 71.

<sup>505</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 78.

<sup>506</sup> Meaning two accusers (The Prosecutor and the Victims).

<sup>507</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 78.

<sup>508</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 80.

<sup>509</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 81.

<sup>510</sup> Articles 69(3), 64(6)(d), 66(2), and Rules 76 – 84 of the ICC REP.

<sup>511</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 93.

Despite affirming the existence of such a right for the parties, the Appeals Chamber added that there was no provision in the ICC Statute that prevents victims from adducing evidence directed at the guilt or innocence of the accused person, and to challenge the admissibility of evidence.<sup>512</sup>

The reasoning of the Court revolves around its powers under Article 69(3) with respect to which the Court can request the production of additional evidence that may assist it in the determination of the truth. Thus, the Appeals Chamber held that the responsibility of the Prosecutor under Article 66(2) could not be used to flout its statutory authority to allow the submission of evidence by the victims since it is the Court which must be convinced that the guilt of the accused has been established beyond reasonable doubt.<sup>513</sup>

Most importantly, the Appeals Chamber underscored the fact that Article 68(3) must be interpreted to enable *meaningful participation* by the victims and, therefore, if victims were restricted to producing evidence unrelated to the guilt or innocence of the accused then such evidence would be inadmissible for irrelevance and that would render their participation ineffectual.<sup>514</sup>

Similarly, another crucial factor that was raised in the *Katanga and Chui* cases is that restricting victims to presenting “views and concerns” will not result in substantive gains for them as such views, not being evidence, “cannot be taken into account in the final judgment”.<sup>515</sup>

In essence, the Appeals Chamber held that the “possibility” of victims to tender evidence pertaining to the guilt or innocence of the accused person could arise from the triangular application of Articles 68(3) and 69(3) as well as Rule 91(3) that empowers Legal Representatives

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<sup>512</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 94.

<sup>513</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 95; Article 66(3) of the ICC Statute says: “In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt”.

<sup>514</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 97; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, para 83, ICC-01/04-01/07, 22 January 2010.

<sup>515</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, para 89; As for the distinction between evidence and views, see; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, para 19, ICC-01/05-01/08, 22 February 2012.

of Victims to put questions to witnesses.<sup>516</sup> Thus, victims with proven personal interests that are affected by issues touching on evidentiary matters may “move the court” under Article 69(3) to be allowed to present evidence.<sup>517</sup>

What comes out clearly from the decision of the Appeals Chamber is that victims have no statutory right to lead evidence on the guilt or innocence of the accused person. In the words of the Prosecutor in the *Ntaganda* case, victims have “a right to *petition* the Chamber to call evidence under the authority afforded to it under Article 69(3)”.<sup>518</sup> The concept of a “right to petition” was also endorsed by the Trial Chamber II in the *Katanga and Chui* case.<sup>519</sup> When the trial court accepts the petition, it must determine the appropriate stage for the presentation of such evidence and ensure that it is disclosed to the defence before being presented to the Judges.<sup>520</sup>

On the question of victim’s right to challenge the relevance or admissibility of evidence, the Appeals Chamber held that the Court could allow victims to challenge the admissibility of evidence owing to its statutory powers to rule on the admissibility and relevance of evidence.<sup>521</sup> Such an approach could be discerned from the aggregate effect of Articles 68(3), 69(4),<sup>522</sup> 64(9)<sup>523</sup> of the ICC Statute as well as Rules 89 and 91 of the ICC REP. Similarly, the questioning of

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<sup>516</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/05-01/08-2138, para 81.

<sup>517</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, paras 98 – 99.

<sup>518</sup> *The Prosecutor v. Bosco Ntaganda*, Public Redacted Version of “Prosecution’s Response to the ‘Confidential Redacted Version of Request by the Common Legal Representative of the Victims of the Attacks for Leave to Present Evidence and Victims’ Views and Concerns’ – ICC-01/04-02/06-1739-Conf-Red”, 3 February 2017, ICC-01/04-02/06-1772-Conf, para 2.

<sup>519</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/05-01/08-2138, paras 49 and 52.

<sup>520</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 100.

<sup>521</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 101.

<sup>522</sup> Article 69(4) of the ICC Statute says: “The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence”.

<sup>523</sup> Article 64(9) of the ICC Statute says: “The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to: (a) Rule on the admissibility or relevance of evidence; and (b) Take all necessary steps to maintain order in the course of a hearing”.

witnesses by the Legal Representative of Victims under Rule 91(3) could bring up issues directed at the admissibility and relevance of evidence that affect the personal interests of the victims.<sup>524</sup>

In another scenario, the Trial Chamber II in *Katanga and Chui* opined that victims may as well challenge the admissibility or relevance of evidence through presentation of “views and concerns” as nothing under the Statute prevented them from relaying information to the Court on the probative value of evidence and thereby assist the Court to discharge its mandate.

The Court stated that: “...it must permit a victim who has information clearly indicating the admissibility of disputed evidence, or, on the contrary, establishing that such evidence cannot be admitted or is irrelevant, to transmit that information to the Chamber. Such information may prevent the Chamber from being misled by relying on inadmissible or irrelevant evidence – or dismissing evidence that is in fact admissible and relevant – in order to establish the facts”.<sup>525</sup>

Accordingly, the Appeals Chamber in the *Lubanga* case also held that victims have a right to *petition* the court to be permitted to lead evidence on the guilt and innocence of the accused and to make submissions on the relevance or admissibility of evidence. To do so, the Trial Chamber must determine an appropriate moment for the exercise of such a right by ensuring that the petition by victims indicate how their interests are affected, and that the rights of the accused are observed.<sup>526</sup>

The decision of the Appeals Chamber in *Lubanga* regarding the position of victims in tendering evidence on the innocence or guilt of the accused person and in challenging the admissibility and relevance of evidence was wholly upheld by the Appeals Chamber in the *Katanga and Chui*

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<sup>524</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 102.

<sup>525</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, para 104.

<sup>526</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06 OA 9 OA 10, para 104; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, para 84.

cases.<sup>527</sup> The Appeals Chamber reiterated that, for the victims to be allowed to tender evidence, they must satisfy a two-pronged procedure.

First, the conditions under Article 68(3) must be met and secondly, they must trigger the exercise of powers of the Court under Article 69(3).<sup>528</sup> Likewise, the Court upheld the finding in *Lubanga* that victims could adduce evidence on the guilt or innocence of the accused person. The Appeals Chamber in *Katanga and Chui* emphasises that it could not rule out the victim's evidence on the role of the accused in the perpetration of crimes if such evidence is necessary for the establishment of the truth.<sup>529</sup>

One of the issues that came up in the Appeal and which was not fully covered by the decision of the Appeals Chamber in *Lubanga* was "whether it is possible, under the Rome Statute, for evidence to be adduced at trial, which had not been disclosed prior to the commencement of the trial".<sup>530</sup>

In other words, where does the victim's evidence stand in relation to disclosure obligation under the ICC Statute<sup>531</sup> and whether disclosure during trial violates fair trial rights of the accused person. In dealing with that issue, the Appeals Chamber underscored that, in exercising its statutory powers pursuant to Articles 69(3) and 64(6)(d), the Court may receive evidence from the victims during the trial and such evidence cannot be amenable to disclosure obligations applicable to the Prosecutor since the Court may not know in advance of the trial if it would need additional evidence to enable it to ascertain the truth until after it has received evidence from the parties.<sup>532</sup>

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<sup>527</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 entitled "Decision on the Modalities of Victim Participation at Trial", ICC-01/04-01/07-2288, 16 July 2010, para 48 and paras 111 – 114.

<sup>528</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 entitled "Decision on the Modalities of Victim Participation at Trial", ICC-01/04-01/07-2288, 16 July 2010, para 44.

<sup>529</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 entitled "Decision on the Modalities of Victim Participation at Trial", ICC-01/04-01/07-2288, 16 July 2010, paras 3 and 112.

<sup>530</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 entitled "Decision on the Modalities of Victim Participation at Trial", ICC-01/04-01/07-2288, 16 July 2010, para 41.

<sup>531</sup> Subject to Articles 61(3) and 64(3)(c) of the ICC Statute and Rule 121 (3) and (5) of the ICC REP, the Prosecutor must disclose to the Defence the evidence she or he intends to rely at the trial.

<sup>532</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 entitled "Decision on the Modalities of Victim Participation at Trial", para 44 and 45, ICC-01/04-01/07 O A 11, 16 July 2010.

In summary, the production of evidence under Article 69(3) of the ICC Statute is *sui generis* and therefore not amenable to the pre-trial disclosure regime applicable to the parties. Since Article 69(3) evidence is not susceptible to statutory disclosure obligations, the Appeals Chamber has established a principle (court-ordered disclosure) to the effect that such evidence must be disclosed to the parties before its presentation in the Court.<sup>533</sup>

Even though there are two decisions of the Appeals Chamber (Lubanga and Katanga) that uphold the *quasi-right* of victims to adduce evidence on the guilt or innocence of the accused, Judge Ozaki has recently written a dissenting opinion in a recent *Ntaganda* decision opposing that role accorded to victims in evidentiary matters. In February 2017, the Trial Chamber VI in *Ntaganda* handed down a decision that, in many respects, echoes the main findings of the Appeals Chamber in *Lubanga* and *Katanga* regarding the production of evidence by the victims as discussed above.<sup>534</sup>

In his dissenting remarks, Judge Ozaki argues that rights of the accused person would be violated if victims are allowed to complement the Prosecutor in presenting evidence relating to the guilt and innocence of the accused.<sup>535</sup> Aptly put, the Judge asserts that, by allowing victims to tender such evidence, the court subjects the defendant to two accusers, leading to a violation of the equality of arms principle and fair trial rights.

Essentially, Judge Ozaki opines that the ICC Statute does not support the extension of the Prosecutor's role under Article 66(2) to the victims due to three reasons.<sup>536</sup> First, the disclosure regime (Rules 76-84) is only applicable to parties; secondly, allowing the submission of additional evidence by the victims and which is not amenable to the disclosure regime leads to a violation of

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<sup>533</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 entitled "Decision on the Modalities of Victim Participation at Trial", ICC-01/04-01/07-2288, 16 July 2010, paras 51 – 55.

<sup>534</sup> *The Prosecutor V. Bosco Ntaganda*, Public redacted version of 'Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims' views and concerns' (10 February 2017, ICC-01/04-02/06-1780-Conf), ICC-01/04-02/06-1780-Red, 15 February 2017.

<sup>535</sup> *The Prosecutor V. Bosco Ntaganda*, Public redacted version of 'Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims' views and concerns' (10 February 2017, ICC-01/04-02/06-1780-Conf), Partly Dissenting Opinion of Judge Kuniko Ozaki, ICC-01/04-02/06-1780-Anx-Red, para 1.

<sup>536</sup> *The Prosecutor V. Bosco Ntaganda*, Partly Dissenting Opinion of Judge Kuniko Ozaki, ICC-01/04-02/06-1780-Anx-Red, para 6.



the principle of equality of arms as victims become “auxiliary prosecutors”; and thirdly, the right to a speedy trial is affected.

I do not subscribe to the arguments raised by Judge Ozaki in opposing the victim’s role in presenting evidence on the criminality of the accused person. The Judge employs a strict interpretation of the ICC Statute in a way that could turn victims into mere spectators to the proceedings at the ICC. Interestingly, the Judge concedes that victims could be called as witnesses but he falls short of describing what should the victim’s role be with respect to the supply of evidence on the role of the accused.

Confusingly, he accepts that he would have allowed only victim a/30012/15 to testify as the evidence sought to be adduced is significant in the determination of truth because it is related to “the conduct” of Ntaganda.<sup>537</sup> One may want to ask, how does the evidence on the conduct of an accused person fall outside the scope of their innocence or guilt? Common sense suggests that any body of evidence that does not relate either to the guilt or innocence of an accused person would be inadmissible or neglected for lack of relevance.

Thus, there is absolutely no reason for categorisation of types of evidence to be given by the victims. The Appeals Chamber in *Katanga* and *Chui* stated that: “Evidence on the conduct of the accused is encompassed within the general category of evidence pertaining to the guilt or innocence of the accused which victims may be permitted to submit. The Appeals Chamber finds no reason to distinguish between distinct categories of evidence the victims may or may not be requested to present”.<sup>538</sup>

If Judge Ozaki’s approach to the role of victims in the supply of trial evidence is to be followed, victim’s right to participate in ICC proceedings would become ineffectual. Such an approach runs counter to the victim’s internationally recognised right of access to the Court and the right to be heard.

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<sup>537</sup> *The Prosecutor V. Bosco Ntaganda*, Partly Dissenting Opinion of Judge Kuniko Ozaki, ICC-01/04-02/06-1780-Anx-Red, para 7.

<sup>538</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 entitled "Decision on the Modalities of Victim Participation at Trial", ICC-01/04-01/07-2288, para 113.

In *Katanga*, it was suggested that non-criminal provisions of the ICC Statute should not be subjected to strict interpretations,<sup>539</sup> and the outcome of interpretations undertaken by the Court must enhance human rights recognised under international law.<sup>540</sup> Arguably, Article 68(3) on victim participation is not a criminal provision and therefore it should not be interpreted strictly.

On the issue of double prosecution, Judge Ozaki does not present sufficient reasons to substantiate his argument that victims would become “auxiliary prosecutors” if they adduce evidence on the guilt or innocence of the accused.

It is submitted that the parameters of the charges facing the accused are defined by the Prosecutor and approved by the Court in confirmation proceedings.<sup>541</sup> In confirmation proceedings, the Prosecutor must convince the Court that there are “substantial grounds to believe” that the suspect is responsible for the allegations contained in the charges.<sup>542</sup> Once the Court confirms the charges, the suspect is committed to a trial, and such charges can only be amended before a trial begins and upon notification of the accused person.<sup>543</sup>

Thus, when victims present evidence on whatever issue, such evidence must conform to the scope of the Prosecutor’s case as confirmed by the Court. Conformity and relevance to the charges are the most important considerations in assessing victim’s applications to tender evidence at the ICC. In my view, there can be a violation of the equality of arms principle if victims present evidence that seeks to enlarge the scope of charges beyond the Prosecutor’s case and thereby force defendants to confront an “unexpected case” at trial. If that happens, then it could be alleged that rights of the accused person are endangered by double prosecution. That has never been the case at the ICC until now.

Thus, grounds presented by Judge Ozaki for the exclusion of victim’s evidence relating to the criminality of the accused person are hypothetical. The Judge has not provided reasons to indicate serious encroachments on rights of the defendants if victims present evidence on criminality. Until

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<sup>539</sup> *Katanga* Article 74 Judgment, para 52.

<sup>540</sup> *Katanga* Article 74 Judgment, para 50.

<sup>541</sup> Article 61(7) (a) and (b), ICC Statute.

<sup>542</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2014, para 9.

<sup>543</sup> Article 61 (9) of the ICC Statute.

now, the available empirical evidence indicates that no victim has ever testified at the ICC on issues which are *ultra vires* the Prosecutor's case.

Most of the victims have testified on the gravity of victimisation and the role of the accused in the perpetration of crimes. In the same vein, most of the testimonies have been corroborative to the evidence already adduced by the Prosecutor and therefore the accused person has never been ambushed in the trial proceedings.

The ICC Statute contemplates that there would be "new or additional evidence" that could be received by the Court during the trial proceedings, in addition to the evidence already disclosed to the parties before the trial begins.

That is why the ICC is empowered to receive or order the production of additional evidence.<sup>544</sup> Such evidence could come from the parties (Prosecutor and Defence) or victims since the relevant provisions do not restrict the supply of such "additional evidence" to the parties. Since the supply of additional evidence is envisaged under the ICC statute, it is improper to argue that there would be an injustice to accused persons if such evidence came from the victims and when it relates to the guilt or innocence of the defendant.

In the case of a violation, there is a sufficient protection mechanism for the parties' rights if they have issues on such evidence. Under Rule 64(1) of the ICC RPE, parties are allowed to bring up issues relating to the relevance or admissibility of evidence.<sup>545</sup> Thus, if the defence finds that certain evidence to be adduced by the victims would trump their rights or place them at a disadvantage, they can then use that provision to seek an intervention of the Court promptly.

Lastly, Judge Ozaki raised the issue of "expeditiousness" in relation to the supply of evidence by the victims. In the decision over which he dissents, the Chamber allowed three victims to testify out of thousands of victims participating in the *Ntaganda* case.<sup>546</sup> The Judge does not provide substantial reasons to justify his worries about the possible delay of the proceedings if the three

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<sup>544</sup> Article 69(3), and Article 64(6)(d) of the ICC Statute and Rule 84 (Disclosure and additional evidence for trial) of the ICC RPE.

<sup>545</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the Appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the Decision of Trial Chamber III entitled "Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence", ICC-01/05-01/08-1386, 3 May 2011, para 47.

<sup>546</sup> *The Prosecutor v. Bosco Ntaganda*, Decision on Victims' Participation in Trial Proceedings, ICC-01/04-02/06-449, 6 February 2015, para 1.

victims testify. It is true that defendants have a “right to be tried without undue delay”.<sup>547</sup> However, trial without undue delay should not be achieved at the expense of rights of the Prosecutor and the victims. As held by the Pre-Trial Chamber I in *Situation in the Democratic Republic of Congo*, the ICC should equally “preserve and guarantee” rights of the parties and victims.<sup>548</sup>

Thus, the fairness of the proceedings should be upheld for all the participants at the ICC including the victims. There must be respect for the “procedural rights” of both the parties and the victims.<sup>549</sup> For the victims, fairness would mean that they can exercise their rights as recognised under the Statute and international law. Reasonable delays must be tolerated when victims are exercising their rights because, as the Appeals Chamber argues, expeditiousness should not be fronted to “justify deviations from statutory requirements”.<sup>550</sup> In the same vein, I add that expeditiousness should not be used to justify derogations from victims’ rights recognised under international law.

### **3.2.7 Direct and Indirect Victims: Same Rights?**

Crimes under international law tend to produce large numbers of victims who succumb to the victimisation on various levels. Indeed, the harm that ensues from such crimes could affect victims directly or indirectly, depending on the circumstances. For institutions, there must be a direct nexus between the crime and the harm.<sup>551</sup> Accordingly, the Trial Chamber I in *Lubanga* has applied a purposive approach to interpretation and held that the requirement of a direct nexus between the harm and the crime is not required for natural persons.<sup>552</sup> Thus, for natural persons, they can participate in the ICC proceedings as direct or indirect victims of any crime under the ICC Statute.

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<sup>547</sup> Article 67(1)(c) of the ICC Statute.

<sup>548</sup> *Situation in the Democratic Republic of the Congo*, Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-135-tEN, 31 March 2006, para 43.

<sup>549</sup> *Situation in the Democratic Republic of the Congo*, Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-135-tEN, para 38.

<sup>550</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the Appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the Decision of Trial Chamber III entitled “Decision on the Admission into Evidence of Materials Contained in the Prosecution’s List of Evidence”, ICC-01/05-01/08-1386, para 55.

<sup>551</sup> Rule 85(b) of the ICC REP.

<sup>552</sup> Rule 85(a) of the ICC REP; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims’ Participation, ICC-01/04-01/06-1119, 18 January 2018, para 91.

Despite such a finding, the Trial Chamber in *Lubanga* did not expound further the concept of indirect victims in relation to crimes under the ICC Statute. The Court failed to contextualise the application of the concept of “indirect victimisation” in relation to serious crimes such as the recruitment and use of children in armed conflicts. In reality, the war crime of using child soldiers in armed conflicts tend to produce different layers of victims apart from the children themselves who are also perpetrators. In that sense, when children are regarded as direct victims, what would be the status of people who suffer harm from the conduct of child soldiers?

The Appeals Chamber in *Lubanga* has clarified the concept of indirect victimisation by linking it to familial relations of the victims. In establishing the familial relation’s principle about indirect victimisation, the Appeals Chamber stated that: “harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the court can give rise to the harm suffered by other victims”.<sup>553</sup>

Now, who are these “other victims” whose harm could result from the direct victims? The “other victims” must be persons who have a close personal relationship with the direct victim, for example, parents or blood relatives of child soldiers.<sup>554</sup> In principle, the Appeals Chamber confirmed the finding of the Trial Chamber that individuals can be direct and indirect victims of crime as long as the harm suffered is personal.

However, the court failed to explain the status of persons who, for example, suffer harm from the conduct of direct victims such as child soldiers. Implicitly, the conceptualisation of indirect victims by the Appeals Chamber in *Lubanga* seem to exclude indirect victims who are harmed by child soldiers. Such an exclusion became clearer in another decision in the *Lubanga* case.

In 2009, three Judges of the Trial Chamber I in *Lubanga* were required to decide on the status of 200 applications for participation as victims. The individuals claimed to have suffered harm (murder, rape, pillage, and enslavement) as a result of crimes perpetrated by the UPC (Lubanga’s militia). Thus, the major issue for the Court was whether such individuals could qualify as indirect

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<sup>553</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, para 32.

<sup>554</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1432, para 32.

victims, claiming that their victimisation is traceable to the conduct of child soldiers.<sup>555</sup> Before discussing the decision of the Court on the matter, let us first navigate through the submissions of the parties.

**(a) The Prosecutor: Persons Harmed by Child Soldiers Should Participate as Indirect Victims**

Relying on the tripartite nexus between personal interests of the victims, the harm suffered, and the charges, the Prosecutor argued that persons who suffered harm resulting from the conduct of child soldiers recruited by Lubanga should be allowed to participate as indirect victims.<sup>556</sup> He stated that, "...the protection afforded by the provisions of the Rome Statute relating to the recruitment and use of children under the age of fifteen years extends to third parties who suffered harm as a result of crimes committed by children within the ranks of the UPC/FPLC".<sup>557</sup>

**(b) The Defence: Persons Harmed by Child Soldiers Should Not Participate**

The defence opposed the inclusion of the 200 individuals as indirect victims by reiterating that only those with parental relationships with child soldiers should be allowed to participate.<sup>558</sup> That suggestion is in line with a finding of the Appeals Chamber as discussed earlier. Stressing on the importance of linking harm to charges, the Defence underscored that the conduct of child soldiers was not part of the charges against Lubanga and therefore the Court would be overstepping its jurisdictional mandate if it allowed victims of the crimes of child soldiers to participate in the proceedings.<sup>559</sup>

**(c) Submissions by Office of the Public Council for the Victims**

As Lubanga was charged with the war crime of using child soldiers, the Office of the Public Counsel for the Victims (OPCV) submitted that indirect victims should be allowed to participate if they suffered harm "which is linked to the criminal enlistment or conscription of children under

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<sup>555</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Indirect Victims, ICC-01/04-01/06-1813, 8 April 2009, para 2.

<sup>556</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Indirect Victims, ICC-01/04-01/06-1813, para 6.

<sup>557</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Observations on Examples of Applications for Participation in the Case of Persons Who Might be Considered Indirect Victims, ICC-01/04-01/06-1544, 5 December 2008, para 6.

<sup>558</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Indirect Victims, ICC-01/04-01/06-1813, para 7.

<sup>559</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Indirect Victims, ICC-01/04-01/06-1813, para 7.

the age of fifteen or their active participation in hostilities”.<sup>560</sup> That point negates the requirement of “parental relations” as espoused by the Appeals Chamber.

Furthermore, the OPCV outlined five categories of victims in relation to child soldiers; first, parents of the child soldiers, secondly, persons who suffer harm while intervening to prevent the recruitment or use of children in armed conflicts, thirdly, persons harmed during the attacks in which child soldiers participated, and fourthly, persons who “suffered harm from the crimes targeted at them” by the child soldiers.<sup>561</sup>

In deciding, the Trial Chamber I followed the finding of the Appeals Chamber that crimes under international law could bring about direct and indirect victims.<sup>562</sup> That, for both direct and indirect victims, there must exist a causal connection between the harm suffered, and the crimes contained in the indictment.<sup>563</sup> Regarding the Lubanga case, the Court stated that child soldiers would be the direct victims of the crime of enlistment and conscription of children and using them in an armed conflict.<sup>564</sup>

For indirect victims, the Judges upheld the “familial relations” principle enunciated by the Appeals Chamber, by holding that “indirect victims must establish that, as a result of their relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them. It follows that the harm suffered by indirect victims must arise out of the harm suffered by direct victims, brought about by the commission of the crimes charged”.<sup>565</sup>

Regarding the various layers of victims that may result from child conscription as outlined by the OPCV, the Court only recognises two categories. First, those with parental relations with direct victims, and secondly, people who suffer harm resulting from interventions aimed at stopping the crimes.<sup>566</sup>

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<sup>560</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Indirect Victims, ICC-01/04-01/06-1813, para 8.

<sup>561</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Indirect Victims, ICC-01/04-01/06-1813, para 8.

<sup>562</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Indirect Victims, ICC-01/04-01/06-1813, para 44.

<sup>563</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Indirect Victims, ICC-01/04-01/06-1813, para 45.

<sup>564</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Indirect Victims, ICC-01/04-01/06-1813, para 48.

<sup>565</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Indirect Victims, ICC-01/04-01/06-1813, paras 49 and 50.

<sup>566</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Indirect Victims, ICC-01/04-01/06-1813, paras 50 and 51.

It follows that, persons who experience harm owing to the conduct of child soldiers are excluded from the category of indirect victims.<sup>567</sup> In locking out victims harmed by child soldiers, the Court attempts to draw a distinctive line between the recruitment of child soldiers and the subsequent conduct of such soldiers. The main reasoning of the Court is that, those attacked by child soldiers do not qualify as indirect victims because the harm suffered does not have a nexus to the harm inflicted on children at the time of the crime.<sup>568</sup>

### **3.2.8 Critique of the Court's Conceptualisation of Indirect Victims**

The exclusion by the Court of indirect victims who suffer harm from the conduct of child soldiers is a blow to the millions of victims in the DRC. The argument of the Court that the harm inflicted on indirect victims by child soldiers is peripheral to the crime of child conscription is weak and unsupported under the law. The decision of the Court fails to appreciate the reasons behind the prohibition of the use of child soldiers in armed conflicts.

The fragility, immaturity, and the willingness to carry out any orders, has made it possible for children to be used to unleash monstrous attacks on defenceless civilians in various wars in the developing world.<sup>569</sup> The Court employs a strict approach to interpretation in holding that there is no *causal link* between the crime of child conscription and the harm occasioned to third parties essentially stemming from the conduct of child soldiers. Such an approach is tantamount to denying the fact that, in modern wars, children have been extensively used to launch atrocious attacks on the civilian population.<sup>570</sup>

In most of the wars especially in Africa, the harm experienced by civilians would not have been severely devastating in the absence of extensive use of child soldiers in those conflicts. Consequently, I am of the view that persons harmed by child soldiers should be allowed to

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<sup>567</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Indirect Victims, ICC-01/04-01/06-1813, para 52.

<sup>568</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Indirect Victims, ICC-01/04-01/06-1813, para 52.

<sup>569</sup> Spiga V 'Indirect Victims' Participation in the Lubanga Trial' *Journal of International Criminal Justice* 8 (2010) 190 – 192.

<sup>570</sup> Schauer E and Elbert T 'The Psychological Impact of Child Soldiering' in Martz E (ed) *Trauma Rehabilitation After War and Conflict* (2010) 311 – 313.



participate in the proceedings because the harm suffered is indirectly linked to the crime of recruitment and use of child soldiers in armed conflicts.<sup>571</sup>

It would be safe to argue that, as victim-perpetrators, child soldiers have their victims. The crime of conscription and use of children in wars will always result in a two-tier level of victimisation. The first tier is the recruited children while the second tier covers those harmed by the subsequent conduct of child soldiers. If the ICC continues to recognise indirect victims of that nature, then there is a danger that millions of victims in the DRC will be blocked from the path to justice. The argument that “the conduct of child soldiers is not criminalised” cannot be used to justify the exclusion of indirect victims as international human rights law holds that the status of victimhood exists even in the absence of prosecution and conviction of the wrongdoer.<sup>572</sup>

The absence of charges for child soldiers under international criminal law may seem to suggest that the participation of indirect victims will be ineffectual. However, such victims could tender evidence on their victimisation (murder, pillage, rape, and torture perpetrated by child soldiers) and this could be useful in clarifying gravity issues and aggravating factors during sentencing.<sup>573</sup> In assessing the appropriate sentence for the convicted person, the ICC is required to fully consider the extent of harm caused to the victims and their families.<sup>574</sup>

### **3.3 Admission Procedure for the Victims at the ICC: Unsettled Jurisprudence?**

The admission procedure for the victims at the ICC is unsettled. Mass crimes produce millions of victims. The ICC has admitted that, given scarce resources, it is unable to effectively process the victim’s application promptly to ensure meaningful participation.<sup>575</sup> As a result, different chambers of the Court have applied different methodologies for admitting victims. Different paths taken by the Court have resulted in inconsistencies and unsettled jurisprudence.

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<sup>571</sup> Spiga (2010), 190 and 193.

<sup>572</sup> Para 9 of the UN Basic Principles on Reparations states that: “A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim”.

<sup>573</sup> Article 78(1) of the ICC Statute and Rule 145 of the ICC REP.

<sup>574</sup> Rule 145(1)(c) of the ICC REP.

<sup>575</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings, ICC-ASP/11/22, para 6.

This section intends to briefly outline the different admission systems for victims and analyse the attendant legal issues to determine whether the victim's admission regime is effective and efficient. The effectiveness of an admission system for victims should be gauged on the basis that a particular admission procedure ensures speedy processing of victim's applications while guarding against violation of rights of victims and the parties.<sup>576</sup>

### 3.3.1 The Standard Admission Procedure: Rule 89

According to Rule 89, victims can get to the Court by lodging a written application with the Registrar who should transmit the applications to the Court for a decision.<sup>577</sup> Applications can also be made on behalf of victims when the victim is a minor or disabled.<sup>578</sup> The parties could be provided with copies of such applications for observations in accordance with the procedure set out by the Court.<sup>579</sup> After assessing the applications, the Court may accept or reject them depending on whether the provisions of Article 68(3) and Rule 85 have been met.<sup>580</sup>

In the early jurisprudence of the ICC on victim's admission procedure, Chambers of the Court adhered to the "standard form" application system based on Rule 89 and Regulation 86.<sup>581</sup> The standard form approach was used in the Lubanga, Katanga, Chui, and Bemba cases.<sup>582</sup>

According to the earliest jurisprudence, the role of the registry was limited to reviewing victim's applications for completeness only before transmitting them to the Court for a decision on merits.<sup>583</sup> However, in subsequent decisions, some Chambers of the Court widened the role of the

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<sup>576</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings, ICC-ASP/11/22, paras 16-19.

<sup>577</sup> Rule 89(1) of the ICC REP.

<sup>578</sup> Rule 89(3) ICC REP.

<sup>579</sup> Rule 89(1) ICC REP.

<sup>580</sup> Rule 89(2) ICC REP.

<sup>581</sup> Report on Cluster D (1): Applications for Victim Participation (2015), ICC-ASP/14/30, page 21. Available at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP14/ICC-ASP-14-30-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-30-ENG.pdf) (accessed 21 March 2017).

<sup>582</sup> "Obtaining Victim Status for Purposes of Participating in Proceedings at the International Criminal Court" (2013), War Crimes Research Office at Washington College of Law, at page 16, available at <https://www.wcl.american.edu/warcrimes/icc/documents/Report18final.pdf> (accessed 22 March 2017); The Standard Victim Application Form was developed by the Registry and approved by the court. The form is based on Regulation 86 (1) and (2) of the Regulations of the International Criminal Court, ICC-BD/01-01-04.

<sup>583</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Treatment of Applications for Participation, ICC-01/04-01/07-933-tENG, 26 February 2009, para 19; *The Prosecutor v. Thomas Lubanga Dyilo*,

registry by requiring it to make a *prima facie* assessment of victim's applications on the basis of Rule 85 requirements before submitting them to the court for approval.<sup>584</sup>

Following its assessment of the legality of victim's applications, the registry submits completed applications to the Court coupled with a report on its findings.<sup>585</sup> The parties are afforded an opportunity to comment on the applications<sup>586</sup> and then the court decides on each application, considering the observations of the parties.<sup>587</sup>

The individualised approach to admitting victims to proceedings at the ICC was not free of drawbacks. The individual review of victim's applications became an unbearable burden to the parties and the Court as a significant amount of time, human and financial resources were needed.

In some cases, the defence complained about lack of time and resources to review hundreds of victim applications.<sup>588</sup> At one time in *Bemba*, the Court granted a request for an extension of time limit to enable the defence to review hundreds of applications of victims seeking participation.<sup>589</sup>

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Decision on the Implementation of the Reporting System Between the Registrar and the Trial Chamber in Accordance with Rule 89 and Regulation of the Court 86(5), ICC-01/04-01/06-1022, 09 November 2007, para 20.

<sup>584</sup> *Situation in the Republic of Kenya*, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, ICC-01/09-24 , 03 November 2010 paras 19 -20; *The Prosecutor V. Jean-Pierre Bemba Gombo*, Defining the Status of 54 Victims Who Participated at the Pre-Trial Stage, and Inviting the Parties' Observations on Applications for Participation by 86 Applicants, ICC-01/05-01/08-699, 22 February 2010, pages 21-22.

<sup>585</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Implementation of the Reporting System Between the Registrar and the Trial Chamber in Accordance with Rule 89 and Regulation of the Court 86(5), ICC-01/04-01/06-1022, para 19.

<sup>586</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Third Decision on the Question of Victims' Participation Requesting Observations from the Parties, ICC-01/05-01/08-253, 23 October 2008, paras 9 and 10; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Treatment of Applications for Participation, ICC-01/04-01/07-933-tENG, para 54.

<sup>587</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on 772 Applications by Victims to Participate in the Proceedings, ICC-01/05-01/08-1017, 18 November 2010, para 36; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, ICC-01/04-01/07-1491-Red-tENG, 23 September 2009, para 19; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims' Participation, ICC-01/04-01/06-1119, para 84.

<sup>588</sup> "Obtaining Victim Status for Purposes of Participating in Proceedings at the International Criminal Court" (2013) 18 – 19.

<sup>589</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Defence Response to the Third Transmission of Victims' Applications for Participation in the Proceedings, ICC-01/05-01/08-945, 11 October 2010, para 5.

Likewise, in 2011, the registry informed the Court of its inability to thoroughly review victim applications due to a significant surge in applications for participation.<sup>590</sup>

In a report of the Court to the ASP in 2012, it was stated that:

The Court is experiencing difficulties processing applications in a timely manner to keep pace with the proceedings and enable victims to effectively exercise their rights under the Statute. One of the main reasons for this difficulty is the lack of appropriate resources in the Registry, parties, legal representatives of applicants and Chambers to deal with the volume of applications.<sup>591</sup>

The individualised procedure for the admission of victims at the ICC has been complained of by the parties and the Court for being extremely time-consuming and resource-intensive. Admittedly, such a system could have had a chilling effect on both the victims and the parties as a significant amount of time was devoted to processing such applications and that could affect the speed of proceedings.

While I agree with some commentators who argue that the ICC victims' participation regime is time-consuming and expensive,<sup>592</sup> I am of the position that the individualised system could be reformed and scrapped for a system that is economical with time and resources and ensures efficiency by guaranteeing substantive results for the victims. Let us now explore approaches devised by various chambers of the Court to mitigate the shortcomings of the standard form approach.

### **3.3.2 The Gbagbo Procedure: Mixed Approach**

The pre-trial chamber in Gbagbo adopted a partly collective system in receiving and considering applications for participation by the victims. Victims were at liberty to either apply individually through the standard form process or to submit a group form accompanied by summarised individual declarations.<sup>593</sup> The role of the registry in reviewing the applications for adherence to

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<sup>590</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 12.

<sup>591</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 6.

<sup>592</sup> Van den Wyngaert C "Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge" (2011) 44 *Case Western Reserve Journal of International Law* 492-494.

<sup>593</sup> *The Prosecutor v. Laurent Gbagbo*, Second Decision on Issues Related to the Victims' Application Process, ICC-02/11-01/11-86, 5 April 2012, para 17-21; *The Prosecutor v. Laurent Gbagbo*, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-

Article 68(3) and Rule 85 was maintained for both approaches. Due to potential difficulties in recording a collective narrative for victims of atrocity crimes, it has been held that, in the case of differences amongst group members on the nature of victimisation and the correct recollection of events, victims should fill out separate individual forms or create homogenous groups.<sup>594</sup>

### **3.3.3 Kenya Cases Approach: Differentiated System for Victims Seeking Personal Participation and Those Participating Through Legal Representatives**

In the Kenya cases, the Trial Chamber V observed that there should be a victim's admission system that does not unduly prolong proceedings by forcing parties to spend a considerable amount of time on non-trial issues (reviewing the applications).<sup>595</sup> The Chamber sanctioned a two-tier application system whereby victims seeking 'personal participation' were required to adhere to the "standard form approach" whereas those willing to participate solely through legal representatives were required to only register with the Court.<sup>596</sup> Victims not seeking individual participation were exempted from submitting applications under Rule 89(1).<sup>597</sup>

The responsibility for reviewing applications for completeness in accordance with Article 68(3) and Rule 85 was placed on the legal representatives who were obligated not to take into account "views and concerns" of persons who do not qualify as victims.<sup>598</sup> The Court reasoned that in the wake of large numbers of victims seeking individual participation, the standard form approach under Rule 89 was no longer useful as it would cause unnecessary delays.<sup>599</sup>

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02/11-01/11-138, 4 June 2012, paras 3-5; *The Prosecutor v. Laurent Gbagbo*, Decision on Issues Related to the Victims' Application Process, ICC-02/11-01/11-33, 6 February 2012, para 7.

<sup>594</sup> *The Prosecutor v. Laurent Gbagbo*, Second Decision on Issues Related to the Victims' Application Process, ICC-02/11-01/11-86, para 29.

<sup>595</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims' Representation and Participation, ICC-01/09-01/11-460, para 15.

<sup>596</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims' Representation and Participation, ICC-01/09-01/11-460, para 25.

<sup>597</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims' Representation and Participation, ICC-01/09-01/11-460, para 49.

<sup>598</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims' Representation and Participation, ICC-01/09-01/11-460, para 53.

<sup>599</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims' Representation and Participation, ICC-01/09-01/11-460, para 28.

Furthermore, it argued that the two-tier application regime (personal appearance or group representation) was legally possible under Rule 89.<sup>600</sup> Thus, the Judges invoked Article 51(5) to disable the strict application of Rule 89 in implementing the involvement of victims at the ICC under Article 68(3), by establishing a “differentiated procedure for direct individual participation and participation through common legal representatives”.<sup>601</sup>

While admitting that heterogenous interests of all the victims may not be fully covered, the court opined that group participation through legal representatives could still cover “shared legal and factual concerns” of the victims.<sup>602</sup> On issues of efficiency and rights of the accused, it was observed that the proposed system would require much less time and resources to implement in comparison to the standard system and that the accused would have more time for preparing the defence.<sup>603</sup>

### **3.3.4 Ntaganda Pre-Trial System: The Simplified Form Approach**

In *Ntaganda*, the Pre-Trial Chamber II observed that there was a need for having an efficient and working victim’s admission system and that application forms should be simplified and tailored to the demands of the victims in a particular case.<sup>604</sup> According to the Court, having a simplified victim’s application form would expedite the processing of such applications and ensure that proceedings are held expeditiously.<sup>605</sup> Judge Trendafilova argued that it would be inconceivable for the ICC to have a homogenous victim’s admissions system, suggesting that a victim’s application system should respond to the specificities of cases before the Court.<sup>606</sup>

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<sup>600</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims’ Representation and Participation, ICC-01/09-01/11-460, para 27.

<sup>601</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims’ Representation and Participation, ICC-01/09-01/11-460, para 29.

<sup>602</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims’ Representation and Participation, ICC-01/09-01/11-460, para 33.

<sup>603</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims’ Representation and Participation, ICC-01/09-01/11-460, para 36.

<sup>604</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victims’ Application Process, ICC-01/04-02/06-67, 28 May 2013, para 17.

<sup>605</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victims’ Application Process, ICC-01/04-02/06-67, para 18.

<sup>606</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victims’ Application Process, ICC-01/04-02/06-67, para 18.

Thus, in Ntaganda pre-trial proceedings, the Judge decided that victims should use a “concise and simplified one-page individual application form (the simplified form)” containing only essential information strictly needed to prove victimhood as per Rule 85.<sup>607</sup> The “simplified form” was modelled on the requirements of Rule 85, capturing the most important information concisely.<sup>608</sup> The registry was responsible for assisting the victims to complete the forms,<sup>609</sup> and due to a shortage of human resources, the registry was allowed to enlist the help of local intermediaries for that purpose.<sup>610</sup> Likewise, the chamber entrusted the registry with the responsibility of reviewing the form for completeness,<sup>611</sup> transmitting them to the parties for observations, and to the court for a decision on merits.<sup>612</sup>

To expedite the processing of applications, Judge Trendafilova instructed the registry to aggregate the simplified application forms submitted by victims into groups based on; location of crime complained of, time of commission, nature of criminality, nature of the harm suffered, and gender of the victims.<sup>613</sup> It is important to note here that the grouping of victims was done by the registry on the basis of criteria set by the Court, and the Court did not restrict the grouping to the conditions mentioned but the registry could also consider “other specific circumstances common to victims”.<sup>614</sup> The Judge also noted that the grouping of victims at the application stage could save time and liberate the victims from the potentially traumatising protracted application processes and enable the Court to determine the applications expeditiously according to Rule 89(4).<sup>615</sup>

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<sup>607</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victims’ Application Process, ICC-01/04-02/06-67, para 21.

<sup>608</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victims’ Application Process, ICC-01/04-02/06-67, paras 22 and 24.

<sup>609</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victims’ Application Process, ICC-01/04-02/06-67, para 26.

<sup>610</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victims’ Application Process, ICC-01/04-02/06-67, paras 27 and 28.

<sup>611</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victims’ Application Process, ICC-01/04-02/06-67, paras 29, 30, and 37.

<sup>612</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victims’ Application Process, ICC-01/04-02/06-67, para 33.

<sup>613</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victims’ Application Process, ICC-01/04-02/06-67, paras 33-35.

<sup>614</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victims’ Application Process, ICC-01/04-02/06-67, para 35.

<sup>615</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victims’ Application Process, ICC-01/04-02/06-67, para 34.

### 3.3.5 Ntaganda Trial Approach: Hybrid of Ntaganda's Pre-Trial and Kenya Cases Approach

In the trial of Bosco Ntaganda, the Trial Chamber VI resolved to adopt a blended approach to the victim's admission procedure by retaining the simplified form approach used during pre-trial while seeking to achieve judicial economy benefits by delegating the assessment of applications to the registry as it was the case in the Kenya cases.<sup>616</sup>

Accordingly, victim applicants would fill out simplified applications forms which are assessed by the registry for completeness based on principles set out by the Court, and then such applications are transmitted to the Court with a report on compliance with Rule 85.<sup>617</sup> In assessing the applications for adherence to the law, the registry would group the applications into three groups: group A (applicants who qualify as victims), group B (applicants who don't qualify as victims), and group C (applicants with an unclear status).<sup>618</sup> Only group C applicants would be subjected to scrutiny by the parties,<sup>619</sup> and the Court assesses their applications for a decision on merits. As for group A and B applicants, the Court only ratifies the assessment of the registry.<sup>620</sup> The parties do not make observations on group A and B applicants.

Thus, according to the proposed system, it is the registry, and not the legal representatives as it was in the Kenya cases, that assesses applications for conformity to Rule 85 and Article 68(3).<sup>621</sup>

In delegating the duty of assessing applications to the registry, the Court invoked Rule 89(4) to opine that it is mandated to devise a system that is effective and guarantees expeditiousness of

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<sup>616</sup> It should be noted that in the Kenya cases the Court delegated Rule 85 assessment to the legal representatives of the victims.

<sup>617</sup> *The Prosecutor v. Bosco Ntaganda*, Decision on Victims' Participation in Trial Proceedings, ICC-01/04-02/06-449, para 24(i).

<sup>618</sup> *The Prosecutor v. Bosco Ntaganda*, Decision on Victims' Participation in Trial Proceedings, ICC-01/04-02/06-449, para 24(ii).

<sup>619</sup> *The Prosecutor v. Bosco Ntaganda*, Decision on Victims' Participation in Trial Proceedings, ICC-01/04-02/06-449, para 24(vi).

<sup>620</sup> *The Prosecutor v. Bosco Ntaganda*, Decision on Victims' Participation in Trial Proceedings, ICC-01/04-02/06-449, para 24(vii).

<sup>621</sup> *The Prosecutor v. Bosco Ntaganda*, Decision on Victims' Participation in Trial Proceedings, ICC-01/04-02/06-449, para 32.



proceedings and meaningful participation of the victims.<sup>622</sup> In defence of its approach, the Court further held that there is no absolute statutory requirement that victim's applications should be individually assessed by the Court.<sup>623</sup>

### **3.4 Observations on Victim Admission Systems at the ICC**

The victim's admission systems discussed above are similar in certain respects. First, the standard application form was used in both *Ntaganda*, *Gbagbo*, and *Kenya* cases. However, the standard application form was shortened in *Ntaganda* to only include minimum essential information.

Secondly, in both approaches, the administrative wing of the Court (the Registry) retains the arduous task of reviewing the applications for completeness. "Completeness" in this sense means that victim application forms should have the required identifying information needed by the Court to decide on their status as per Rule 85.<sup>624</sup> However, it should be noted here that in *Gbagbo* and *Ntaganda* (trial system), the registry has an enhanced role of assessing victim's applications for completeness and for compliance with Rule 85.<sup>625</sup>

By contrast, in the *Kenya* cases, the role of the registry was limited to managing the victim's database and to ensure that it was accessible to legal representatives.

Thirdly, in both approaches with exception of the *Kenya* cases' approach, the Court retained its authority of making Rule 85 assessments. However, in the *Ntaganda* trial admission system, the Court only scrutinised those applications with respect to which the registry could not make a clear determination on the status of applicants. As for the *Kenya* cases, the Rule 85 assessment was only made by the legal representatives.<sup>626</sup>

The four alternatives to the standard form approach discussed above indicate that the jurisprudence on victim's application procedure is far from being settled at the ICC. The Court is still finding its

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<sup>622</sup> *The Prosecutor v. Bosco Ntaganda*, Decision on Victims' Participation in Trial Proceedings, ICC-01/04-02/06-449, paras 32 and 33.

<sup>623</sup> *The Prosecutor v. Bosco Ntaganda*, Decision on Victims' Participation in Trial Proceedings, ICC-01/04-02/06-449, para 34.

<sup>624</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victims' Application Process, ICC-01/04-02/06-67, para 29 and 30 (on the ingredients of a complete application).

<sup>625</sup> It needs to be mentioned here that in the *Ntaganda* trial system, the Rule 85 assessments conducted by the Registry were based on the grouping criteria established by the Court itself.

<sup>626</sup> Ideally, the Court relegated its judicial function of making Rule 85 assessments to the registry.

way on how to treat such applications. Admittedly, it is a daunting task for the ICC to find the right system that ensures meaningful participation and guard against violation of the rights of the accused.

While it could be easier to sort out legal issues that affect the victim's admission process at the ICC, the Court may struggle to find an approach that is neither resource-intensive nor rights-trampling. All the alternative approaches to the standard system could still need to be fine-tuned to be time-efficient and sustainable in the wake of scarce resources available to the Court.<sup>627</sup> Aptly put, the current ICC victim's admission system must be changed to smoothly deal with the surging number of victims seeking participation.<sup>628</sup> As stated in *Ruto and Sang*, the Rule 89 admission procedure is not appropriate for victims of atrocity crimes.

Searching for a victim's admission regime that is sustainable, efficient, and effective, the ICC submitted a report to the ASP in 2012 in which it outlined possible six options to the current system.

**(a) Maintain Rule 89 Regime: Ensure Sustainability by Increasing Funding**

The standard form application procedure created under Rule 89 could work as originally perceived by drafters of the statute if sufficient funding is provided to make it sustainable and efficient.<sup>629</sup> Alternatively, the current regime could be practically altered to separate applications for reparations from applications for participation in proceedings and that may improve efficiency by drastically reducing the number of victims seeking participation at the trial stage.<sup>630</sup>

For the current system to function properly, additional human and financial resources are needed for all the actors (registry, parties, victim's lawyers, and the court) involved in the application process.<sup>631</sup> However, maintaining the current system may not be feasible in the long run,

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<sup>627</sup> See 'Victims to lose out with states' double-standard on ICC budget', available at <http://www.coalitionfortheicc.org/news/20161121/victims-lose-out-states-doublestandard-icc-budget> (accessed 28th March 2017).

<sup>628</sup> In a 2016 ICC report, thousands of victims participated in the proceedings at the ICC. See 'Report on the Activities of the International Criminal Court', ICC-ASP/15/16 (November 2016) at page 2.

<sup>629</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 22.

<sup>630</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 23.

<sup>631</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, paras 24 and 25.

economically speaking, as the Court may never have the required financial and human capital to equally run such a system across all the *situations* before it.<sup>632</sup> It would simply not work as the individualised approach envisioned under Rule 89 cannot be efficiently applied to large numbers of victims of crimes under the jurisdiction of the ICC.<sup>633</sup>

**(b) Semi-Collective Approach: Save Time and Reduce Paper Work Through Group Applications**

In *Gbagbo*, victims could apply either individually through the standard form or collectively through group forms (detailing common harms and similar criminal incidents) accompanied by individual declarations.<sup>634</sup> That semi-collective approach adhered to the standard procedure as applications were assessed individually and participation could be individual.

The Gbagbo approach has been deemed to be compliant with the current legal framework on victims under the ICC Statute. Assessed against resource-related issues, the regime could significantly save the time required for processing the applications though it may translate into increasing requirements for registry staff on the ground.<sup>635</sup> However, the partly collective approach has been criticised by the defence for offering minimal information on victims and criminal incidents in question.<sup>636</sup>

**(c) Collective Application and Participation: Recognition of Victim's Communities**

Under this approach, a community of people affected by crimes under international law could seek participation as a group by submitting a collective application.<sup>637</sup> The formation of such groups could either be triggered by ICC cases or could precede the institution of proceedings.<sup>638</sup> For this

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<sup>632</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 28.

<sup>633</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 30.

<sup>634</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 32.

<sup>635</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, paras 34 and 35.

<sup>636</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, paras 36 and 37.

<sup>637</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 39.

<sup>638</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 39 (2).

approach to function, there should be amendments to Rule 85 to recognise victim's communities or associations.<sup>639</sup> Likewise, there should be a mechanism to enable the Court to verify the legality of victims organisations under national laws before allowing them to participate at the ICC.

The group approach could save valuable time for both the Court and the parties as less time and resources would be needed for processing the applications.<sup>640</sup>

However, it has been submitted that the collective approach could pose some practical and legal huddles for the Court.<sup>641</sup> Large numbers of victims produced by atrocity crimes make it impossible to constitute a fully homogenous group of victims with similar interests and demands and some of the victims (sexual and gender crime victims) may not feel comfortable to disclose their ordeal in a group setting.<sup>642</sup> In the same vein, what would be the role of the ICC if there are no pre-existing groups? Further concerns were raised as to how would the ICC respond to situations where the national legislation on the composition of victims' communities differs from the principles established by the Court.<sup>643</sup>

#### **(d) Registry's Review of Applications: Enhancing Transparency and Minimising Judicial Scrutiny**

Under this approach, the registry receives applications and reviews them for compliance with the law and then transmits them together with a consolidated report to the parties and the Court for observations.<sup>644</sup> The report should be prepared based on criteria set out by the Court and then after considerations by the parties, the Court would adopt or amend the report. It is not clear whether

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<sup>639</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, paras 39(1), 41 and 42.

<sup>640</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 43.

<sup>641</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 44.

<sup>642</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 46.

<sup>643</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 45.

<sup>644</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, paras 50 and 51.

this approach would require changes to Rule 85 as the registry would be submitting the report to parties, a break-away from the current practice.<sup>645</sup>

On the face of it, it appears that widening the role of the registry to that extent (making assessments of applications) could affect its neutrality and result into an encroachment on judicial functions of the Court.<sup>646</sup> However, it has been argued that the neutrality factor could be safeguarded if the registry produces a report on victim's applications that fall short of making Rule 85 assessments.<sup>647</sup>

Generally, this approach could be advantageous to the Court as placing the burden of initial assessments of applications on the registry could economise the amount of time and financial resources that would be needed if all the parties were fully engaged in the process.<sup>648</sup> While submission of a consolidated report on victim's applications to the parties could enhance transparency, issues of personal security of victims and the exact role of the parties may have to be clarified to avoid duplication and violation of rights and protections afforded to victims under the ICC Statute. For that matter, if redactions are used on reports, it means there would be an additional workload for the registry.<sup>649</sup>

#### **(e) Exclusive Judicial Determination on Victim's Applications: No Litigation Over Applications**

This approach envisages fast-tracking of judicial decisions on the status of victim applicants by doing away with the requirement of transmitting applications to the parties for observations as provided for under Rule 89(1).<sup>650</sup> At best, the approach seeks to limit the adversarial contest between the parties over victim's applications for participation by allowing the parties to request for exclusion of certain victims only during critical junctures in the trial phase.

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<sup>645</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 52.

<sup>646</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 52.

<sup>647</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 54.

<sup>648</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 53.

<sup>649</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 55.

<sup>650</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 57.

That could be achieved through a three-pronged scenario: giving extremely minimal information to the parties for observations; no transmission of victim's applications to the parties but the court may ask them to make observations on certain critical legal issues that may evolve; and no observations at all on the applications by the parties.<sup>651</sup>

Implementing this system would certainly require amendments to Rule 89 to remove the requirement of right of reply by the parties.<sup>652</sup> There are concerns that exclusion of the right of reply to victim's applications could violate the parties' right to be heard.<sup>653</sup> While it remains unclear as to the usefulness of a procedure of limiting the parties' role in challenging victim's applications to the trial stage, it is argued that such an approach could be a recipe for duplication of judicial functions.<sup>654</sup>

Additionally, late challenges on victim's applications could put victims at a disadvantage as the element of certainty on the status of their applications would be lacking.<sup>655</sup> Despite such potential shortcomings of the proposed approach, there would surely be economic advantages for the court and the parties as fewer time and resources would be needed.<sup>656</sup>

#### **(f) Pre-Trial Processing of Victim's Applications for Participation**

The last approach introduces a victim's admission procedure that proposes to streamline the application process by limiting it to a specific stage of the proceedings.<sup>657</sup> It should be recalled that in *Bemba*, victim's applications were dealt with by the Court even during the trial stage and this was complained about by the defence for affecting the right to have adequate time for preparations.

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<sup>651</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 58.

<sup>652</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 59.

<sup>653</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 61.

<sup>654</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 62.

<sup>655</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 63.

<sup>656</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 60.

<sup>657</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 65.

Under the proposed procedure, victims would have to comply with strict deadlines set by the Court and to only submit their applications before the confirmation of charges. No applications would be accepted after confirmation of charges except when the charges are broader or narrower than those originally presented by the Prosecutor.<sup>658</sup>

Another side of the coin to this approach would be to restrict victim applications to the Pre-Trial Chamber even after a case has moved to the Trial Chamber. It is hoped that such an approach could have significant advantages for the Court and the parties as using deadlines and limiting applications to a specific stage would save the time required for processing the applications and enhance expeditiousness at the trial stage.<sup>659</sup> Admittedly, expeditiousness of the proceedings could be affected if the Court entertains endless applications of victims seeking to participate. Thus, unwarranted delays could be avoided if the trial chamber is not distracted by non-trial issues.

However, the accused's right to be tried without undue delay could be dealt a blow if victims-related issues preoccupy the pre-trial phase unless the pre-trial chamber is allowed to deal with victim applications on a rolling basis even when a case advances to the trial phase.<sup>660</sup> For the proposed system to function smoothly, there would be a need for increasing resources for the pre-trial chamber, the registry, and the victim's lawyers to enable them to reach victims at the earliest possible opportunity for supplying them with information and assisting them to complete applications.<sup>661</sup>

### **3.5 Way Forward: Which Victims Admission System is Suitable for the ICC?**

From the preceding discussion, all the six alternative mechanisms to the current victim's admission regime at the ICC have advantages and disadvantages.<sup>662</sup> Ideally, given the nature of crimes being prosecuted at the ICC, it would be difficult to devise an admission system that is fully responsive

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<sup>658</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 66.

<sup>659</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 68.

<sup>660</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, paras 68 and 70.

<sup>661</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 69 and 71.

<sup>662</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 73.

to the heterogenous needs of all the victims. It is submitted that some aspects of the proposed mechanisms could be combined to produce a working approach as it is virtually impossible to have a one-size-fits-all admission procedure for the victims.<sup>663</sup>

As argued in *Ruto* and *Sang*, the standard procedure approach under Rule 89 is “not appropriate” for cases with massive numbers of victims.<sup>664</sup> One may ask, what should then be the basic considerations for an efficient victim’s admission system at the ICC? In *Ntaganda*, the Trial Chamber VI held that: “The Chamber recognises the importance of effective and meaningful victim participation in the proceedings. Achieving an efficient application process which provides applicants with a fair and timely determination of their status based on straightforward criteria is an essential element in giving effect to such participation”.<sup>665</sup>

Thus, there is a need for a new system that not only upholds the rights of the parties and participants but also creates an admission procedure that is certain, time-conscious, effective, and sustainable. The sustainability factor cannot be ignored in fashioning a new victim’s admission system as resource-related reasons have pre-occupied the court’s discourse on the participation of victims at the ICC.<sup>666</sup>

For a victim’s admission procedure to be meaningful for the victims and observant to rights of the parties, it is argued that there should be a hybrid approach that allows for both individual and collective application and participation. In the interests of justice and judicial economy, victims should be allowed to participate as communities or associations based on the constitutive criteria established by the court itself.

Since some victims may not feel secure to advocate for their interests in a group setting, the individualised approach should be retained as the ‘opt out’ avenue for such victims. If the hybrid

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<sup>663</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 20.

<sup>664</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims’ Representation and Participation, ICC-01/09-01/11-460, para 24.

<sup>665</sup> *The Prosecutor v. Bosco Ntaganda*, Decision on Victims’ Participation in Trial Proceedings, ICC-01/04-02/06-449, para 26.

<sup>666</sup> Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings (2012), ICC-ASP/11/22, para 74.



approach is implemented, victims would be able to apply for participation collectively or individually depending on the circumstances.

Because the primary objective of the ICC is to prosecute individuals bearing the greatest responsibility for the perpetration of crimes under international law and mindful of the fact that protracted victims-related proceedings could flout rights of the accused persons, it is proposed that the hybrid mechanism should be implemented under the following criteria or principles:

1. Decisions on victims seeking participation should be committed to a Pre-Trial Chamber which shall determine all the applications before the confirmation of charges.
2. Victims applications should not be subjected to an adversarial contest by the parties and therefore applications should not be submitted to the parties for observations.
3. In curing potential injustices that may stem from the refusal to subject victim's applications to adversarial contests, the Court should, either on its own motion or by application from the parties, have powers to request for or permit submissions by parties on certain legal or factual issues relating to victim's applications.
4. Parties should be allowed to scrutinise or challenge a victim's status at critical junctures of the case, for example when a victim wants to testify at trial or applies for reparations.
5. Applications should be restricted to deadlines and should never be entertained after the confirmation of charges except when the charges are widened or narrowed.
6. Since early victim applications could depend on many factors such as outreach activities of the ICC, the Court should be at liberty to permit late applications if there is a good cause shown by the applicant.
7. Applications should be commenced by a specially court-approved standard application form that is concise; only incorporating vital information on the victim's identity and harm-related accounts.
8. All applications should be administratively processed by the registry and then transmitted to the Court for a judicial determination.
9. Applications should not be transmitted to the parties except that they should be duly notified when victims are admitted to participate in the proceedings.

10. For collective applications, the law should permit the participation of natural or case-triggered victims' organisations. Alternatively, up on receipt of applications, the registry should have the mandate of organising groups based on criteria set out by the Court.
11. Group applications accompanied by a report prepared by the registry can be approved by the Court without the need to resort to one by one assessment of individual applications.
12. For individual applicants, they should seek participation by submitting a simplified form to the registry which shall vet the forms for completeness before sending them to the Court together with a report for approval.
13. Individual applications should only be accepted when a victim seeks direct participation<sup>667</sup> (giving evidence or views in person) and when the group option is not suitable to the applicant.
14. The registry should only review the applications for compliance with legal requirements, with the Court having a final say on merits (Rule 85 assessments).
15. Since the Pre-Trial Chamber may not be able to dispose of all decisions on victim applications before the finalisation of confirmation proceedings, the Chamber should be allowed to deal with such applications on a rolling basis even when a case has moved to the trial stage.
16. Thus, all applications for participation should continue to be dealt with by the Pre-Trial Chamber even when a trial chamber is seized with the case except that the Trial Chamber shall be able to decide matters arising from challenges mounted by the parties on the status of victims.

The proposed system can have many advantages than disadvantages for the Court, the parties, and the victims as streamlining applications to the pre-trial chamber coupled with deadline limitations and non-involvement of the parties could significantly reduce the time spent on victim's applications at the ICC. The number of individual applicants will go down significantly as victims can apply and participate in groups. While there would be no significant savings on resources, the proposed approach is likely to be less resource-intensive compared to current approaches.

The Court will have to ensure that the registry and victim's lawyers get the required resources to enable them to be on the ground early enough for outreach activities and assistance to the victims.

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<sup>667</sup> For the meaning of direct participation, see *The Prosecutor v. Bosco Ntaganda*, Decision on Victims' Participation in Trial Proceedings, ICC-01/04-02/06-449, para 39.

The efficiency of this system could highly depend on outreach measures taken by the ICC in situation countries.<sup>668</sup>

There would also be some judicial gains if such an approach is adopted as committing decisions on victim's applications to pre-trial chambers would contribute to enhancing expeditiousness at the trial level as the Court will be concentrating on trial issues. The role of the registry could also be less straining as non-submission of victim's reports to the parties would obviate the need for redactions hence reduction of workload.

However, the proposed procedure may not be wholly compatible with the current legal framework on victim's participation at the ICC. Although it has been held in some decisions that the Court could employ the provisions of Rule 89(4) and 51(5) to craft a victim's admission process that ensures the effectiveness of proceedings,<sup>669</sup> it is argued that some of the components of the proposed hybrid system are incompatible with Article 68(3) and Rule 85.

For example, the participation of victim's communities would require modification of the definition of victims under Rule 85 to incorporate victim's organisations or communities. Likewise, obviating the need for transmission of applications to the parties for observations would need amendments to Rule 89(1) to absolve the registry with an obligation to transmit such applications to the parties.

Furthermore, restricting victim's applications to the Pre-Trial Chamber would require amendments to Article 68(3) of the ICC Statute which allows for victim's applications for participation to be dealt with at any stage of the proceedings (pre-trial, trial, or appeal stage). It is important that victims-related proceedings should have a finality. In my view, allowing endless applications for participation at all stages of the proceedings would be distracting for the parties and time-consuming for the Court.

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<sup>668</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victims' Application Process ICC-01/04-02/06-67, para 12.

<sup>669</sup> *The Prosecutor v. Bosco Ntaganda*, Decision on Victims' Participation in Trial Proceedings, ICC-01/04-02/06-449, para 31; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims' Representation and Participation, ICC-01/09-01/11-460, para 29.

## 3.6 The Typology of Participation: Stages and Modes of Victim’s Interventions

### 3.6.1 Stages of Participation: What are They?

Article 68(3) guarantees that victims who have the required legal status can be allowed to participate in any stage of the proceedings at the ICC. However, it should be noted that victims have no general and unfettered right to make interventions at any stage in a particular case even when they have been admitted as participants.<sup>670</sup> In *Ruto and Sang*, the Trial Chamber V has held that it is for the court to determine *the appropriate stage and time* for victim’s interventions in the proceedings considering rights of both the victims and defendants and the need to ensure that proceedings are expeditious.<sup>671</sup>

A similar position was taken by the Trial Chamber IV in *Banda* in which it was further held that “stages of proceedings” are specific procedural junctures in which a certain witness wants to testify or a particular piece of evidence is under consideration by the Court.<sup>672</sup> Therefore, the participation of victims in proceedings at the ICC is not applicable to the generality of a case but only possible at certain points of the case.<sup>673</sup>

What then should be the right moment for the victims to intervene? Judge Pikis has suggested that victim’s views and concerns should come forward at the earliest possible opportunity in a case to “alert the Court and the parties to the implications of the case on the personal interests of victims and how best they may be safeguarded”.<sup>674</sup>

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<sup>670</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims’ Representation and Participation, ICC-01/09-01/11-460, para 11.

<sup>671</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims’ Representation and Participation, ICC-01/09-01/11-460, para 13; On the discretion of the Court in deciding the timing of involvement of victims, see also, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on Victim’s Representation and Participation, ICC-01/09-02/11-498, 3 October 2012, para 12; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victim’s Participation, ICC-01/04-01/06-1119, para 104.

<sup>672</sup> *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Decision on the Participation of Victims in the Trial Proceedings, , ICC-02/05-03/09-545, paras 15 and 16.

<sup>673</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 Concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, Separate Opinion of Judge Georghios M. Pikis, ICC-01/04-01/06 OA8, para 17 at page 20.

<sup>674</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 Concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, Separate Opinion of Judge Georghios M. Pikis, ICC-01/04-01/06 OA8, para 20 at page 22.

The suggestion by Judge Pikis underscores the importance of having victim's ideas early on the case than taking them when proceedings are at an advanced stage as that could catch the parties off-guard. However, considering the unpredictable nature of atrocity crime prosecutions, it may not be feasible to suggest "a fixed moment" for victim's interventions. There should be some flexibility. That's why, in *Kenyatta* and *Ntaganda*, it was held that the appropriate juncture for the involvement of victims should be decided on a case by case basis.<sup>675</sup>

### 3.6.2 Modes of Participation

Victims are not on the same level as the parties regarding rights and duties under the ICC Statute. Not being parties, their participation is limited to the presentation of *views and concerns* and, in doing that, it has been held that they should not be allowed to assume prosecutorial functions or present views that are beyond the scope of the charges.<sup>676</sup>

In other words, the participation of victims should never elevate them to the level of taking over the Prosecutor's primary objective of proving the charges before the Court.<sup>677</sup> In *Kenyatta* and *Muthaura* it was held that the principle of equality of arms would be trumped if victims are allowed to support the Prosecutor in discharging the burden of proof.<sup>678</sup>

As regards modalities of participation, it has been held that the nature and degree of involvement of victims in a case would depend on the nature of charges, the number of victims, and the nature

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<sup>675</sup> *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on Victim's Representation and Participation, ICC-01/09-02/11-498, para 12; *The Prosecutor v. Bosco Ntaganda*, Decision on Victim's Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/04-02/06-211, 15 January 2014, para 82.

<sup>676</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims' Representation and Participation, ICC-01/09-01/11-460, para 14; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 Concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, Separate Opinion of Judge Georghios M. Pikis, ICC-01/04-01/06 OA8, para 15 and 16 at page 19; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Supplemented Applications by the Legal Representatives of Victims to Present Evidence and the Views and Concerns of Victims, ICC-01/05-01/08-2138, 22 February 2012, paras 13-15.

<sup>677</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, para 65; *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victim's Participation of 18 January 2008, ICC-01/04-01/06-1432, para 93.

<sup>678</sup> *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on Victim's Representation and Participation, ICC-01/09-02/11-498, para 13.

of victim's interests.<sup>679</sup> As the nature of participation is case-specific and case-dependent,<sup>680</sup> the section below outlines the modalities of victim's participation that have been thus far sanctioned by various Chambers at the ICC.

Victims have been allowed, either by themselves or through legal representatives, to participate in the following manner:

- (a) Access to court filings and documents, subject to confidentiality restrictions imposed by the Statute.<sup>681</sup>
- (b) Production and examination of evidence before the court, including contesting the admissibility of evidence.<sup>682</sup>
- (c) Participation in Court hearings through both oral and written submissions.<sup>683</sup>

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<sup>679</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, para 54.

<sup>680</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victim's Participation, ICC-01/04-01/06-1119, para 101.

<sup>681</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victim's Participation, ICC-01/04-01/06-1119, paras 105-107; *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on Victim's Modalities of Participation at the Pre-Trial Stage of the Case, ICC-02/05-02/09-136, 6 October 2009, paras 11-15; *The Prosecutor v. Bosco Ntaganda*, Decision on Victim's Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/04-02/06-211, para 88 (access restricted to public records); *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims' Representation and Participation, ICC-01/09-01/11-460, para 64; *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Decision on the Participation of Victims in the Trial Proceedings, ICC-02/05-03/09-545, paras 34-39; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Request of Legal Representative of Victims for Access to Documents, ICC-01/05-01/08-3445, 17 October 2016, para 8.

<sup>682</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victim's Participation, ICC-01/04-01/06-1119, paras 108-111; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, paras 81-101, and para 104 (on contesting admissibility of evidence); *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims' Representation and Participation, ICC-01/09-01/11-460, para 77; *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Decision on the Participation of Victims in the Trial Proceedings, ICC-02/05-03/09-545, paras 24 – 30.

<sup>683</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victim's Participation, ICC-01/04-01/06-1119, paras 112-116; *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on Victim's Modalities of Participation at the Pre-Trial Stage of the Case, ICC-02/05-02/09-136, paras 16-20 and para 24; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, paras 69 and 70; *The Prosecutor v. Bosco Ntaganda*, Decision on Victim's Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/04-02/06, 15 January 2014, para 85 (on participation at confirmation hearings); *The Prosecutor v. Bosco Ntaganda*, Decision on Victim's Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/04-02/06-211, para 96 (on filing submissions at confirmation hearing); *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims' Representation and Participation, ICC-01/09-01/11-460, paras 70-73; *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Decision on the Participation of Victims in the Trial Proceedings, ICC-02/05-03/09-545, para 41.

- (d) Questioning witnesses called by the Parties as well as experts and defendants.<sup>684</sup>
- (e) Opportunity for opening and closing briefs in court proceedings.<sup>685</sup>

### **3.6.3 Participation at the Investigation Stage: A No-Go Area for Victims?**

The ICC Statute provides that the Prosecutor shall be the sole investigating authority over violations suggesting perpetration of core crimes.<sup>686</sup> Investigations should be independently conducted by the Prosecutor.<sup>687</sup> Despite that, the Prosecutor is obligated to notify the Pre-Trial Chamber when she decides to drop investigations.<sup>688</sup> While victims may make submissions to the Court in proceedings in which the Prosecutor seeks authorisation to investigate,<sup>689</sup> the actual role of victims in the ICC investigation regime is still unclear.

According to the ICC Statute, it appears that victims may have a role to play when it comes to issues touching upon the Prosecutor's decision not to investigate or prosecute. Accordingly, the Court could seek victim's opinion in proceedings reviewing such a decision by the Prosecutor.<sup>690</sup> And for information, victims are entitled to be notified of the Prosecutor's Article 53 decision regarding non-investigation or non-prosecution.<sup>691</sup>

Victims can have a participatory right in pre-confirmation Court proceedings related to investigations conducted by the Prosecutor. However, the law is still unclear as to the actual role and degree of involvement of the victims in such investigations. This section seeks to provide a jurisprudential analysis regarding the role of victims in investigations by examining Court decisions over the matter.

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<sup>684</sup> *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on Victim's Modalities of Participation at the Pre-Trial Stage of the Case, ICC-02/05-02/09-136, paras 23-24; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, paras 72-75; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims' Representation and Participation, ICC-01/09-01/11-460, para 74; *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Decision on the Participation of Victims in the Trial Proceedings, ICC-02/05-03/09-545, paras 31 – 33.

<sup>685</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, para 68.

<sup>686</sup> Articles 15 (1), 42 and 53 of the ICC Statute.

<sup>687</sup> Article 42(1) ICC Statute.

<sup>688</sup> Article 53(1) (c) ICC Statute.

<sup>689</sup> Article 15(3) ICC Statute.

<sup>690</sup> Rules 93 and 107(1) of the ICC RPE.

<sup>691</sup> Rule 92(2) ICC RPE.

### 3.6.3.1 Early Situation-Level Decisions: Congo, Uganda, and Darfur Situations

The first pioneer decision regarding the status of victims at the investigation stage came in 2006 when the full bench of the Pre-Trial Chamber I in the *Situation of Congo* was required to determine whether the ICC Statute framework allowed for the participation of victims during investigations.<sup>692</sup> In disposing of such a question, the Court considered whether Article 68(3) would cover the “investigation stage” as judicial proceedings.<sup>693</sup>

The Chamber, considering terminological implications of the words “investigations and proceedings” under Articles 54(3)(e), 56(1)(b) and (2), and 127, reasoned that “the term proceedings does not necessarily exclude the stage of investigation of a situation”.<sup>694</sup> In contextual terms, the Court also argued that Article 68(3) does not explicitly discount the involvement of victims at the investigation stage.<sup>695</sup>

Furthermore, citing key provisions of human rights conventions and the jurisprudence of the European Court of Human Rights as well as the Inter-American Court of Human Rights, the three judges observed that regional human rights courts have acknowledged the victim’s right to participate in investigations.<sup>696</sup> That, victims have a general interest in the fight against immunity, and such a fight should begin at the investigation stage.<sup>697</sup> Thus, the Court concluded that Article 68(3) applies to investigations.

Confronted with the Prosecutor’s argument that participation of victims in investigations would be inappropriate for undermining “the integrity and objectivity of investigations”, the Court opined

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<sup>692</sup> *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-01/04-101-tEN-Corr, 17 January 2006, para 22.

<sup>693</sup> *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-01/04-101-tEN-Corr, para 27.

<sup>694</sup> *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-01/04-101-tEN-Corr, paras 29 – 38.

<sup>695</sup> *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-01/04-101-tEN-Corr, paras 42-46.

<sup>696</sup> *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-01/04-101-tEN-Corr, paras 50-53.

<sup>697</sup> *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-01/04-101-tEN-Corr, para 53.



that participation would not affect the objectivity of investigations unless such participation extends beyond the presentation of views and concerns.<sup>698</sup>

On the potential nexus between personal interests and investigations, the Chamber observed that “...personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered”.<sup>699</sup>

Aptly put, the reasoning of the Pre-Trial Chamber I regarding the role of victims at the investigation stage was acknowledged and followed by other Pre-Trial Chambers in the *situations* of Uganda and Darfur (Sudan).<sup>700</sup>

### **3.6.3.2 Appeal’s Chamber U-Turn Regarding Participation of Victims in Investigations**

On the 19<sup>th</sup> of December 2008, the Appeals Chamber delivered a unanimous decision that effectively overturned earlier jurisprudence of the ICC that sanctioned the participation of victims at the investigation stage.<sup>701</sup> The thrust of the appeal was whether victims of a *situation* could legally assume participatory rights at the investigation stage.<sup>702</sup>

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<sup>698</sup> *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-01/04-101-tEN-Corr, paras 56-59.

<sup>699</sup> *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-01/04-101-tEN-Corr, para 63.

<sup>700</sup> *Situation in Uganda*, Decision on Victim’s Applications for Participation a/0010/06, a/0064/06, to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05-252, 10 August 2007, para 83; *Situation in Darfur Sudan*, Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, ICC-02/05-111-Corr, 14 December 2007, at page 23; *Situation in the Democratic Republic of the Congo*, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, ICC-01/04-417, 7 December 2007, paras 2-6.

<sup>701</sup> *Situation in the Democratic Republic of the Congo*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, 19 December 2008, para 59.

<sup>702</sup> *Situation in the Democratic Republic of the Congo*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, paras 10 and 36.

Both, the Defence and the Prosecutor pushed that the regime under Article 68(3) could not incorporate ‘participation in investigations’ as investigations are not judicial proceedings.

In contrast, the victims cited three multifaceted factors in support of earlier decisions that granted them participation in investigations. They argued that their participation would serve three interests: clarifying facts, seeking punishment of the perpetrators, and claiming repatriations.<sup>703</sup>

The Appeals Chamber held that it would be contrary to the ambit of Article 68(3) to allow victims to participate in investigations as the said provision relates to judicial proceedings to which investigations are not.<sup>704</sup> Likewise, the Court argued that allowing victims to participate in investigations may pollute prosecutorial obligations as the duty of conducting investigations is a preserve of the Prosecutor.<sup>705</sup>

However, despite refusing to give the victims a direct hand in the investigations, the Court opined that victims could still use other avenues under the Statute and furnish information to the Prosecutor.<sup>706</sup> The Court further added that interests of the victims are well protected as the Statute obligates the Prosecutor to take into account the victim’s interests while conducting investigations.<sup>707</sup>

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<sup>703</sup> *Situation in The Democratic Republic of The Congo*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, para 29.

<sup>704</sup> *Situation in The Democratic Republic of The Congo*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, para 45.

<sup>705</sup> *Situation in The Democratic Republic of The Congo*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, para 52.

<sup>706</sup> *Situation in The Democratic Republic of The Congo*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, para 53.

<sup>707</sup> *Situation in The Democratic Republic of The Congo*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, para 54; See also Articles 54(1)(b) and 53(1)(c) ICC Statute.

Since participation is strictly confined to judicial proceedings,<sup>708</sup> the Court held that victims can still participate in proceedings touching upon investigations conducted by the Prosecutor.<sup>709</sup> It should be noted here that the Appeals Chamber neglected the chance to lay down the law as to how proceedings at the investigation stage should be conducted with respect to the victims.<sup>710</sup> That is a lacuna that leaves the victims in limbo regarding the extent of their involvement in pre-confirmation proceedings relating to investigations.

### 3.7 Legal Representation for Victims

As already discussed in previous sections, victims can present their views either in person or through legal representatives.<sup>711</sup> The jurisprudence of the Court also provides that legal representation for victims is not a “pre-requisite for participation” and therefore victims can represent themselves or use lawyers.<sup>712</sup> As per the Rules, victims are entitled to a lawyer of their choice and in the case of disagreements amongst victims over legal representation, the Court is empowered to instruct the registry to pick a lawyer for them.<sup>713</sup>

However, in the *Situation of Uganda*, the Pre-Trial Chamber II has held that victim’s right to pick counsel is not mandatory as Rule 90 (on legal counsel for victims) envisages common legal representation as opposed to individual representation hence the Court retains the option to either

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<sup>708</sup> *Situation in The Democratic Republic of The Congo*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, para 55; *Situation in The Republic of Kenya*, Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya, ICC-01/09-24, para 9.

<sup>709</sup> *Situation in The Democratic Republic of The Congo*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, para 56.

<sup>710</sup> *Situation in The Democratic Republic of The Congo*, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, para 57.

<sup>711</sup> Article 68(3) ICC Statute. Legal Representation is optional as the last sentence of Article 68(3) provides that: “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”.

<sup>712</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen*, Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-limit for Submission of Observations on Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05-134, 1 February 2007, paras 3, 4, and 10.

<sup>713</sup> Rule 90 (1) and (3) ICC RPE.

choose counsel for victims or allow the victims to do that.<sup>714</sup> Victims retain the privilege of choosing own counsel if they opt for individual representation.

In the appointment of a lawyer for a group of victims, the Court is obligated to ensure that the diverse interests of victims are taken on board.<sup>715</sup> The law also provides for *pro bono* legal services for victims who are indigent.<sup>716</sup> As decided in *Bemba*, indigent victims lose the right to select their legal counsel.<sup>717</sup> *Pro bono* lawyers are picked by the Court. As for qualifications, counsel for victims must have the knowledge and training enabling them to competently represent victims of crimes under international law.<sup>718</sup>

Some decisions of the ICC have stressed that legal representatives should be geographically proximate to the victims to ensure effective communication and that counsel should have knowledge of the *situation country* as well as a good understanding of victims' communities to ensure meaningful representation.<sup>719</sup>

Furthermore, in his dissenting opinion in *Ntaganda* in 2015, Judge Ozaki has laid down important principles for the organisation of legal representatives at the ICC.<sup>720</sup> One of such principles is that a legal representative should be geographically proximate to victims for information sharing and consultations and that the counsel's familiarity with the cultural attributes of the victims may help secure a good working relationship which is essential for meaningful representation.<sup>721</sup>

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<sup>714</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen*, Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-limit for Submission of Observations on Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05-134, para 5.

<sup>715</sup> Rule 90(4) ICC RPE.

<sup>716</sup> Rule 90(5) ICC RPE.

<sup>717</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Common Legal Representation of Victims for the Purpose of Trial, ICC-01/05-01/08-100, 10 November 2010, para 16.

<sup>718</sup> Rule 90(6) and Rule 22(1) ICC RPE.

<sup>719</sup> *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on Victim's Representation and Participation, ICC-01/09-02/11-498, para 60; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Victims' Representation and Participation, ICC-01/09-01/11-460, para 60.

<sup>720</sup> *The Prosecutor v. Bosco Ntaganda*, Second Decision on Victims' Participation in Trial Proceedings, Partly Dissenting Opinion of Judge Ozaki, ICC-01/04-02/06-650-Anx, 16 June 2015.

<sup>721</sup> *The Prosecutor v. Bosco Ntaganda*, Second Decision on Victims' Participation in Trial Proceedings, Partly Dissenting Opinion of Judge Ozaki, ICC-01/04-02/06-650-Anx, paras 6 and 7.

Advocating for the use of local lawyers instead of Hague-based lawyers, Judge Ozaki argued that local counsel is better placed to ensure a meaningful tripartite engagement between the victims, legal representatives, and the Court.<sup>722</sup> In his opinion, representational proximity would also provide the Court with unpolluted information regarding the victims.<sup>723</sup> The Judge further opined that victims would feel “empowered” and the proceedings enhanced if the representation is carried out by lawyers with a fine grasp of crime localities, cultural orientation of the victims, and the nature of victimisation.<sup>724</sup>

The Dissenting opinion by Judge Ozaki was in response to the majority decision in which the Trial Chamber VI refused to modify the system of legal representation for the trial proceedings by substituting Hague based counsel for those based in the DRC.<sup>725</sup> The chamber neglected the “proximity definition” espoused by Ozaki, stating that it does not have to be physical but a working knowledge of the victim’s culture and the typology of victimisation would suffice for the purpose of representation.<sup>726</sup> It was therefore decided that victims would continue to be represented by Western-based lawyers assisted by local lawyers based in the DRC,<sup>727</sup> contrary to the Judge Ozaki idea that such representation should “be led from the ground” by local lawyers.<sup>728</sup>

As per Article 68(3), it would seem that victims are entitled to representation only in the proceedings. However, practice indicates that some Chambers of the Court have sanctioned legal representation for victims even during the application phase while others have refused to do that.<sup>729</sup>

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<sup>722</sup> *The Prosecutor v. Bosco Ntaganda*, Second Decision on Victims’ Participation in Trial Proceedings, Partly Dissenting Opinion of Judge Ozaki, ICC-01/04-02/06-650-Anx, paras 10-13.

<sup>723</sup> *The Prosecutor v. Bosco Ntaganda*, Second Decision on Victims’ Participation in Trial Proceedings, Partly Dissenting Opinion of Judge Ozaki, ICC-01/04-02/06-650-Anx, para 14.

<sup>724</sup> *The Prosecutor v. Bosco Ntaganda*, Second Decision on Victims’ Participation in Trial Proceedings, Partly Dissenting Opinion of Judge Ozaki, ICC-01/04-02/06-650-Anx, para 15-16.

<sup>725</sup> *The Prosecutor v. Bosco Ntaganda*, Second Decision on Victims’ Participation in Trial Proceedings, ICC-01/04-02/06-650, 16 June 2015, paras 28 -32.

<sup>726</sup> *The Prosecutor v. Bosco Ntaganda*, Second Decision on Victims’ Participation in Trial Proceedings, ICC-01/04-02/06-650, para 28.

<sup>727</sup> *The Prosecutor v. Bosco Ntaganda*, Second Decision on Victims’ Participation in Trial Proceedings, ICC-01/04-02/06-650, paras 29 and 32.

<sup>728</sup> *The Prosecutor v. Bosco Ntaganda*, Second Decision on Victims’ Participation in Trial Proceedings, Partly Dissenting Opinion of Judge Ozaki, ICC-01/04-02/06-650-Anx, para 17.

<sup>729</sup> Report on Cluster D (1): Applications for Victim Participation (2015), ICC-ASP/14/30, page 21.

Most of the court’s jurisprudence seems to be in agreement that persons applying for participation as victims at the ICC are not entitled to counsel until their status is determined by the Court.<sup>730</sup>

In order to cure some disadvantages resulting from lack of legal counsel for applicant victims, some Chambers of the Court have held that the registry (Office of Public Counsel for Victims) should provide legal services to such victims.<sup>731</sup> That approach should be distinguished from the appointment of legal counsel under Rule 90, which is exercisable once a particular applicant has been declared ‘victim’ by the Court.

Even though victims are generally not entitled to legal counsel at the application stage, Judge Mauro Politi has argued that “the interests of justice principle” espoused under Regulation 80<sup>732</sup> could be invoked to enable the Court to order the appointment of counsel for victims even when their applications are under consideration.<sup>733</sup>

One of the scenarios in which such a principle could be used is when there is inequality amongst victims owing to access, and lack of access, to legal counsel at the application phase. The appointment of counsel for victim applicants under *ad hoc* considerations was also endorsed by Judge Ekaterina Trendafilova in *Ntaganda* in which she argued that “...should any issue arise which warrants submissions by the applicants, their legal representation will be promptly

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<sup>730</sup> *Situation in the Democratic Republic of the Congo*, Decision on the Requests of the Legal Representative of Applicants on Application Process for Victim’s Participation and Legal Representation, ICC-01/04-374, 17 August 2007, para 43; *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen*, Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-limit for Submission of Observations on Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05-134, para 11; *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victim’s Application Process, ICC-01/04-02/06-67, para 45.

<sup>731</sup> *Situation in the Democratic Republic of the Congo*, Decision on the Requests of the Legal Representative of Applicants on Application Process for Victim’s Participation and Legal Representation, ICC-01/04-374, para 44; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Observations on Legal Representation of Unrepresented Applicants, ICC-01/05-01/08-651, 9 December 2009, para 18(a); *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Role of the Office of Public Counsel for Victims and its Request for Access to Documents, ICC-01/04-01/06-1211, 6 March 2008, para 34.

<sup>732</sup> Regulation 80(1) says: “A Chamber, following consultation with the Registrar, may appoint a legal representative of victims where the interests of justice so require”, Regulations of the ICC, ICC-BD/01-01-04.

<sup>733</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen*, Decision on Legal Representation, Appointment of Counsel for the Defence, Protective Measures and Time-limit for Submission of Observations on Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05-134, para 12.

organized, unless some of the applicants are assisted by a lawyer of their own choice”.<sup>734</sup> What emerges from the Judge Trendafilova argument is that applicants should be afforded legal assistance whenever they seek to move the Court during the application stage.

Lastly, some Chambers of the Court have stressed that victim applicants should be consulted by the registry on the choice of counsel to represent them after they have been granted permission to participate.<sup>735</sup> This is intended for capturing victim’s concerns on legal representation early on to enable them to participate meaningfully in confirmation hearings.

### **3.8 Nexus Between Victim Participation and Reparations at the ICC**

In general terms, victim’s right to justice encapsulates the right to obtain reparation for the harm suffered. In international criminal justice, the right to reparation for the victims can only be executed when the Court gives a guilty verdict for the accused.<sup>736</sup> There can never be reparations for the victims at the ICC in the absence of a conviction for the defendant.

Thus, effective participation by the victims in the trial proceedings could lead to substantive gains for them when a case reaches the reparations stage. Since the nature and size of reparations would depend on the extent of harm suffered by victims of the crimes of a convicted person, it follows that the adduction of victimisation evidence by the victims during the trial could help clarify things in reparation proceedings.<sup>737</sup>

That is notwithstanding the fact that victims are at liberty to either present the evidence relating to reparations during the trial or preserve it until the commencement of reparation proceedings.<sup>738</sup>

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<sup>734</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victim’s Application Process, ICC-01/04-02/06-67, para 45.

<sup>735</sup> *The Prosecutor v. Bosco Ntaganda*, Decision Establishing Principles on the Victim’s Application Process, ICC-01/04-02/06-67, para 46; *The Prosecutor v. Laurent Gbagbo*, Second Decision on Issues Related to the Victim’s Application Process, ICC-02/11-01/11-86, para 44; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Common Legal Representation of Victims for the Purpose of Trial, ICC-01/05-01/08-100, paras 18-21.

<sup>736</sup> Article 75(2) ICC Statute.

<sup>737</sup> *Lubanga Appeals Chamber Reparations Judgment*, paras 184-185; *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Request by Victims a/ 0225/06, a/0229/06 and a/0270/07 to Express their Views and Concerns in Person and to Present Evidence During the Trial, ICC-01/04-01/06-2032-Anx, para 29.

<sup>738</sup> Regulation 56 of the ICC Regulations says that: “The Trial Chamber **may hear** the witnesses and examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial.”

Since reparation proceedings are distinct from trial proceedings,<sup>739</sup> it has been suggested by the Court that reparation evidence produced by the victims during the trial could be received by the Court and recorded for use in reparation proceedings.<sup>740</sup> In addition, the Appeals Chamber in *Lubanga* has argued that the Trial Chamber may elicit evidence on the harm caused to the victims for the purpose of assessing the convicted person's liability for reparations.<sup>741</sup>

More importantly, participation by the victims is crucial in recording their victimisation as ICC judgments are based on the evidence submitted to the Court as well as submissions by parties and participants (victims).<sup>742</sup>

It has been held by the ICC and the Inter-American Court of Human Rights that court judgments have an important reparative value for the victims.<sup>743</sup> Thus, participation enhances *recognition* of the victims, giving them the confidence they need to be more articulate about their plight. Even when the participation of the victims at the ICC does not lead to reparations due to non-conviction of the defendant, victims could still use the judgment to pursue other justice mechanisms at the domestic level because non-conviction does not necessarily mean that crimes were not committed.

As stated in *Katanga*, an acquittal does not mean that the accused is innocent and that crimes were not committed; it only means that the evidence presented did not meet the “beyond reasonable doubt” standard of proof.<sup>744</sup>

Thus, it is submitted that ICC judgments, whether resulting in a conviction or acquittal, could help the victims get *recognised* and seek remedy through other justice mechanisms. For example, irrespective of whether reparations have been provided to them at the ICC, victims could still use the ICC official records (Judgments, Decisions, and Orders) to assert their rights in national jurisdictions either against governments or individuals. That proposition is in line with the ICC

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<sup>739</sup> *Lubanga* Reparations Judgment (2012), para 76.

<sup>740</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Victims' Participation, ICC-01/04-01/06-1119, paras 119 - 121.

<sup>741</sup> *Lubanga* Appeals Chamber Reparations Judgment, para 186.

<sup>742</sup> Article 74(2) ICC Statute.

<sup>743</sup> *Lubanga* Appeals Chamber Reparations Judgment, para 237; Decisions of the Inter-American Court of Human Rights, *Case of Velasquez Rodriguez v Honduras*, Reparations and Costs, Judgment of 21 July 1989, para 36; *Case of Tibi v Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 7 September 2004, para. 243; *Case of the Plan de Sanchez Massacre v Guatemala*, Reparations and Costs, Judgment of 19 November 2004, para. 81.

<sup>744</sup> *Katanga* Article 74 Judgment, para 70.



Statute and international human rights law since, whatever the outcome of proceedings at the ICC, neither state responsibility nor rights of the victims under domestic law are affected.<sup>745</sup>

### **3.9 Chapter Conclusion**

The chapter has attempted to lay down the law relating to the participation of victims at the ICC by navigating through decisions of the Court to gauge the compatibility of the ICC victim's participation system to what I call "principles of substantive participation" as alluded to earlier. After a decade and a half in operation and with 10 situations under its jurisdiction, it would be the ideal moment for one to pinpoint some drawbacks of the victim participation regime at the ICC.

It is submitted that the victim participation policy that has been carried out by the ICC in sixteen years is neither tokenistic nor substantive in terms of responding to justice demands of the victims of heinous violations of human rights. One cannot claim that such a policy has significantly resulted in substantive gains for the victims.

This writer concludes that the participation regime for the victims at the ICC is not wholly non-retraumatising, and it is neither fully amenable to the principle of equal access to justice nor affording full access to information. Going by the jurisprudential analysis and considering the legal framework of the ICC, I am inclined to conclude that the principles of substantive participation have not been fully observed due to the following reasons.

First, the discourse of 'defendants first then the victims' has subjected victims to a disadvantage in relation to the accused persons. As demonstrated, most of the Judges have immensely capitalised on the 'parties/non-parties divide' to close down space for the victims in ICC proceedings. Even though victims are not parties and the observance of rights of the accused is stressed upon under Article 68(3), the ICC Statute does not suggest that defendants are superior to victims in terms of rights and privileges.

Like defendants, victims also need the protection of the Court, without which they will not be able to get justice. While the jurisprudence of the ICC has clearly stated that participation per se can

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<sup>745</sup> Articles 75(6) and 25(4) ICC Statute; See also paragraph V (9) of the UN Basic Principles on Reparations which provides that: "A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim."

never be repugnant to rights of the defendants, some Judges have given in to the slogan “respect for rights of the defence”<sup>746</sup> resulting in unreasonable roadblocks on the path to justice for victims.

That is why some of the Judges, as discussed, have invoked utilitarian considerations<sup>747</sup> in restricting interventions by the victims. Victims need the right to be heard, and that is the rationale of Article 68(3) of the ICC Statute. They can never be heard meaningfully if they are regarded as second class to the accused persons.

Secondly, participation is never assured because the exact typology for victim participation is unclear under the ICC Statute and the interpretation of Article 68(3) by the Judges has led to unpredictable jurisprudence. As held by Judge Steiner in *Katanga*, “legal certainty” is essential for an effective participation of the victims at the ICC.<sup>748</sup>

However, it is submitted that legal certainty in relation to victim’s rights at the ICC may not be possible because, unlike the Special Tribunal for Lebanon,<sup>749</sup> the ICC Statute does not define modes of participation for the victims. The modes of participation must be set out by the Judges. That is why some Judges say that victims can give evidence on guilt or innocence of the accused while others have contested that it is for the Prosecutor to do that and not the victims. Also, as indicated, there have been conflicting decisions on the exact role of victims in the investigations. Thus, in the absence of specific statutory provisions on the content of rights of the victims, ICC Judges will continue to produce inconsistent jurisprudence in that regard.

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<sup>746</sup> See for example, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Decision on the Participation of Victims in the Appeal, ICC-02/04-01/05-324, 27 October 2008, para 10.

<sup>747</sup> Judges are not concerned by the judicial value of victim’s interventions; they are concerned by the number of victims seeking participation and the volume of views – that the higher the number the more the likelihood that defence rights will be affected, which is unsupported by the ICC Statute. For example, in one decision in *Lubanga*, the Trial Chamber I suggested that the number of victims seeking personal participation must be trimmed down as allowing a large number of victims to directly present views could breach fair trial rights of the accused person. See, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Request by Victims a/ 0225/06, a/0229/06 and a/0270/07 to Express their Views and Concerns in Person and to Present Evidence During the Trial, ICC-01/04-01/06-2032-Anx, para 27.

<sup>748</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, paras 50-51.

<sup>749</sup> Rule 87 of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon, STL-BD-2009-01-Rev.8.

It is argued that the inconsistency could only be cured by having a provision that defines modes of participation.<sup>750</sup> The principle of curing jurisprudential inconsistencies through positive law was also upheld by the Appeals Chamber in *Lubanga* in support of the adoption of a provision in ICC Regulations that regulates powers of the Court to modify legal characterisation of facts.<sup>751</sup>

Thirdly, the requirement of proving *personal interests* for every intervention creates uncertainties for the victims as participation is not assured even for the victims who have already been admitted in the case. The personal interest's criterion under Article 68(3) operates as a clawback clause to participation as rights granted with a right hand could as well be taken away by the other hand.

Arguably, the requirement of personal interests should not be the absolute determinant factor for participation as such a requirement does not feature under the specific statutory provisions such as Articles 15(3) and 19(3) that grant participatory rights to the victims.<sup>752</sup> Victims should only be required to establish a nexus between crimes charged and harm suffered, for them to be granted participation. In the ECCC, victims do not have to prove personal interests to participate.

Fourthly, the role of victims in the investigations is another area that has resulted in conflicting decisions amongst different Chambers of the ICC. While the Appeals Chamber has held that victims can only have the right to be heard in the proceedings relating to investigations as opposed to taking investigative steps alongside the prosecutor, other chambers of the court have acknowledged the right of legal representatives to investigate. For example, in *Katanga*, the full bench of the Trial Chamber II has held that victims are not allowed to conduct investigations to

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<sup>750</sup> On how to cure inconsistencies, see, 'Regulation 55 and Rights of the Accused at the International Criminal Court' Washington College of Law War Crimes Office (2013), at page 9, available at <https://www.wcl.american.edu/warcrimes/icc/documents/Report17.pdf> (accessed 20 April 2017).

<sup>751</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06 OA 15 OA 16, 8 December 2009, para 70.

<sup>752</sup> *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-01/04-101-tEN-Corr, paras 61-62; *Situation in the Democratic Republic of the Congo*, Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, para 29.

establish the guilt or innocence of the defendant but legal representatives may carry out investigations for proving victimisations suffered by the victims.<sup>753</sup>

What emerges from such decisions is the fact that the jurisprudence of the ICC is unsettled on the exact role of victims in investigations. Where does one draw a line between investigations geared at proving the guilt of the accused and those directed at proving harm to the victims? Clearly, this is a jurisprudential uncertainty that does not help the victims.

The rationale fronted for banning the victims from investigating incriminating or exonerating evidence is that such an approach would violate the principle of equality of arms and fair trial rules by subjecting defendants to cases of both the Prosecutor and the victims.<sup>754</sup> However, it is my opinion that such worries are practically unsubstantiated since, whatever the case, it is the Prosecutor-led investigations that will form the basis of charges. It is for the prosecutor to institute charges, not the victims. So, if the victims conduct investigations, they may not necessarily be *ultra vires* to the indictment sought by the Prosecutor and that kills the notion of double prosecution.

The same Trial Chamber in *Katanga* has suggested, in another decision, that victims can request the Prosecutor to undertake certain investigations.<sup>755</sup> That suggests that prosecutorial investigations may not be comprehensive and fully responsive to victim's interests, prompting the Court to envisage that victims may push the Prosecutor to take a certain direction in the investigations.

Aptly put, the interests of justice demand that victims should be somehow involved in the investigations as there is evidence at the ICC that investigations by the Prosecutor could be skewed. In the *Chui* case, which resulted in an acquittal even though crimes were committed in Ituri, the Court protested that investigations conducted by the Prosecutor were not thorough for lacking

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<sup>753</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, paras 102 – 103.

<sup>754</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788-tENG, para 102.

<sup>755</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, para 83.

crucial forensic evidence on the victims and crime localities and for neglecting critical aspects of the case such as socio-cultural information.<sup>756</sup>

Fifthly, the principle of equal access to justice for the victims as enshrined in human rights instruments is strategically unenforceable under the ICC Statute with respect to the victims. Prosecutorial selectivity means that victims of uncharged crimes or fugitive defendants such as *Al Bashir* (Darfur Victims) may not be able to participate in the proceedings and claim reparations. Likewise, the strategic selection of incidents on which the Prosecutor base the charges would mean that a particular *situation* could produce participating and non-participating victims.

For example, in *Lubanga*, the prosecutor restricted the charges to conscription and use of child soldiers, leaving out sexual and gender based crimes. That decision locked out victims of sexual crimes perpetrated by *Lubanga*. So, in summary, the lack of equal access affects both the participation regime and the reparations case. Ideally, such inequality will continue to exist as long as the ICC continues to function strictly as a criminal court as opposed to human rights courts.

Judge Wyngaert has opined that the ICC can never be a criminal court (prosecutions) and a human rights court (restorative justice) at the same time, suggesting that the Trust Fund for Victims should be transformed into a reparation or claims commission so as to widen its jurisdictional base in dealing with large numbers of victims seeking recognition and reparations.<sup>757</sup>

Lastly, the admission system for the victims must be refined by going for the proposed semi-collective hybrid procedure that incorporates both collective and individual applications. Such an approach would cater to both victim's communities as well as individuals that are not comfortable with group settings.

To economise judicial proceedings and to guard against protracted victim-related proceedings, victim applications should not be subjected to a judicial contest by the parties. Applications should be administratively assessed by the registry for compliance and submitted to the Court for approval. However, in the spirit of safeguarding the parties' right to be heard, parties should be afforded an opportunity to challenge victim applicants whenever they seek to intervene in critical

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<sup>756</sup> *Ngudjolo Chui* Article 74 Judgment, paras 115-123.

<sup>757</sup> See Judge Christine Baroness Van den Wyngaert presentation on YouTube entitled "Victims before International Criminals Courts: A Challenge for International Criminal Justice" (2011), available at <https://www.youtube.com/watch?v=DYb19TIPOBU> (watched on 21 April 2017).

junctures of the case. The proposed system should be equally applied to all the cases at the ICC subject to a judicial discretion to make minor modifications to suit specific circumstances of a case under consideration.

**CHAPTER FOUR**  
**AN ANALYSIS OF THE INTERNATIONAL CRIMINAL COURT’S REPARATION**  
**JURISPRUDENCE**

**4.1 Introductory Remarks**

The chapter provides a reasoned analysis of the ICC reparation decisions in *Lubanga*, *Katanga*, and *Al Mahdi* to determine their compatibility with an international human rights law requirement that reparations should be adequate, effective, and prompt.<sup>758</sup>

As discussed in the previous chapter, victim’s right to participate in the criminal proceedings is crucial to satisfying the right to reparation under Article 75 of the ICC Statute. The reparations stage is a province of the victims.<sup>759</sup> Therefore, victims’ participation in the reparation *process* is critical to achieving meaningful redress.<sup>760</sup>

The ICC Statute begins with a preamble that embodies a commitment of the international community towards the elimination of impunity for international crimes. Anti-impunity efforts should be directed at both criminal justice as well as restorative justice. Criminal punishment of the perpetrators could mean nothing for the victims if their harm remains unredressed. The ICC presents a system of international criminal justice that seeks to combine punitive justice with reparative justice.<sup>761</sup>

Also, the court has admitted in its reparations judgments that its success in eradicating impunity for international crimes hinges on the success of its redress system.<sup>762</sup> In my opinion, the success of the ICC reparation system needs to be measured on the basis of how responsive it is to the needs

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<sup>758</sup> *Al Mahdi* Reparations Order (2017), para 33; *Lubanga* Reparations Judgment, para 242; *Katanga* Reparations Order (2017) paras 15 and 267; *Lubanga* Reparations Order (2015), para 44; General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), African Commission on Human and Peoples’ Rights, 2017, paras 8, 25, and 33.

<sup>759</sup> *Lubanga* Reparations Judgment (2012), para 267.

<sup>760</sup> *Lubanga* Reparations Judgment, para 203.

<sup>761</sup> Article 75 of the ICC Statute; *Lubanga* Reparations Judgment (2012), para 177; *Lubanga* Reparations Order (2015), para 1.

<sup>762</sup> *Katanga* Reparations Order (2017), para 14; *Lubanga* Reparations Judgment (2012), para 178; *Lubanga* Reparations Order (2015), para 3.

of heterogenous victims and different harm categories. International crimes entail a universe of victims with unique and heterogenous redress requirements.

According to a UN Special Report by Pablo de Greiff, reparations need to be conceptualised as a three-term phenomenon that incorporates ‘victims, benefits, and beneficiaries’ as interrelated aspects.<sup>763</sup> That, *complete* reparations must extend redress benefits to the right victims, eventually turning them into beneficiaries. Thus, reparations should not be solely deemed as a justice mechanism but a *process* through which victims achieve justice. Just like the end result, the reparation process matters for the victims. For example, a process laden with complex procedural requirements and an overly bureaucratic reparation regime may potentially result in unjust and inadequate reparations.

Diane Orentlicher defines ‘completeness’ with regard to reparations as a scenario where redress benefits are provided to all the victims of all categories of crimes under consideration in a given case.<sup>764</sup>

Since ICC reparations are defendant-based, narrow charges could give rise to ‘incomplete’ reparations as some victims from the same *situation* could be excluded from participation and eventual access to reparations. In abstract terms, a reparation program becomes comprehensive when all victims of all human rights violations in a particular situation receive reparation. However, due to inherent limitations of the ICC reparations, comprehensive reparations are inconceivable. Owing to resource constraints, no reparation program whether court-ordered or administrative reparations has been able to achieve completeness.<sup>765</sup>

More so, the ICC, as a court of last resort, operates in a complementary relationship with national courts. Since prosecutions are focused on gross violations and persons most responsible for the commission of crimes, many victims in a given *situation* may not access defendant-based

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<sup>763</sup> See UN Report entitled ‘Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence’, A/69/518, 14 October 2014, para 23; ‘Rule of Law Tools for Post Conflict States: Reparation Programs’ (2008), Office of the United Nations High Commission for Human Rights, page 15.

<sup>764</sup> Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, E/CN.4/2005/102, 18 February 2005, para 59(b) at page 17; See also a UN Report entitled ‘Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity, by Professor Diane Orentlicher’, E/CN.4/2004/88, 27 February 2004, para 60 at page 19.

<sup>765</sup> ‘Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence’, A/69/518, para 26.



reparations due to limited charges. That is an inherent limitation. Thus, it would be illusory, at least under the current legal regime, for one to envisage comprehensive reparations at the ICC.

However, the completeness of reparations could be affected by a number of aspects. The scope of a reparation program and the number of beneficiaries could be affected by the following: availability of information on victims, crimes, and court proceedings; victim's participation in the proceedings; outreach activities; accessibility of the court; and evidentiary requirements.<sup>766</sup>

For example, extensive grassroots outreach activities regarding reparations in *situation* countries could enhance the breadth of reparations regarding participation.<sup>767</sup> In *Lubanga*, the Trial Chamber I rightly opined that “outreach activities, which include, firstly, gender and ethnic-inclusive programmes and, secondly, communication between the Court and the affected individuals and their communities are essential to ensure that reparations have broad and real significance”.<sup>768</sup> Similarly, dissemination of information regarding reparation procedures and programmes to be implemented is crucial for effective victim participation.<sup>769</sup>

In addition, the human rights requirement that victims should be treated equally and fairly underscores the need for an equal dissemination of information to all the victims without discrimination.<sup>770</sup> Victims must have unhindered access to all the information on the violations as well as the redress mechanisms under consideration.<sup>771</sup>

Judicial accessibility is another aspect that could determine the extent of the provision of reparations to the victims. A smooth access to the Court is a critical step towards reparative justice.<sup>772</sup> That points to the legal framework establishing the right to redress as well as the procedural avenue towards the obtainment of reparations by the victims.<sup>773</sup> Effective reparations

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<sup>766</sup> ‘Rule of Law Tools for Post Conflict States: Reparation Programs’ (2008) pages 15 – 18.

<sup>767</sup> *The Prosecutor v. Germain Katanga*, Queen's University Belfast's Human Rights Centre (HRC) and University of Ulster's Transitional Justice Institute (TJI) Submission on Reparations Issues pursuant to Article 75 of the Statute, ICC-01/04-01/07-3551, para 23.

<sup>768</sup> *Lubanga* Reparations Judgment (2012), para 205.

<sup>769</sup> *Lubanga* Reparations Judgment (2012), paras 214 and 259.

<sup>770</sup> *Al Mahdi* Reparations Order (2017), para 29.

<sup>771</sup> UN Basic Principles on Reparations, paras 11(c) and 24.

<sup>772</sup> UN Basic Principles on Reparations, para 12.

<sup>773</sup> General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), African Commission on Human and Peoples' Rights, 2017, para 9 at page 4.

entail the availability of redress without undue impediments whether legal, technical, or procedural.<sup>774</sup> It follows that, victim's access to a remedy could be hindered when you have restrictive laws and complicated court procedures.

To determine whether ICC reparations are near *complete* or promise *completeness*, one has to look at the way the Court has pronounced itself to the factors affecting completeness as mentioned above. That is what this chapter does by assessing the substantive parts of the Court's reparation judgments.

## 4.2 Nature of ICC Reparations

To have a clear picture of the ICC reparations, one has to understand that, despite being civil, ICC reparations are born out of the criminal proceedings. An order for reparations is intrinsically linked to the result of a criminal trial in which liability for reparations is pinned to the parameters of the conviction decision.<sup>775</sup> Therefore, an obligation to repair stems from individual criminal responsibility.<sup>776</sup>

All reparation decisions of the ICC are unanimous that the purpose of reparations is to obligate person held responsible for the commission of atrocity crimes "...to repair the harm they caused to the victims and to enable the Court to ensure that offenders account for their acts".<sup>777</sup> The main agenda is to ensure accountability of the perpetrators towards the victims by the provision of redress for the harm suffered. However, despite agreeing that reparations should revolve around remedying the victims for the defendant's specific transgressions of their rights, other chambers of the Court have introduced other considerations.

Some decisions have gone further by demanding that reparations should be reconciliatory, transformative, and deterrent.

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<sup>774</sup> General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), African Commission on Human and Peoples' Rights, 2017, para 23 at page 8.

<sup>775</sup> *Katanga* Reparations Order (2017), paras 16 and 17.

<sup>776</sup> *Katanga* Reparations Order (2017), para 17.

<sup>777</sup> *Katanga* Reparations Order (2017), paras 15 and 267; *Lubanga* Reparations Judgment (2012), para 179; *Lubanga* Reparations Order (2015), para 65; *Al Mahdi* Reparations Order (2017), para 27.

#### 4.2.1 Can ICC Reparations Achieve Deterrence?

In *Lubanga* and *Al Mahdi*, Trial Chamber I and Trial Chamber VIII respectively introduce the concept of deterrence as one of the objectives of reparations. In both decisions, the Court states that reparations should be able “...to deter future violations”.<sup>778</sup>

Arguably, since reparations are neither punitive nor criminal, the deterrence objective becomes illusory for being unachievable. The fact that ICC reparations emanate from a criminal conviction does not necessarily make them punitive. They are still civil. In clear terms, reparations are not for pain infliction on the part of the offender but for making amends for an injury suffered by a victim.<sup>779</sup>

Furthermore, the ICC does not provide judicial guidance on the turbulent question of achieving deterrence through reparations. While it would be conceivable to accept that fear of criminal sanctions for atrocity violations could deter people from committing grave crimes and thereby avoid the ICC,<sup>780</sup> it is highly unlikely that reparations per se could be deterrent. One pragmatic question regarding ICC reparations warrants a discussion here. What would be the deterrent effect of ICC reparations when the actual enforcement of reparations does not take a penny from the convicted defendants? At the time of writing, the practice of the Court has been to enforce reparations through the Trust Fund due to the defendant’s indigence.<sup>781</sup>

One may ask whether it would ever be an incentive for people to conform to international criminal law for fear of liability for reparations. It is argued that reparations per se may certainly not discourage criminal behaviour in atrocity crime environments. It is particularly so as ICC reparations are an offshoot of a criminal conviction, only considered when there is a guilty verdict.

Additionally, no economic strain could be felt by most defendants since it is assured, under the current practice, that a reparation order against them will always be enforced by a third party (the

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<sup>778</sup> *Lubanga* Reparations Judgment (2012), para 179; *Lubanga* Reparations Order (2015), para 71; *Al Mahdi* Reparations Order (2017), para 28.

<sup>779</sup> Sayre-McCord G ‘Criminal Justice and Legal Reparations as an Alternative to Punishment’ (2001) 35 *Noûs* 504-505.

<sup>780</sup> Simmons B and Jo H ‘Can the International Criminal Court Deter Atrocity?’ (2016) 70 *International Organization* 446-448.

<sup>781</sup> *Katanga* Reparations Order (2017), paras 327-330; *Lubanga* Appeals Chamber Reparations Judgment, para 116; *Lubanga* Reparations Judgment (2012), paras 269, 273, and 274; *Al Mahdi* Reparations Order (2017), para 138.

Trust Fund). For example, the indigent *Al Mahdi* does not have to worry about his 2.7 million euros reparations bill because the Trust Fund will take care of it.

Similarly, the impecunious *Katanga* may never have to worry about his 1 million euro reparation order because the Trust Fund will enforce it.<sup>782</sup>

Turning to another side of the coin, would there be deterrence when a defendant shoulders the whole economic burden of reparations? In my view, there is no one-size fits all answer to the question. However, I hold the view that the deterrent function of international crimes reparations is contingent upon the nature and scale of prosecutions at the ICC and in national jurisdictions. Prosecution-based deterrence is the point I advance here.

The primary goal of the ICC is to ‘prevent recurrence of crimes’ through a complementary action alongside national authorities.<sup>783</sup> Since atrocity crime prosecutions at the domestic level tend to be lower due to inaction,<sup>784</sup> the aggregate deterrent impact of ICC reparations will potentially be minimal and possibly ineffectual because the Court does not prosecute everyone.

The ICC only goes for serious high gravity crimes targeting perpetrators holding, for example, leadership positions and incidents representing atrocious criminality.<sup>785</sup> Considering that ICC

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<sup>782</sup> *Katanga* Reparations Order (2017), paras 326, 327, and 330.

<sup>783</sup> ICC Policy Paper on Case Selection and Prioritisation, Office of the Prosecutor, 15 September 2016, para 7.

<sup>784</sup> In the past, many conflict states have not been in the habit of conducting meaningful investigations and prosecutions of the persons responsible for core crimes. On this assertion, please see: *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, paras 69 and 80; *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010, para 29; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11-101, 30 May 2011, para 70; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-02/11-96, 30 May 2011, para 66; *The Prosecutor v. Simone Gbagbo*, Decision on Côte d’Ivoire’s Challenge to the Admissibility of the Case against Simone Gbagbo, ICC-02/11-01/12-47-Red, 11 December 2014, paras 78-79; *The Prosecutor v. Simone Gbagbo*, Judgment on the Appeal of Côte d’Ivoire against the Decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”, ICC-02/11-01/12-75-Red, 27 May 2015, para 59; *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (“*Omar Al Bashir*”), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009, paras 49-51.

<sup>785</sup> ICC Case Selection Policy (2016) paras 35-40; Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, 23 April 2009, Regulation 33; *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (“*Omar Al Bashir*”), ICC-02/05-01/09-3, para 42.

reparations are an offspring of a criminal conviction, the resultant scenario is that reparations awarded at the ICC may never be reflective of the total harm suffered in a given conflict situation. Equally, entrenched impunity in some jurisdictions means fewer prosecutions which in turn affect reparations. Therefore, unless there is a near impossible situation where atrocity crime prosecutions domestically and internationally cover all the perpetrators, it is highly improbable to achieve functional deterrence through ICC reparations.

#### **4.2.2 Is Reconciliation Possible Through Defendant-Focused Reparations?**

Ideally, reconciliation is critical for post-conflict peace initiatives and, if handled rightly, it can help heal wounds inflicted by past crimes.<sup>786</sup> However, to achieve meaningful peace in atrocity crime situations, reconciliation needs to be conceptualised as a healing process that comes at the very end of a truth-telling process. In the past, a number of post conflict transitions have used truth commissions to establish historical truth regarding past atrocities to achieve forgiveness and trigger reconciliation. Thus, apologies and truth-telling are critical for reconciliation as a post conflict justice process.<sup>787</sup>

As alluded to earlier, some ICC reparation decisions have premised reconciliation as one of the objectives of reparations. Some reparations decisions have mentioned reconciliation as a post-conflict justice mechanism but they fall short of describing how it should be done. Neither the ICC Statute nor the current jurisprudence of the Court provides a clear definition of reconciliation. Black's law dictionary defines reconciliation as "restoration of harmony between persons or things that had been in conflict".<sup>788</sup> While defendant-focused reparation system of the ICC presupposes the existence of 'from defendants to victims' redress typology, the judgments of the Court do not provide guidance on how to effectuate reconciliation in a scenario where you have, for example, one defendant and a million victims.

Hayner argues that individual reconciliation that applies to an individual needs to be distinguished from national reconciliation that essentially seeks to achieve aggregate political goals that benefit

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<sup>786</sup> Hayner PB *Unspeakable Truths: Confronting State Terror and Atrocity* (2001) 154.

<sup>787</sup> Hansen WL and Adhikari P 'Reparations and Reconciliation in the Aftermath of Civil War' (2013) *Journal of Human Rights* 425.

<sup>788</sup> Black's Law Dictionary, Seventh Edition (1999) 1278.

the society as a whole.<sup>789</sup> Noting that ICC reparations could be individual or collective, how does the Court conceptualise reconciliation in mass crime cases? Interestingly, the prevailing jurisprudence of the Court is unanimous that reparations should promote reconciliation “between the victims of the crime, the affected communities and the convicted person”.<sup>790</sup>

Understanding that individual-focused reconciliation is difficult to achieve in certain mass crime prosecutions,<sup>791</sup> the Court seeks to achieve community-focused healing process that could potentially foster long-standing peace. Since the implementation of reparations in *Lubanga*, *Katanga*, and *Al Mahdi* has not been completed, it would be difficult to assess the impact of any reconciliatory efforts that have been earmarked through court-ordered reparations.

However, some reparation orders that are at the implementation stage could provide an understanding of how the Court perceives community-based reconciliation process. Consequently, one could be able to make a preliminary finding regarding the functional potentiality of such redress processes.

In the *Katanga* case, the Defence made submissions before the court that the defendant would be willing to participate in a traditional ceremony of forgiveness where Katanga could issue a public apology to the victims.<sup>792</sup> It has been suggested that the ceremony should take place in Bogoro, the place where horrendous crimes against humanity were committed against civilians. However, in an interim draft implementation plan that is still before the Court for final orders, the TFV has expressed that Katanga may not be able to participate as he is still incarcerated in the DRC.<sup>793</sup> Thus, the implementation of the public apology ceremony as a reparation measure that hinges on voluntary consent of the defendant may not be possible unless the government of the DRC ends the detention or permits Katanga to attend.<sup>794</sup> This situation serves as one of the many possible scenarios where reconciliation in mass crime cases may not succeed.

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<sup>789</sup> Hayner (2001) 155.

<sup>790</sup> *Al Mahdi* Reparations Order (2017), para 28; *Katanga* Reparations Order (2017), para 317; *Lubanga* Reparations Judgment (2012), paras 193 and 244.

<sup>791</sup> *Lubanga* Reparations Judgment (2012), footnote 431 at page 82.

<sup>792</sup> *The Prosecutor v. Germain Katanga*, Defence Observations on the TFV’s Draft implementation Plan, ICC-01/04-01/07-3764, 11 September 2017, para 9.

<sup>793</sup> *The Prosecutor v. Germain Katanga*, Draft Implementation Plan Relevant to Trial Chamber II’s Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728), ICC-01/04-01/07-3751-Red, 25 July 2017, para 134.

<sup>794</sup> *Katanga* Reparations TFV Draft Implementation Plan (2017), ICC-01/04-01/07-3751-Red, para 135.

In *Al Mahdi*, a case involving a war crime of attacking protected cultural and religious buildings in Timbuktu in Mali, the TFV has proposed community dialogue and religious ceremonies around the conflict zone to raise awareness on the importance of cultural heritage and to foster reconciliation.<sup>795</sup> According to the TFV, the objective of community dialogue and the ceremonies is to restore the victim's dignity and heal the trauma experienced by the society following the destruction of historical and religious mausoleums in Timbuktu.<sup>796</sup> To enhance reconciliation and peaceful coexistence, a video containing *Al Mahdi's* apology will be streamed to the public.<sup>797</sup>

The few case studies examined above provide a glimpse of how tricky reconciliation could be in atrocity crime situations. It is submitted that it could be an uphill task for the ICC to foster reconciliation in *situation* countries through defendant-focused reparations due to the following reasons.

First, reconciliation as an aspect of justice requires full truth regarding particular violations. For the case of the DRC, domestic reconciliation efforts failed to yield any meaningful results due to a malfunctioning truth commission. Ideally, it would not be possible to obtain aggregate truth on past violations in mass crime prosecutions. Prosecutions, streamlined along strict procedural and evidentiary rules that focus on individual perpetrators and select charges and incidents, may potentially not produce global truth on the violations under consideration. Half-truths are not needed for transitional justice reconciliation.

Secondly, given that reparations are voluntary and may not be forced on the victims,<sup>798</sup> so does reconciliation. For example, the jurisprudence of the Court is clear that apologies by defendants can not be ordered by the Court and that victims are at liberty whether or not to accept the hand of forgiveness. In *Al Mahdi*, a three-bench Judge of Trial Chamber VIII held that:

The Chamber recognises that it is ultimately up to each individual victim to decide whether he or she considers Mr Al Mahdi's apology to be sufficient. Some victims may already be satisfied with the apology

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<sup>795</sup> *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted version of "Corrected version of Draft Implementation Plan for Reparations, With public redacted Annex I, 20 April 2018, ICC-01/12-01/15-265-Conf", 30 April 2018 ICC-01/12-01/15-265-Conf-Corr+Corr-Anx, ICC-01/12-01/15-265-Corr-Red, 18 May 2018, para 256.

<sup>796</sup> *Al Mahdi* Reparations TFV Draft Implementation Plan (2017), ICC-01/12-01/15-265-Corr-Red, paras 259 and 260.

<sup>797</sup> *Al Mahdi* Reparations TFV Draft Implementation Plan (2017), ICC-01/12-01/15-265-Corr-Red, para 259.

<sup>798</sup> *Lubanga* Reparations Judgment (2012), para 204.

given, and others will not be satisfied no matter what kind of further apologies are given. This is inevitable, and eminently understandable.<sup>799</sup>

Therefore, the point here is that prosecution-based reconciliation has to adhere to certain rules and that includes, for example, not ordering apologies or forcing their acceptance on the victims.

Thirdly, despite convictions, some defendants may not perceive themselves as perpetrators and accept responsibility. For example, in a sentence reduction hearing in *Lubanga*, a three-bench judge of the Appeals Chamber noted that Lubanga had not genuinely dissociated himself from his crimes.<sup>800</sup> It is critical that reconciliation should be undertaken when perpetrators accept wrongdoing and ask for forgiveness. There cannot be reconciliation without acceptance of responsibility. For the Congo *situation* before the Court, some convicted defendants consider themselves as heroes in their communities. They established tribal-based military groups to protect the interests of their respective communities.<sup>801</sup>

For example, during mitigation before sentencing, Thomas Lubanga told the court that he formed the UPC/FPLC to restore peace in a conflict-prone region of Ituri in Eastern DRC.<sup>802</sup> While already convicted for the war crime of using children in an armed conflict, Lubanga contested that charge during sentencing by arguing that the enlistment was voluntary and that it was necessary for him and his people to build a large army “...in order to establish political and military control over Ituri as a response to the threat of massacre and given the absence of any intervention from the United Nations.”<sup>803</sup> The peace objective was a central issue throughout defence submissions during sentencing.<sup>804</sup> The Court accepted that the peace agenda could have been achieved but this was rejected as a mitigating factor for sentencing due to the extensive use of child soldiers.<sup>805</sup>

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<sup>799</sup> *Al Mahdi* Reparations Order (2017), para 69.

<sup>800</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Second Decision on the Review Concerning Reduction of Sentence of Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-3375, 3 November 2017, paras 52 and 57.

<sup>801</sup> Lubanga Trial Transcript, Submissions by the Prosecutor, ICC-01/04-01/06-T-107-ENG ET WT, 26 January 2009, page 21, lines 8-12; See a Human Rights Watch Report entitled ‘ITURI: “COVERED IN BLOOD” Ethnically Targeted Violence In Northeastern DR Congo’ July 2003, Vol. 15, No. 11 (A), pages 14-16, available at <https://www.hrw.org/report/2003/07/07/covered-blood/ethnically-targeted-violence-northern-drc> (accessed 31 May 2018).

<sup>802</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012, para 84.

<sup>803</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2901, para 83.

<sup>804</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2901, para 86.

<sup>805</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2901, para 87.



Similarly, in *Bemba*, the defence argued that the MLC (military group) was created to establish a constitutional democracy in the DRC.<sup>806</sup> As Bemba's military group was responsible for war crimes in the Central African Republic (the CAR), the Court reasoned that his peace efforts in the DRC had no relevance for the CAR.<sup>807</sup> Again, the Court rejected the defendant's peace rhetoric at sentencing because his military group's political goals for the DRC created a fertile ground for the growth of an atrocious conflict in the CAR where crimes against humanity and war crimes claimed thousands of lives.<sup>808</sup>

Fourthly, inherent limitations of criminal prosecutions may affect victims' perception of justice in a negative way. Case selection criteria used at the ICC may lead to non-prosecution of certain crimes in a given situation. That essentially brings up a category of victims, for example, those whose harms relate to crimes that were not charged may feel discriminated against as they will not receive reparations.

Reconciliation could be impossible to achieve under such circumstances. While it is generally accepted that the ICC may never prosecute all the crimes in the world, it is submitted that the Prosecutor has to prosecute for crimes that represent the largest category of harms suffered by many people in a given *situation*. For example, in *Lubanga*, the Prosecutor submitted testimonies to the Court on horrendous sexual crimes that were committed against women and children but no sexual and gender based charges were brought up.<sup>809</sup> Limited charges lead to categorised reparations only for certain victims and that violates human rights for being unfair and inequitable.<sup>810</sup>

Fifthly, the layout of reconciliation programs in a transitional society has to be responsive to societal and ethnic issues that caused the conflict. Since ICC reparations are defendant-based, charges could be a determining factor when it comes to reconciliation. For example, three cases of

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<sup>806</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 21 June 2016, para 71.

<sup>807</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3399, para 76.

<sup>808</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3399, para 75.

<sup>809</sup> Lubanga Trial Transcript, Submissions by the Prosecutor, ICC-01/04-01/06-T-107-ENG ET WT, 26 January 2009, page 5, lines 1-4 and page 11, lines 21-24; *The Prosecutor v. Thomas Lubanga Dyilo*, Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations, ICC-01/04-01/06-2803-Red, 23 March 2012, para 149.

<sup>810</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2803-Red, para 150.

*Katanga*, *Lubanga*, and *Chui* relate to war crimes and crimes against humanity that were perpetrated in the region of Ituri in Eastern DRC.<sup>811</sup> The defendants come from different ethnic groups (Hema, Lendu, and Ngiti) that were pitted against each other during the war. Thus, charges preferred by the Prosecutor could unwittingly leave out some communities and affect reparations if harms suffered are unrelated to crimes proved in court.<sup>812</sup>

In *Lubanga*, a case involving conscription of child soldiers from the *Hema* ethnic group, victims from the same tribe as the defendant will receive reparation while victims from other ethnic groups (Lendu and Ngiti) may not access redress because the Prosecutor did not charge child conscription in the *Katanga and Chui* case.<sup>813</sup>

In its first reparations report in the *Lubanga* case, the TFV observed that:

The selectivity of charges in the present case, which as noted above may seem to favour one ethnic group fighting in the conflict over the other, while both sides seem to have committed atrocities on a similar scale, will make it extremely challenging to promote reconciliation in the region and reduce tensions stemming from the underlying causes fuelling the conflict and dividing the pastoral (Hema) and the agricultural lifestyle (Lendu) that underlies the conflict.<sup>814</sup>

Therefore, due to the factors explained above, it is clear that reconciliation may not be achieved easily through judicial reparations.

#### **4.2.3 Can ICC Reparations be Transformative?**

As discussed in chapter one, some scholars have underscored the point that reparations should be able to transform societies dealing with mass crimes. Similarly, in *Lubanga*, the Appeals Chamber of the ICC held that reparations should have a “transformative value”.<sup>815</sup> What does not come out clearly is the actual nature of transformation envisaged by the Court. Is it political, social, economic, and cultural transformation? While it is possible for certain international crimes to affect a community,<sup>816</sup> one should not expect court-ordered reparations that hinge on an

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<sup>811</sup> *The Prosecutor v. Mathieu Ngudjolo Chui*, Case Information Sheet, ICC-PIDS-CIS-DRC2-06-006/15\_Eng; *The Prosecutor v. Thomas Lubanga Dyilo*, Case Information Sheet, ICC-PIDS-CIS-DRC-01-016/17\_Eng; *The Prosecutor v. Germain Katanga*, Case Information Sheet, ICC-PIDS-CIS-DRC-03-014/18\_Eng.

<sup>812</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2803-Red, para 180.

<sup>813</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2803-Red, para 151.

<sup>814</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2803-Red, para 183.

<sup>815</sup> *Lubanga* Reparations Order (2015), para 67.

<sup>816</sup> *Lubanga* Appeals Chamber Reparations Judgment, para 212.

individual's criminal responsibility to bring about a society's transformation in all spheres of life. It is practically impossible.

To start with, the limited nature of ICC prosecutions may not yield redress measures that cut across all reparative demands of the victims, let alone effecting societal changes. So, what kind of transformation is envisaged by the ICC? In *Lubanga*, the TFV submitted that reparations should be transformative by rooting out "imbedded inequality and exclusion" that led to the violations.<sup>817</sup> Indeed, gender inequality and economic exclusions of a certain group of people could ignite and perpetuate conflicts in a society. However, this could not be achieved in certain cases, for example, as gender-based and sexual crimes were not charged in the *Lubanga* case.<sup>818</sup>

Considering this scenario, it would be difficult to have transformative reparations of whatever nature that aim at putting a stop to gender-based violations since defendant-focused reparations will not focus on the non-charged crimes.<sup>819</sup> That notwithstanding, the TFV has underscored the need for a gender-inclusive reparations programme that responds to the needs of women.<sup>820</sup> While reparations in *Lubanga* are yet to be implemented in full, collective reparations proposals by the TFV do not seem to be gender sensitive.<sup>821</sup>

In one of its submissions at the ICC, the TFV spoke of the transformative importance of economic empowerment for women in the DRC. It stated that "Reparations that support women's economic empowerment can contribute to transformative justice by placing them in a better position to break with historic patterns of subordination and social exclusion".<sup>822</sup> If achievable, that would help restore dignity for the women, considering a deeply culturally-imbedded masculine domination that affects women.<sup>823</sup> However, the concept of economic empowerment sounds like an economic development program. Are reparations for economic development?

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<sup>817</sup> *Lubanga* Reparations Judgment (2012), para 57.

<sup>818</sup> *Lubanga* Appeals Chamber Reparations Judgment, para 198.

<sup>819</sup> Trust Fund for Victims, Draft Implementation Plan for Collective Reparations to Victims Submitted to the Amended Reparations Order of 3 March 2015 in the case against Thomas Lubanga Dyilo (ICC-01/04-01/06), ICC-01/04-01/06-3177-AnxA, 3 November 2015, para 34.

<sup>820</sup> *Lubanga* Draft Implementation Plan for Collective Reparations, ICC-01/04-01/06-3177-AnxA, para 38.

<sup>821</sup> *Lubanga* Draft Implementation Plan for Collective Reparations, ICC-01/04-01/06-3177-AnxA, paras 68-69.

<sup>822</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2803-Red, para 34.

<sup>823</sup> *Lubanga* Draft Implementation Plan for Collective Reparations, ICC-01/04-01/06-3177-AnxA, paras 32-33.

It is submitted that reparation programmes should not be confused with development projects carried out by governments.<sup>824</sup> In most post-conflict poor societies, victims prefer reparations that come in the form of compensation or basic needs such as housing, roads, and medical care, to name a few.<sup>825</sup> Post-conflict justice expectations of the victims could be myriad. It is not practically possible to meet all the expectations. However, a good reparations framework must be responsive to the victim's needs and perceptions as they relate to harm suffered.<sup>826</sup>

In *Al Mahdi*, the Court recognised the economic impact of the attack on Timbuktu's historical and religious mausoleums. Consequently, victims demanded compensation for the economic losses stemming from the destruction of the mausoleums as they lost income from tourism and other investments around the historical sites.<sup>827</sup>

Also, the TFV noted that some victims live in abject poverty as a direct consequence of the war crime of destruction of the religious historical sites.<sup>828</sup> To deal with the economic impact of war crimes, the TFV proposes a set of reparation programs that will redress financial losses suffered by the victims. The programmes intend to rehabilitate the economy by supporting income generating activities on “agriculture, trade, small and light industry, and handicrafts”.<sup>829</sup>

The economic recovery programs are victim-specific, in the sense that they respond to particular harms brought about by Al Mahdi crimes. While the programmes will be implemented in Timbuktu, the collective nature of such reparations does not make them transformative. Programmes will focus on reviving light handicraft industries, improving agricultural output at the family level and extending small loans to the victims.<sup>830</sup> Looking at the actual nature of programmes proposed by the TFV, they will only have a micro-level economic impact on the people of Timbuktu and therefore, minimal transformation, if any.

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<sup>824</sup> Lubanga Draft Implementation Plan for Collective Reparations, ICC-01/04-01/06-3177-AnxA, para 70; *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2803-Red, para 187.

<sup>825</sup> Hansen and Adhikari (2013) 425 and 427.

<sup>826</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2803-Red, para 185.

<sup>827</sup> *Al Mahdi* Reparations Order (2017), para 73.

<sup>828</sup> *Al Mahdi* Draft Implementation Plan for Reparations, ICC-01/12-01/15-265-Corr-Red, para 245.

<sup>829</sup> *Al Mahdi* Draft Implementation Plan for Reparations, ICC-01/12-01/15-265-Corr-Red, paras 247-249.

<sup>830</sup> *Al Mahdi* Draft Implementation Plan for Reparations, ICC-01/12-01/15-265-Corr-Red, paras 250-254.

Provisionally, this section has demonstrated that, due to many factors, it could be tricky and practically impossible for the ICC's defendant focused reparations to be fully reconciliatory, deterrent, and transformative.

Unlike administrative state reparation programmes, court-ordered reparations are inherently inflexible in nature and scope, making them impossible to achieve the triple goals of reconciliation, deterrence, and transformation of a society. Things such as reconciliation and human transformation could be achieved easily under administrative reparation programmes that emanate from truth commissions or state policy (Latin American transitions).

The ICC does not have the mandate, capacity, and resources to repair all historical wounds caused by egregious violations in a society to achieve transformation through the restoration of social justice.<sup>831</sup>

ICC reparations proceedings are judicial proceedings in nature.<sup>832</sup> They are intrinsically linked to criminal proceedings. Consequently, they focus on perpetrators whose liability for reparations must be within the conviction decision. That gives no room for consideration of issues alien to the case. The primary objective is to redress victims for the harm suffered. It is not about wealth creation and redistribution, and righting historical injustices.

As stated by Judge Wyngaert and Judge Morrison in *Bemba's* acquittal decision by the Appeals Chamber, "...international criminal law is concerned with individual responsibility and culpability and not with righting socio-historical wrongs."<sup>833</sup> In any case, the nature of reparations at the ICC depends on reparation principles set out by the Court in a particular case. Such principles may differ due to the types of crimes under consideration, mode of criminal participation, and the gravity of the violations.

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<sup>831</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", Separate Opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison, ICC-01/05-01/08-3636-Anx2, 8 June 2018, paras 74 and 75.

<sup>832</sup> *Katanga* Reparations Order (2017), para 18.

<sup>833</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Separate Opinion of Judge Christine Van den Wyngaert and Judge Howard Morrison, ICC-01/05-01/08-3636-Anx2, para 74.

### 4.3 Reparation Principles: Pioneer *Lubanga* Decision Followed in *Katanga* and *Al Mhadi*

The ICC Statute does not provide for principles applicable to reparations. Knowing that many issues, both judicial and non-judicial, could come into play when determining reparations, drafters of the ICC Statute decided to leave this to the Judges. Accordingly, the ICC Statute obligates the Judges to establish principles to be applied to reparations for the victims.<sup>834</sup> In the first reparations decision of the ICC in *Lubanga*, the Court held that reparations principles applied in that case could be “applied, adapted, expanded upon, or added to by future Trial Chambers”.<sup>835</sup>

The following reparations principles were pronounced by the Appeals Chamber of the ICC in the *Lubanga* case.

- Reparations could be granted to direct and indirect victims, including family members of direct victims and persons who suffer harm while intervening to help others or prevent the commission of violations.<sup>836</sup>
- Legal persons such as business entities and providers of social services may receive reparations upon proof of harm.<sup>837</sup>
- Reparation decisions of the ICC or other bodies, whether domestic or international, are independent of each other and they should not prejudice the victim’s right to redress.<sup>838</sup>
- Harm or injury, whether direct or indirect, must be personal to the victim.<sup>839</sup>
- Eligibility for reparations depends on the causality principle that harm suffered must result from crimes under the jurisdiction of the ICC.<sup>840</sup>
- The equality principle needs to be adhered to by treating the victims with dignity, afford them equal access to information, and award reparations that respond to their needs.<sup>841</sup>
- Human rights and dignity of the victims must be respected and access to reparations must be equally granted to all victims without discrimination of any nature.<sup>842</sup>

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<sup>834</sup> Article 75(1) ICC Statute; *Lubanga* Reparations Judgment (2012), para 176.

<sup>835</sup> *Lubanga* Reparations Order (2015), para 5.

<sup>836</sup> *Lubanga* Reparations Order (2015), para 6.

<sup>837</sup> *Lubanga* Reparations Order (2015), para 8.

<sup>838</sup> *Lubanga* Reparations Order (2015), para 9.

<sup>839</sup> *Lubanga* Reparations Order (2015), para 10.

<sup>840</sup> *Lubanga* Reparations Order (2015), para 11.

<sup>841</sup> *Lubanga* Reparations Order (2015), paras 12-14.

<sup>842</sup> *Lubanga* Reparations Order (2015), paras 15-16.

- Reparations should not reinforce practices that caused human rights violations and the implementation of reparative measures should not re-traumatise the victims.<sup>843</sup>
- Reparations should be gender-sensitive.<sup>844</sup>
- The provision of reparations should prioritise victims who are vulnerable or those in need of urgent help.<sup>845</sup>
- Victims that qualify for reparations should have unhindered access to the reparations case.<sup>846</sup>
- Reparations are voluntary and they may not be forced on the victims.<sup>847</sup>
- Outreach measures and consultation with the victims are necessary before an award of reparations.<sup>848</sup>
- Reparations could be individual and collective. When collective, they should also respond to individual harms.<sup>849</sup>
- Reparations may not be limited to ‘restitution, compensation, and rehabilitation’.<sup>850</sup>
- Compensation should be used for harms that can be quantified economically.<sup>851</sup>

Even though the ICC does not operate under the common law doctrine of precedent, the Trial Chamber II and VIII in *Katanga* and *Al Mahdi* respectively decided to unreservedly apply the reparation principles established in *Lubanga*.<sup>852</sup> That was done notwithstanding the heterogeneous nature of crimes in the three cases.

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<sup>843</sup> *Lubanga* Reparations Order (2015), para 17.

<sup>844</sup> *Lubanga* Reparations Order (2015), para 18.

<sup>845</sup> *Lubanga* Reparations Order (2015), para 19.

<sup>846</sup> *Lubanga* Reparations Order (2015), para 29.

<sup>847</sup> *Lubanga* Reparations Order (2015), para 30.

<sup>848</sup> *Lubanga* Reparations Order (2015), paras 31-32.

<sup>849</sup> *Lubanga* Reparations Order (2015), para 33.

<sup>850</sup> *Lubanga* Reparations Order (2015), para 34.

<sup>851</sup> *Lubanga* Reparations Order (2015), para 37.

<sup>852</sup> *Katanga* Reparations Order (2017), para 30; *Al Mahdi* Reparations Order (2017), paras 25-26; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-236, Public redacted version of “Corrected version of *Draft Implementation Plan for Reparations, With public redacted Annex I, 20 April 2018, ICC-01/12-01/15-265-Conf*”, 30 April 2018 ICC-01/12-01/15-265-Conf-Corr+Corr-Anx, ICC-01/12-01/15-265-Corr-Red, 18 May 2018, para 69.

However, in *Al Mahdi*, the Court observed 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*.”<sup>853</sup>

To a large extent, the reparation principles enunciated by the ICC in its various judgments adhere to international human rights precepts on reparation as provided for under the UN Basic Principles on Reparations.<sup>854</sup> Despite this, all reparation decisions of the ICC until now have conspicuously neglected to address the question of reparation for the victims when a case does not end with a conviction. Ideally, a case may terminate due to an acquittal or death of an accused person. What will be the fate of victims in the event of a mistrial, death of a convicted defendant, or termination of a case on account of other reasons?

International human rights law provides that states should redress victims of human rights violations when a perpetrator is unable or unwilling to do that.<sup>855</sup> The inability or unwillingness to provide reparations by defendants could emanate from a pool of factors, some of which are those mentioned earlier. Thus, being an enforcer of international human rights law through international criminal justice, it is significantly important for the ICC to pronounce itself on these issues.

Following a 2016 majority decision of the Trial Chamber V(A) to vacate charges in the *Ruto and Sang* case,<sup>856</sup> counsel for the victims approached the Court with an application requesting the ICC to hold the Kenyan government responsible for reparations to the victims and to order the TFV to rehabilitate victims of the Post-election violence of 2007.<sup>857</sup> By majority, Judge Eboe-Osuji dissenting, it was decided that the ICC can only deal with the question of reparation when a guilty verdict has been entered against a person.<sup>858</sup> With this decision, the Judges seem to have accorded significant weight to legal formalism at the expense of a more flexible approach to Article 75 that would have benefited the victims.

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<sup>853</sup> *Al Mahdi* Reparations Order (2017), para 26.

<sup>854</sup> *Al Mahdi* Reparations Order (2017), para 25.

<sup>855</sup> Para IX (16) of the UN Basic Principles on Reparations.

<sup>856</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red-Corr, 5 April 2016, page 1.

<sup>857</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Requests regarding Reparations, ICC-01/09-01/11-2038, 1 July 2016, para 4.

<sup>858</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-2038, para 7.



In his dissenting opinion, Judge Eboe-Osuji argued that a positivist and formalistic reading of Article 75 of the ICC Statute may never afford a “convincing system of reasoning” that prevents the ICC from entertaining reparation matters in the absence of convictions.<sup>859</sup> Citing the European Convention on Compensation of Victims of Violent Crimes and domestic laws of some jurisdictions, he argued that there is no principle of law that says reparations should be conviction-based.<sup>860</sup> The European Convention on Compensation provides that victims of violent crimes can receive reparations in the absence of prosecution or conviction of the offender.<sup>861</sup>

In buttressing his argument that the norm of no conviction no reparation has no place in civilised legal systems, Judge Eboe-Osuji cites Article 75 (6) of the ICC Statute<sup>862</sup> which provides that the whole reparations provision under the Statute (Article 75) should not be interpreted in a manner that prejudices the rights of victims under domestic or international law.<sup>863</sup>

Additionally, in the decision vacating the charges in the *Ruto* and *Sang* case, the Judge offered more cogent reasons for rejection of the conviction-based reparation system at the ICC. He argues that; first, international crimes represent an attack on a civilian population, often leaving behind the objective reality that people have been harmed even when individual criminal responsibility has not been established.

Secondly, traditional tort-based compensation litigations have been deemed inefficient and expensive and that is why most jurisdictions have opted for no-fault compensation schemes that do not rely on convictions.

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<sup>859</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* , Dissenting Opinion of Judge Eboe-Osuji, CC-01/09-01/11-2038-Anx, 1 July 2017, para 12.

<sup>860</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* , Dissenting Opinion of Judge Eboe-Osuji, CC-01/09-01/11-2038-Anx, para 13; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* , Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Eboe-Osuji, para 201.

<sup>861</sup> Article 2(2), ETS 116 – Compensation of Victims of Crimes, 24.XI.1983.

<sup>862</sup> Article 75 (6) provides: “Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.”

<sup>863</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* , ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Eboe-Osuji, para 201.

Thirdly, ICC victims have no active role or say in the prosecutions and framing of the charges and therefore it is not for them to ensure that there is a conviction; and lastly, lengthy criminal proceedings derail prompt access to reparations by the victims.<sup>864</sup>

Turning to the specifics of the *Ruto* and *Sang* case in the Kenya *situation* before the ICC, the Judge noted that the case collapsed due to obstruction of justice emanating from witness interference as well as coordinated obstructive rhetoric against the Court by the government and other influential political voices in Kenya.<sup>865</sup>

While accepting that the ICC cannot order reparations against states, the Judge questioned whether extensive political meddling seen in *Ruto* and *Sang* could justify action by the ICC.<sup>866</sup> No clear direction comes from the Court in that regard despite the admission that the ICC may have to step in at some point when it is manifestly clear that a state has violated its obligations under international law.<sup>867</sup> The issue of state responsibility for reparation under the ICC system is dealt with extensively in chapter five.

#### **4.4 Legal Mechanics of Individual Liability for Reparations**

The reparations jurisprudence of the ICC is unanimous that a reparation order must reflect an individual culpability for certain crimes in a conviction decision.<sup>868</sup> In determining the scope of a convicted defendant's reparative responsibility, the Appeals Chamber in *Lubanga* introduced a proportionality principle to mean that liability for reparations should be proportional to the harm caused and to the mode of participation in the perpetration of crimes.<sup>869</sup>

The proportionality principle has been followed religiously in the *Katanga* and *Al Mahdi* reparation decisions.<sup>870</sup> From the surface, the proportionality principle enunciated by the Court

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<sup>864</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* , ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Eboe-Osuji, para 202.

<sup>865</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* , ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Eboe-Osuji, paras 156 and 161-163.

<sup>866</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* , ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Eboe-Osuji, para 208.

<sup>867</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* , ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Eboe-Osuji, paras 209-210.

<sup>868</sup> *Al Mahdi* Reparations Order (2017) para 50; *Lubanga* Reparations Order (2015), para 20; *Katanga* Reparations Order (2017), para 251; *Lubanga* Appeals Chamber Reparations Judgment, para 65.

<sup>869</sup> *Lubanga* Appeals Chamber Reparations Judgment, para 118; *Lubanga* Reparations Order (2015), para 21.

<sup>870</sup> *Al Mahdi* Reparations Order (2017), para 50; *Katanga* Reparations Order (2017), para 252.

appears to demand that an individual's reparative burden should be reflective of their actual role in the commission of crimes. Thus, does it follow that a convicted person's reparative obligation should be strictly limited to harms stemming from their specific criminal acts in a given situation? Atrocity crimes entail multiple perpetrators, would it be possible for the ICC to disaggregate an individual's role in the crimes from the other contributory perpetrators to demarcate reparative responsibility based on the proportionality principle?

These questions came under scrutiny in the *Katanga* reparations case. In his appeal against a 'disproportionate' one million euros reparation bill, Katanga argued that the Court failed to take into account the role played by other people in the commission of crimes in Bogoro.<sup>871</sup> Making reference to the Appeals Chamber decision in *Lubanga* that reparations should be proportionate to harm caused and to mode of commission, the Court rejected Katanga's appeal by arguing that the amount of reparations ordered against a convicted person need not be pinned on harms resulting from his actual role as disaggregated from other persons who allegedly committed the crimes.<sup>872</sup>

The Court further reasoned that the purpose of reparations is to remedy harm suffered by the victims and that contributory participation by other persons in the commission of the crimes for which a person has been convicted for may not be relevant.<sup>873</sup> Additionally, it was noted that a person's reparations bill should not exceed what is needed to repair although it may not be inappropriate to hold the person responsible for the full reparation costs.<sup>874</sup> Therefore, Katanga was held responsible for the full amount of reparations needed to repair harms suffered by victims of the Bogoro attacks in Eastern DRC.

In a bid to liberate itself from a rather awkward interpretation of the proportionality principle, the Court held that in situations where a case results in multiple convictions relating to similar crimes then it would be reasonable to apportion the reparation costs among all the convicted defendants.<sup>875</sup> While admitting that "a plurality of persons potentially bear responsibility for having contributed

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<sup>871</sup> *The Prosecutor v. Germain Katanga*, Defence Document in Support of Appeal against the Reparations Order, ICC-01/04-01/07-3747-Red, 29 June 2017, para 81; *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-01/04-01/07-3778-Red, para 174.

<sup>872</sup> *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 175.

<sup>873</sup> *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 178.

<sup>874</sup> *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 178.

<sup>875</sup> *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 180.

to the commission of the crimes which caused harm to victims”, the Court rightly argues that matters of individual criminal responsibility are not for the reparations phase and, apart from *Katanga*, there are no other convictions in relation to crimes perpetrated in Bogoro.<sup>876</sup>

It is submitted that the decision of the Court in *Katanga* regarding the applicability of the proportionality principle is legally and factually erroneous. In arriving at its decision, the Court neglected important legal and factual considerations. Despite admitting that atrocity crimes potentially result from multiple actors as was the case in *Katanga*,<sup>877</sup> the Court declined to take that aspect into account when ordering reparations.<sup>878</sup> Additionally, the Court wrongly held that the mode of liability was not relevant for a determination of liability in reparation cases.<sup>879</sup>

In general, the Appeals Chamber decided that the proportionality rule as regards reparations cannot be worked out by looking at contributory harm from other persons apart from the convicted person and the mode of criminal liability of the convicted person. Without providing a reasoned decision, the Court gives a blanket argument that reparations are for repairing harm suffered and not for determining the mode of criminal liability.<sup>880</sup>

The proportionality principle as originally espoused in *Lubanga* clearly gives a direction that the actual size of a defendant’s reparative obligation should be proportionate to harm caused, nature of criminal participation, and specific circumstances of a case. Legal liability, of whatever nature, must be distributed justly and equitably. To hold a person responsible for the full amount of reparations for harms suffered by multiple victims due to multiple criminal incidents by mass perpetrators without considering their roles is unjust. Unfortunately, the Appeals Chamber in *Katanga* did not give reasons as to what it understands by proportionality.

It is submitted that the whole ICC Statute system indicates that criminal liability for international crimes comes up in different levels. Article 25 of the ICC Statute provides for various modes of criminal responsibility which include direct and indirect perpetrators. As Werle suggests, the statute provides for four clearly distinguishable modes of individual criminal responsibility

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<sup>876</sup> *Katanga* Reparations Order (2017), para 263.

<sup>877</sup> *Katanga* Reparations Order (2017) , para 263.

<sup>878</sup> *Katanga* Reparations Order (2017), para 182.

<sup>879</sup> *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 179.

<sup>880</sup> *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, paras 182 and 184.

(commission, ordering and instigating, assistance and, contribution to a group crime).<sup>881</sup> Thus, it is argued that modes of individual criminal liability under Article 25(3) of the ICC Statute provides a hierarchical structure of responsibility with some modes attracting a higher degree of individual responsibility than others.<sup>882</sup>

Noting that international crimes entail the participation of a large number of people in their commission, it is crucially important to determine each person's degree of involvement to establish their rightful mode of responsibility. Arguably, mode of participation and the nature of commission of crimes are essential factors for sentencing.<sup>883</sup> Why would the nature of a criminal act and method of perpetration (gravity) be critical for sentencing? Criminal punishment is for punishing criminal behaviour and for deterring people from committing crimes. Usually, horrible crimes attract harsher punishment and vice versa. That is proportional sentencing.<sup>884</sup>

In addition to listing a number of mitigating and aggravating circumstances for sentencing,<sup>885</sup> the ICC Statute and decisions of the Court require that a sentence must consider "the degree of culpability and balance all the relevant factors".<sup>886</sup> Since the law requires proportionality at sentencing, the same should be applied to reparations. Defendant-focused reparations emanate from a criminal conviction that sets out liability which then provides a basis for reparative demands by the victims.

Ideally, victims could be harmed by multiple criminal incidents in atrocity crime environments and sometimes it could be difficult to practically allocate responsibility to the perpetrators according to their roles. However, that does not mean that victims should recover all reparations from a single defendant who was selected by the Prosecutor for prosecution out of hundreds of potential accused persons.

However, for the actual doctrine of proportionality to function properly, the ICC may have to do a near impossible task of establishing criminal responsibility for all the perpetrators in a given

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<sup>881</sup> Werle G 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 *Journal of International Criminal Justice* 957.

<sup>882</sup> Werle (2007) 956-957.

<sup>883</sup> Article 78 (1) ICC Statute.

<sup>884</sup> *Katanga* Sentence Decision, para 39.

<sup>885</sup> Article 78 ICC Statute and Rule 145 of the ICC RPE.

<sup>886</sup> *Katanga* Sentence Decision, para 40.

*situation* for it to proportionally assign reparative liability to all the defendants.<sup>887</sup> That is practically impossible. That is why the ICC hides behind an argument that the reparation phase is not for criminal responsibility since accepting that ‘mode of participation’ is critical for assessing liability for reparations will call for establishing a global truth on the crimes. The ICC neither has the capacity nor the competence to pursue all the perpetrators of international crimes.

Due to misapplication of the proportionality principle on reparations, the defendant’s liability for reparation has not been based on the extent of actual damage and the nature of crimes but on what harm has been caused and what amount of money is sufficient to repair.<sup>888</sup>

I argue that conviction-focused reparations should inherently be reflective of the nature of the harm caused and the type of crime committed, including specific circumstances of the defendant. Arguably, case selection and institution of charges is done by an independent Prosecutor. It will not serve the interests of justice to impose a huge reparative liability on one person simply because other perpetrators have not been charged. The resulting situation is a huge reparations bill which may never be paid by the indigent defendants.

## **4.5 Types and Modalities of Reparations**

### **4.5.1 Types of Reparations Under International Human Rights Law**

The prevailing jurisprudence of the Court has understood reparations as being of two main types. Reparations could be individual or collective and they may be awarded concurrently depending on circumstances of a given case.<sup>889</sup> However, the ICC Statute does not define individual and collective reparations.<sup>890</sup>

In *Katanga*, the Trial Chamber II conceptualised individual reparations as redress measures aimed at addressing specific individual harms resulting from crimes of which a person was convicted.<sup>891</sup>

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<sup>887</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Observations by the Redress Trust Pursuant to Article 75(3) of the Statute and Rule 103 of the Rules, ICC-01/05-01/08-3448, 17 October 2016, para 24.

<sup>888</sup> *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 184.

<sup>889</sup> *Katanga* Reparations Order (2017), para 265; *Lubanga* Reparations Judgment (2012), paras 217 and 220; *Lubanga* Reparations Order (2015), para 33; *Al Mahdi* Reparations Order (2017), para 45; *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2803-Red, para 16; *Lubanga* Appeals Chamber Reparations Judgment, para 149.

<sup>890</sup> *Katanga* Reparations Order (2017), para 270; *Lubanga* Reparations Judgment (2012), paras 61 and 63.

<sup>891</sup> *Katanga* Reparations Order (2017), para 271.

Since individual reparations are selective and tend to respond to specific harms caused by numerous criminal incidents in atrocity crime situations, it is possible that some victims from the same *situation* may be ineligible for reparations.<sup>892</sup>

Collective reparations have been defined as reparation measured intended for a group of that suffered harm collectively from a similar crime.<sup>893</sup> A group may exist on the basis of a shared identity or shared victimisation and it is not important that the group must have had a legal personality before the violations.<sup>894</sup> It is factual that victims of international crimes could suffer harm caused by heterogenous violations. For collective reparations to be accessible by a group of people, they must have suffered shared harm, irrespective of the form of violations.<sup>895</sup> The Court sees the ‘concept of shared harm’ as resulting from violations of either individual or collective rights, or both.<sup>896</sup>

The jurisprudence of Regional Human Rights Courts indicates that collective and individual reparations can be implemented simultaneously.<sup>897</sup> Similarly, depending on the circumstances of a case, it has been decided that Trial Chambers of the ICC have the discretion to order individual or collective reparations, or both.<sup>898</sup> In *Al Mahdi*, the Court awarded both individual and collective reparations.<sup>899</sup> The Court noted that the destruction of historical sites of Timbuktu had resulted in both community and individual economic harm.<sup>900</sup>

While individual reparations could prove costly in mass crime environments, they have been deemed proper for reassuring the victim’s status as individual holders of rights which in turn ensures personal satisfaction.<sup>901</sup> Comparatively, while collective reparations can respond to

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<sup>892</sup> *Katanga* Reparations Order (2017), para 19.

<sup>893</sup> *Katanga* Reparations Order (2017), para 274.

<sup>894</sup> *Katanga* Reparations Order (2017), para 276.

<sup>895</sup> *Katanga* Reparations Order (2017), para 275; *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2803-Red, para 20.

<sup>896</sup> *Katanga* Reparations Order (2017), para 276.

<sup>897</sup> *Katanga* Reparations Order (2017), para 283.

<sup>898</sup> *Katanga* Reparations Order (2017), para 334.

<sup>899</sup> *Al Mahdi* Reparations Order (2017), para 83.

<sup>900</sup> *Al Mahdi* Reparations Order (2017), paras 74-76.

<sup>901</sup> *Katanga* Reparations Order (2017), para 285.

‘shared needs’,<sup>902</sup> they may be difficult to implement in post-conflict societies especially when the victims are scattered all over the world.<sup>903</sup>

Generally, without trivialising the value of individual reparations, the ICC deems collective reparations as more appropriate in mass crime situations due to their capability to benefit a large number of victims (the utility concept) and thereby ensure resource maximisation.<sup>904</sup> In *Katanga*, the Court ordered collective reparations for supporting housing, income generation, education, and psychological care.<sup>905</sup> In addition, collective reparations, though extended to groups, are cheaper to implement as they potentially obviate the need for individualised verification of the victims.<sup>906</sup>

The ICC’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 in the implementation, it is critical for the Court to appreciate that harms suffered by the victims are always personal. Ideally, collective reparations may not fully respond to the individual needs of the victims. International human rights law stresses the needs for considering ‘individual circumstances’ in redressing the victims.<sup>907</sup>

In *Katanga*, it has been held that the approach of the Court should be first to establish the harm suffered and then propose the appropriate modalities for redress before determining the question of costs.<sup>908</sup> However, given the mass number of victims in international prosecutions, the ICC may never be able to individually assess harms suffered by each victim as that would prolong the proceedings and flout fair trial principles.<sup>909</sup> It is submitted that the non-assessment of individual reparations applications by the Court may not necessarily be unlawful but it does trivialise the legal position of the victims as individual holders of rights.

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<sup>902</sup> *Katanga* Reparations Order (2017), para 289.

<sup>903</sup> *Katanga* Reparations Order (2017), para 286.

<sup>904</sup> *Katanga* Reparations Order (2017), para 292; *Lubanga* Reparations Judgment (2012), para 274; *Lubanga* Appeals Chamber Reparations Judgment, para 140.

<sup>905</sup> *Katanga* Reparations Order (2017), para 304.

<sup>906</sup> *Lubanga* Reparations Judgment (2012), para 274;

<sup>907</sup> UN Basic Principles on Reparations, para IX (18).

<sup>908</sup> *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 2 at page 5.

<sup>909</sup> *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 3 at page 5.



#### 4.5.2 Modalities of Reparations

Modalities of reparations refer to methods that can be used to redress victims of human rights violations.<sup>910</sup> The ICC Statute prescribes ‘restitution, compensation and rehabilitation’ as forms of reparations.<sup>911</sup> 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.<sup>912</sup> The mentioned modalities have been defined as follows.

First, compensation entails an economic benefit in the form of money provided to the victims.<sup>913</sup> This redress method can only be applied to harms that are economically quantifiable.<sup>914</sup> However, due to the scarcity of resources, it may not be possible to award sizeable amounts of monetary compensation to mass victims. Consequently, in *Katanga*, the Court awarded symbolic 250 USD for each of the 297 victims as compensation for the harms suffered.<sup>915</sup> I believe a similar trend could be replicated in future cases before the Court.

Secondly, restitution has been conceptualised as an umbrella term for all redress measures that seek to restore victims to pre-violations life.<sup>916</sup> It may include measures such as “restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”<sup>917</sup> However, restitution may not work in some situations. For example, as noted by the Trial Chamber I in *Lubanga*, children who have been recruited and used in an armed conflict could not be restored to their original status.<sup>918</sup>

Thirdly, rehabilitation encompasses a range of redress measures stemming from the provision of medical and psychological help to the provision of social services and legal assistance.<sup>919</sup>

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<sup>910</sup> *Al Mahdi* Reparations Order (2017), para 46.

<sup>911</sup> Article 75(1) ICC Statute.

<sup>912</sup> *Al Mahdi* Reparations Order (2017), para 46; *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3728-tENG, para 297; *Lubanga* Reparations Judgment (2012), para 222.

<sup>913</sup> *Al Mahdi* Reparations Order (2017), para 47;

<sup>914</sup> *Lubanga* Reparations Judgment (2012), para 226; UN Basic Principles on Reparations, para IX(20).

<sup>915</sup> *Katanga* Reparations Order (2017), para 300 and page 118.

<sup>916</sup> *Lubanga* Reparations Order (2015), paras 35-36; *Lubanga* Reparations Judgment (2012), para 224.

<sup>917</sup> UN Basic Principles on Reparations, para IX (19).

<sup>918</sup> *Lubanga* Reparations Judgment (2012), para 223.

<sup>919</sup> *Lubanga* Reparations Order (2015), para 42; *Al Mahdi* Reparations Order (2017), para 48; UN Basic Principles on Reparations, para IX (21).

Other reparative mechanisms recognised under human rights law include: satisfaction (it may include measures for ceasing hostilities, apologies, searching for the disappeared, and establishing historical truth regarding the violations);<sup>920</sup> and guarantees of non-repetition.<sup>921</sup> As discussed in chapter two, these kinds of reparations could be difficult to implement in the defendant-focused reparative system of the ICC.

All reparation decisions in *Lubanga*, *Katanga*, and *Al Mhadi* agree that reparations should look beyond the conventional mechanisms recognised under the ICC Statute by also considering other modalities that have “symbolic, preventative or transformative value”.<sup>922</sup>

In conformity with international human rights jurisprudence,<sup>923</sup> the Court has determined that its conviction and sentencing decisions could have a significant reparative value for the victims.<sup>924</sup> In particular, publicisation of court judgments could serve a crucial preventative factor in the form of educational reparation.<sup>925</sup> Raising public awareness about past violations could help educate a society and possibly prevent recurrence of the violations.<sup>926</sup>

### 4.5.3 Apologies as Reparation

Apologies have been regarded as symbolic reparation that can help transform societies transitioning from conflict to peace.<sup>927</sup> In transitional justice, apologies can come from individuals, groups, organisations and states. A genuine apology should convey an unequivocal and formal

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<sup>920</sup> UN Basic Principles on Reparations, para IX (22).

<sup>921</sup> UN Basic Principles on Reparations, para IX (23).

<sup>922</sup> *Al Mahdi* Reparations Order (2017), para 49; *Katanga* Reparations Order (2017), para 297; *Lubanga* Reparations Judgment (2012), para 222; *Lubanga* Reparations Order (2015), para 34.

<sup>923</sup> Inter-American Court of Human Rights, *Case of the Plan de Sánchez Massacre v. Guatemala* Judgment of November 19, 2004 (Reparations), para 81; Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras* Judgment of July 21, 1989 (Reparations and Costs), para 36; Inter-American Court of Human Rights, *Case of Tibi v. Ecuador* Judgment of September 07, 2004 (Preliminary Objections, Merits, Reparations and Costs), para 243.

<sup>924</sup> *Lubanga* Reparations Judgment (2012), para 237.

<sup>925</sup> *Lubanga* Reparations Order (2015) para 43; *Lubanga* Reparations Judgment (2012), paras 238-239; *The Prosecutor v. Germain Katanga*, Prosecution’s Observations on the Procedure for Reparations, ICC-01/04-01/07-3544, 30 April 2015, para 24.

<sup>926</sup> *Lubanga* Reparations Judgment (2012), para 240.

<sup>927</sup> Carranza et al ‘More than Words: Apologies as a Form of Reparation’ (2015), International Center for Transitional Justice, at page 1, available at <https://www.ictj.org/sites/default/files/ICTJ-Report-Apologies-2015.pdf> (accessed 22 June 2018).

acknowledgement that crimes have been committed and the person apologising must accept all or part of the responsibility for harm suffered by the victims.<sup>928</sup> Generally, apologies entail acceptance of responsibility by the wrongdoer.<sup>929</sup> While doubtful that victims could be entitled to apologies from the liable persons or states, it is generally accepted that victims have a right to reparation against territorial states inclusive of which are apologies.<sup>930</sup>

Judgments of the ICC have mentioned apologies by convicted defendants as possible forms of reparation.<sup>931</sup> The jurisprudence of the Court directs that apologies by the defendants should be voluntary and that could be communicated to the victims publicly or privately.<sup>932</sup> To fulfil judicial standards, an apology must be “genuine, categorical and empathetic”.<sup>933</sup> Being symbolic and voluntary, apologies by themselves may not be satisfying for the victims. Imagining them as side dishes, they should be accompanied by a delicious main meal of material reparative measures to fill a victim’s stomach. Apologies without affirmative reparative action and accountability measures may not be acceptable to the victims.<sup>934</sup>

Just like liable parties, victims too cannot be forced to accept apologies. It is a matter of perceptions and personal convictions. For example, in the *Al Mahdi* case, some victims expressed dissatisfaction with the apology of the convicted person.<sup>935</sup> However, in reference to an apology tendered by Al Mahdi, the Trial Chamber VIII opined that “some victims may already be satisfied with the apology given, and others will not be satisfied no matter what kind of further apologies are given.”<sup>936</sup> Here, the Court accepts the fact that the issuance and acceptance of apologies are matters of personal conviction and therefore they should not be effected through judicial orders.

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<sup>928</sup> Carranza et al ‘More than Words: Apologies as a Form of Reparation’ (2015), ICTJ, at page 4.

<sup>929</sup> Foley T *Developing Restorative Justice Jurisprudence: Rethinking Responses to Criminal Wrongdoing* (2014) 193 – 194.

<sup>930</sup> Carranza et al ‘More than Words: Apologies as a Form of Reparation’ (2015), ICTJ, at page 5.

<sup>931</sup> *Al Mahdi* Reparations Order (2017), para 70; *Katanga* Reparations Order (2017), para 315; *Lubanga* Reparations Judgment (2012), para 241; *Lubanga* Reparations Order (2015), para 67 (VIII).

<sup>932</sup> *Katanga* Reparations Order (2017), para 315; *Lubanga* Reparations Judgment (2012), para 241; *Lubanga* Reparations Order (2015), para 67 (VIII).

<sup>933</sup> *Al Mahdi* Reparations Order (2017), para 70.

<sup>934</sup> *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted version of “Submissions of the Legal Representative of Victims on the principles and forms of the right to reparation” dated 2 December 2016 (ICC-01/12-01/15-190-Conf), ICC-01/12-01/15-190-Red-tENG, 25 July 2017, paras 43 and 45.

<sup>935</sup> *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-190-Red-tENG, para 44.

<sup>936</sup> *Al Mahdi* Reparations Order (2017), para 69.

Therefore, a court of law cannot order the issuance of an apology by the liable persons, let alone prescribing the contents of an apology. The role of the Court is to ensure that an apology by a defendant is accessible in whatever form or language understandable by the victims.<sup>937</sup> Whether the apology is sufficiently acceptable to the victims, that is a completely different matter that cannot be determined by the Court.

## **4.6 Eligibility for Reparations and Evidentiary Matters**

### **4.6.1 The Eligibility Framework**

The eligibility criteria for the victims in reparation proceedings are the same as those pertaining to participation in the trial as discussed in chapter three. However, for reparations, the only addition is that harm suffered by a victim must emanate from the crimes of the convicted person.<sup>938</sup> The harm inflicted upon the victims does not have to be direct but it must be personal.

Consequently, it has been held that a crime under the jurisdiction of the ICC could give rise to direct and indirect victims,<sup>939</sup> both of which must have suffered person harm to qualify for reparations.<sup>940</sup>

To be considered for reparations, victims can submit individual reparation requests to the court.<sup>941</sup> The application can be made in the course of criminal proceedings. However, it has been held that the provision of reparations should not be limited to the victims who participated in the trial and applied for reparations.<sup>942</sup> The decision to extend reparations to non-participating victims is premised on a rationale that only a small section of mass crime victims could be aware of ICC cases, let alone being conversant with the procedures. For example, in *Al Mahdi*, the Court noted

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<sup>937</sup> *Al Mahdi* Reparations Order (2017), para 71.

<sup>938</sup> *Katanga* Reparations Order (2017), para 37; *Lubanga* Appeals Chamber Reparations Judgment, paras 8 and 65; *Al Mahdi* Reparations Order (2017), para 42.

<sup>939</sup> *Lubanga* Reparations Order (2015), para 63;

<sup>940</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Trust Fund for Victims, Draft Implementation Plan for Collective Reparations to Victims Submitted to the Amended Reparations Order of 3 March 2015 in the case against Thomas Lubanga Dyilo (ICC-01/04-01/06), ICC-01/04-01/06-3177-AnxA, para 6; *Al Mahdi* Reparations Order (2017), para 40.

<sup>941</sup> Rule 94 of ICC RPE.

<sup>942</sup> *Lubanga* Reparations Judgment (2012), para 187; *Lubanga* Reparations Order (2015), para 12.

that the 139 applications admitted for reparations were a fraction of the actual number of potential victims in Timbuktu in Mali.<sup>943</sup>

Given that the actual number of eligible victims may not be known at the time of reparation proceedings, how would the Court identify qualified reparation claimants? This is a question that has no one-size fits all answer. It depends on the circumstances of each case. In *Katanga*, the Court received 341 individual applications.<sup>944</sup> However, after an individual judicial scrutiny of the applicants, the Trial Chamber II determined that only 297 applicants qualified for reparations.<sup>945</sup>

The approach to individually assess the eligibility of reparations applicants came under criticism by the Appeals Chamber in *Katanga*. Despite conceding that it did not amount to an illegality or an abuse of judicial discretion, the Appeals Chamber held that the ‘individual assessment approach’ was undesirable for causing delays in the provision of reparations to the victims.<sup>946</sup>

In *Al Mahdi*, while noting that the Appeals’ Chamber decision in *Lubanga* did not take a position as to whether an individual assessment of reparation claimants would be necessary for both individual and collective reparations,<sup>947</sup> the Trial Chamber VIII decided that a judicial scrutiny is not required even for individual reparations.<sup>948</sup> Instead, the Court determined that individual reparation beneficiaries could best be identified through an administrative screening procedure carried out by the TFV.<sup>949</sup> The Court further stressed that the screening only concerned individual reparation applicants, meaning that non-participating victims could still be eligible for collective reparations.<sup>950</sup>

Despite delegating a rather judicial function to the TFV, the Court has set out the following principles to be adhered to in identifying the victims eligible for reparations.

- The TFV must reasonably strive to identify all eligible victims.<sup>951</sup>

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<sup>943</sup> *Al Mahdi* Reparations Order (2017), para 141.

<sup>944</sup> *Katanga* Reparations Order (2017), para 168.

<sup>945</sup> *Katanga* Reparations Order (2017), paras 43 and 168.

<sup>946</sup> *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 1 at page 4 and para 160.

<sup>947</sup> *Lubanga* Appeals Chamber Reparations Judgment, para 152.

<sup>948</sup> *Al Mahdi* Reparations Order (2017), para 142.

<sup>949</sup> *Al Mahdi* Reparations Order (2017), paras 142 and 144.

<sup>950</sup> *Al Mahdi* Reparations Order (2017), para 145.

<sup>951</sup> *Al Mahdi* Reparations Order (2017), para 146 (i).

- Applicants must fill out prescribed forms and supply identifying documents to the TFV.<sup>952</sup>
- Before determining eligibility, the TFV must allow and consider representations from the victim applicants and the Defence.<sup>953</sup>
- Subject to an applicant's consent, the identity of individual reparation claimants should be disclosed to the TFV and the Defence.<sup>954</sup>
- A decision on eligibility must be communicated to the victim applicants and the Defence. However, since the TFV administrative screening process does not impact the liability threshold for the convicted person, the Defence should not be allowed to challenge an eligibility decision.<sup>955</sup>

Since the jurisprudence of the Court directs that screening of individual reparation claimants would be desirable to determine their suitability, what then would be the procedure for extending collective reparations to non-applicant victims? In Lubanga, where the Court ordered collective reparations, the TFV proposed to conduct structured interviews with direct and indirect victims to determine if they qualify for reparations.<sup>956</sup> Considering that the DRC is a country with a high number of victims of sexual violence, the TFV has committed itself to have an interviewing protocol that can successfully identify victims from marginalized social groups.<sup>957</sup>

#### **4.6.2 The Evidentiary Threshold for Reparations**

Given the civil nature of reparation proceedings, various decisions of the ICC have determined that a standard less demanding than that applicable to criminal proceedings should be used.<sup>958</sup> In the Court decisions, it has been noted that a lesser standard of proof than that of 'beyond reasonable doubt' would be ideal for the reparations stage since victims may encounter difficulties in

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<sup>952</sup> *Al Mahdi* Reparations Order (2017), para 146 (ii).

<sup>953</sup> *Al Mahdi* Reparations Order (2017), para 146 (iii).

<sup>954</sup> *Al Mahdi* Reparations Order (2017), para 146 (iv).

<sup>955</sup> *Al Mahdi* Reparations Order (2017), para 146 (v).

<sup>956</sup> Trust Fund for Victims, Draft Implementation Plan for Collective Reparations to Victims Submitted to the Amended Reparations Order of 3 March 2015 in the case against Thomas Lubanga Dyilo (ICC-01/04-01/06), ICC-01/04-01/06-3177-AnxA, paras 45 and 46.

<sup>957</sup> Trust Fund for Victims, Draft Implementation Plan for Collective Reparations to Victims Submitted to the Amended Reparations Order of 3 March 2015 in the case against Thomas Lubanga Dyilo (ICC-01/04-01/06), ICC-01/04-01/06-3177-AnxA, para 52.

<sup>958</sup> *Lubanga* Reparations Judgment (2012), para 251; *Katanga* Reparations Order (2017), para 59.

obtaining evidence due to destruction or unavailability of evidence due to the longevity of atrocity crime trials.<sup>959</sup>

Referring to the jurisprudence of the ECCC and regional human rights courts,<sup>960</sup> the ICC is unanimous that a reparations claimant should establish his case through the balance of probability standard.<sup>961</sup> What would be the requirement in establishing this standard? Arguably, there may not be a unified procedural criteria for establishing that standard in reparation proceedings for all cases.

However, in *Lubanga*, the Appeals Chamber held that a reparation applicant must “provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case”.<sup>962</sup> Therefore, the question of what could be ‘sufficient’ in discharging the balance of probability standard depends on the circumstances of a case.

In *Katanga*, for example, the Trial Chamber II held that the applicant needs to show that ‘it is more probable than not’ that they suffered harm as a result of crimes of the convicted person.<sup>963</sup> Similarly, in *Lubanga* and *Al Mahdi*, it was held that the ‘proximate cause’ principle could be used to establish, on the balance of probabilities, that the actions of the convicted person could have foreseeably resulted into the harm suffered by reparation claimants.<sup>964</sup>

Consequently, depending on the circumstances of a case, a reparation claimant must sufficiently discharge the balance of probability standard in proving their identity, the harm suffered, and the causal nexus of such harm to crimes of the convicted person.<sup>965</sup>

Thus, issues like time elapsed between the commission of crimes and the beginning of court proceedings and other potential difficulties that victims may face could be critical in determining whether a particular piece of evidence is sufficient or not.<sup>966</sup> For example, in *Katanga*, the Court noted that victims would have difficulties proving material losses since there was no

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<sup>959</sup> *Lubanga* Reparations Judgment (2012), para 252; *Katanga* Reparations Order (2017), paras 47 and 53.

<sup>960</sup> *Katanga* Reparations Order (2017), para 48.

<sup>961</sup> *Katanga* Reparations Order (2017), paras 49 and 50; *Lubanga* Reparations Judgment (2012), para 253; *Lubanga* Reparations Order (2015), para 65; *Al Mahdi* Reparations Order (2017), para 44; *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 42.

<sup>962</sup> *Lubanga* Appeals Chamber Reparations Judgment, para 81.

<sup>963</sup> *Katanga* Reparations Order (2017), para 50.

<sup>964</sup> *Al Mahdi* Reparations Order (2017), para 44; *Lubanga* Reparations Order (2015), para 59.

<sup>965</sup> *Katanga* Reparations Order (2017), para 45.

<sup>966</sup> *Katanga* Reparations Order (2017), paras 53 and 60; *Lubanga* Appeals Chamber Reparations Judgment, para 81.

documentation to prove ownership of property in Bogoro, the place where Katanga crimes took place.<sup>967</sup>

The Court deemed sufficient to presume the existence of material harm of pillaging of domestic effects for any victim who proved the destruction of a house during the attacks.<sup>968</sup> The operative paragraph of the decision of the Court read: “...where an Applicant establishes that he or she suffered material harm as a result of the destruction of a house, an outbuilding of a house, or a business premises, the material harm resulting from the destruction or pillaging of furniture, personal effects or wares is presumed to be established, absent any specific piece of evidence.”<sup>969</sup>

The decision of the Court to use presumptions and circumstantial evidence in ordering compensation for material losses was appealed by Katanga for being “insufficiently proven”.<sup>970</sup> While accepting that an attack on a house could reasonably lead to a loss of domestic belongings, Katanga argued that there was no sufficient evidence to connect his crimes to other losses such as those relating to cattle and crops.<sup>971</sup> He further argued that a reliance on presumptions that do not sufficiently link his crimes to the claimed losses violated his fair trial rights.<sup>972</sup>

While cautioning that ‘factual presumptions’ should not violate rights of the parties, the Appeals Chamber held that judicial presumptions are discretionary in nature and, absent direct evidence, they could be used to identify harm suffered by the victims in reparation proceedings.<sup>973</sup> Whether a certain presumption is reasonable or not, that is a matter to be determined in light of circumstances of a particular case.<sup>974</sup> The Court decided that the trial chamber’s use of factual presumptions was justified as it was reasonably responsive to the evidentiary huddles faced by the victims in proving the harms caused by the crime of pillaging in the Katanga case.<sup>975</sup>

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<sup>967</sup> *Katanga Reparations Order* (2017), para 53; *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 48.

<sup>968</sup> *Katanga Reparations Order* (2017), paras 61 and 90.

<sup>969</sup> *Katanga Reparations Order* (2017), para 91.

<sup>970</sup> *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 46.

<sup>971</sup> *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 52.

<sup>972</sup> *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 53.

<sup>973</sup> *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 75.

<sup>974</sup> *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 76.

<sup>975</sup> *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, paras 89 and 92.



It is submitted that the Court's approach to the question of the standard of proof resonates with the requirements of international human rights law and practice. Without prejudicing fair trial rights of the defendants, victims should not be subjected to restrictive and inconveniencing procedures in their quest for justice.<sup>976</sup> A highly demanding standard of proof would be unreasonably restrictive to the right of access to justice and remedy. Victims may never be able to provide primary documentary evidence to prove their claims in post-conflict environments. For example, in the work of the United Nations Compensation Commission for the Iraq-Kuwait conflict, it was noted that, because of the extensively destructive armed conflict, many claimants and even the Iraqi government could not supply primary evidence to support their case.<sup>977</sup>

In addition, the use of factual presumptions and circumstantial evidence in reparation claims could benefit traditionally marginalised groups such as women in their redress claims. In societies where masculinity reign supreme, it could be difficult for women to come forward and assert their rights, let alone approaching the courts for justice.<sup>978</sup>

#### **4.7 Implementation of Reparation Orders**

Reparations proceedings of the ICC are of a dual nature.<sup>979</sup> The first part consists of a decision of the Court to award reparations to the victims or a decision not to order reparations.<sup>980</sup> When reparations are awarded, the second part concerns the implementation of the reparation order.<sup>981</sup>

As discussed in the previous chapters, the practice of the Court has been to order the implementation of reparation orders against the convicted persons through the TFV. When it is so ordered, the TFV becomes seized and its regulations become applicable.<sup>982</sup> While the TFV is

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<sup>976</sup> Paras 12 and 27 of the UN Basic Principles on Reparations.

<sup>977</sup> Chung JJ 'The United Nations Compensation Commission and the Balancing of Rights between Individual Claimants and the Government of Iraq' (2005) 10 *UCLA Journal of International Law and Foreign Affairs* 155-156.

<sup>978</sup> UN Mapping Report on Congo, para 539; See UK Home Office Report entitled 'Democratic Republic of Congo: Women Fearing Gender-based Harm or Violence' (2017) pages 25 and 29, available at <https://www.justice.gov/eoir/page/file/976636/download> (accessed 3 July 2018).

<sup>979</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the admissibility of the appeals against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparations and directions on the further conduct of proceedings, ICC-01/04-01/06-2953, 14 December 2012, para 53.

<sup>980</sup> Article 75(2) ICC Statute; *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2953, para 54.

<sup>981</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2953, para 55.

<sup>982</sup> Rule 98 of the ICC RPE and Regulation 50 (b) RTFV.

statutorily independent of the Court,<sup>983</sup> when seized with a reparation order that needs to be implemented, the Court is allowed to make some interventions and directions.<sup>984</sup>

Upon being seized with an order to redress the victims on behalf of the ‘indigent’ convicted persons, the TFV becomes an implementing agency and it should prepare a draft plan to carry out the reparation order of the Court.<sup>985</sup> The draft plan for reparations must consider observations of the victims and it should devise reparation projects that are responsive to the modalities of reparations ordered by the Court.<sup>986</sup>

Once a draft plan is submitted before the Court for approval, the Court will strive to see that observations of the parties have been considered by the TFV and once satisfied, it will issue an approval order for the actual implementation of the reparation order.<sup>987</sup> For disputes arising from the implementation activities, the Court will be available to help the parties.<sup>988</sup>

The implementation of a reparation order is a critical phase for the victims. A judicial order on paper may not necessarily be operationalised as ordered by the court. In its various decisions, the ICC has awarded individual and collective reparations to the victims of mass crimes. These reparations may require an enormous amount of resources to be implemented fully.<sup>989</sup> Pragmatically, that may not be the case. In its proposed draft implementation plan in *Lubanga* for collective reparations, the TFV stated that:

...the liability of Mr. Lubanga exceeds what may be complemented by the Trust Fund, i.e. there will be harm caused to victims by the crimes that he committed that cannot be redressed through the activities outlined in this plan.<sup>990</sup>

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<sup>983</sup> *Lubanga* Appeals Chamber Reparations Judgment, para 46.

<sup>984</sup> *Lubanga* Appeals Chamber Reparations Judgment, para 56.

<sup>985</sup> *Al Mahdi* Reparations Order (2017), para 136; *Katanga* Reparations Order (2017), para 307; *Lubanga* Reparations Draft Implementation Plan, ICC-01/04-01/06-3177-Red, para 110(a).

<sup>986</sup> *Katanga* Reparations Order (2017), para 309.

<sup>987</sup> *Katanga* Reparations Order (2017), paras 311-313; *Al Mahdi* Reparations Order (2017), para 148.

<sup>988</sup> *Katanga* Reparations Order (2017), para 314.

<sup>989</sup> *Lubanga* Reparations Draft Implementation Plan, ICC-01/04-01/06-3177-Red, para 113.

<sup>990</sup> Trust Fund for Victims, Draft Implementation Plan for collective reparations to victims Submitted to the Amended Reparations Order of 3 March 2015 in the case against Thomas Lubanga Dyilo (ICC-01/04-01/06), ICC-01/04-01/06-3177-AnxA, para 25.

The admission by the TFV is indicative of the fact that some eligible victims may not receive reparations pursuant to a court order.<sup>991</sup> As admitted in *Lubanga*, the TFV may never have the required financial resources to effectively implement reparation orders of the ICC, even in future cases.<sup>992</sup>

The resultant legal conundrum is that court decisions will lack certainty and finality. The finality issue comes into being as the non-implementation of a reparation decision as ordered entail an amendment of that order without judicial authority. A reparations order is a substantive decision that cannot be varied by a non-judicial body such as the TFV. While the scarcity of resources is not to be blamed on the TFV, the prioritisation of reparation beneficiaries on account of economic considerations may occasion an injustice on the victims.

Arguably, the implementation of reparations could be affected by a number of non-legal operational matters such as security conditions, infrastructure, and time that has elapsed since violations took place.<sup>993</sup> Therefore, while accepting that the operationalisation of a reparation order could be affected by the legal, economic, political, social, and cultural circumstances in a *situation* country, it is argued that the operational adjustments by the TFV should not limit a substantive order of the Court.

Another legal controversy surrounding the role of the TFV in the ICC reparation system is an interplay of the reparations mandate and the assistance mandate. The reparations mandate relates to the implementation of court-ordered reparations by the TFV while the assistance mandate refers to non-judicial reparative assistance extended to the victims in *situation* countries at the behest of the Board governing the TFV.<sup>994</sup> The assistance mandate is not connected to court decisions and it does not respond to any specific cases or issues before the Court. It is for the Board of Directors of the TFV to decide when and how to provide redress to the victims of crimes under the jurisdiction of the ICC in *situation* countries.<sup>995</sup>

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<sup>991</sup> Trust Fund for Victims, Draft Implementation Plan for collective reparations to victims Submitted to the Amended Reparations Order of 3 March 2015 in the case against Thomas Lubanga Dyilo (ICC-01/04-01/06), ICC-01/04-01/06-3177-AnxA, paras 24 and 27.

<sup>992</sup> *Lubanga* Reparations Draft Implementation Plan, ICC-01/04-01/06-3177-Red, paras 115-116.

<sup>993</sup> *Lubanga* Reparations Draft Implementation Plan, ICC-01/04-01/06-3177-Red, para 15.

<sup>994</sup> *Lubanga* Reparations Draft Implementation Plan, ICC-01/04-01/06-3177-Red, para 153.

<sup>995</sup> *Lubanga* Reparations Draft Implementation Plan, ICC-01/04-01/06-3177-Red, para 86.

Dependent on voluntary financial contributions, a decision to intervene through assistance programs depends on the availability of financial resources.<sup>996</sup> Despite the existence of a legal framework that demarcates clearly the power of the ICC over the TFV regarding assistance reparative measures, the Court, in all its reparations decisions until now, has been requesting the TFV to use its ‘assistance mandate’ to provide reparations to unqualified victims.<sup>997</sup> By unqualified victims, I mean victims whose harms do not emanate from the crimes of the convicted person.

Recognising its jurisdiction limits over the TFV, the Court has avoided the use of mandatory language in giving out instructions to the TFV on how to help the victims. For example, in *Katanga*, the court stated that:

... the Chamber invites the TFV to give consideration as part of its assistance mandate, wherever possible, to the harm suffered by the Applicants in the attack on Bogoro upon which the Chamber has not been in a position to act in the case.<sup>998</sup>

Thus, the Court is not ordering the TFV, but inviting it to provide redress to the victims whose harm categories do not relate to the crimes contained in the *Katanga* conviction decision. Notwithstanding the discretionary language directed at the TFV by the Court, it is submitted that, being part of a reparation order, such requests amount to recommendatory orders that could force the TFV to act. Now the question is, are those kinds of requests legally tenable?

Since atrocity violations could give rise to multiple victims and criminalities and considering that the ICC may not deal with all the perpetrators and incidents at the same time, the TFV has submitted that using the assistance mandate to provide reparations for unqualified victims in a given case may occasion an injustice to the accused parties in the present or future cases that relate to the same *situation*.<sup>999</sup>

Since the deployment of resources of the TFV is to be managed sustainably through its Board of Directors that reports only to the ASP, it has been argued that the interventions of the Court over

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<sup>996</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Additional Programme Information Filing, ICC-01/04-01/06-3209, para 87.

<sup>997</sup> *Katanga* Reparations Order (2017), paras 343-344; *Lubanga* Appeals Chamber Reparations Judgment, para 199; *Lubanga* Reparations Order (2015), paras 55 and 64.

<sup>998</sup> *Katanga* Reparations Order (2017), para 344.

<sup>999</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Additional Programme Information Filing, ICC-01/04-01/06-3209, paras 76-77.

the running of assistance programmes consists an infringement of the authority of the Board.<sup>1000</sup> Furthermore, the TFV has cautioned the Court against using the assistance mandate to palliate the ‘inherent’ limitations of the defendant-focused reparation system of the ICC.<sup>1001</sup>

#### **4.8 Chapter Conclusion**

The chapter’s main objective has been to examine the ICC’s reparation system to determine its compatibility with international human rights law and the jurisprudence of regional human rights courts. In the three reparations decisions in *Lubanga*, *Katanga*, and *Al Mahdi*, the ICC has extensively relied on the human rights jurisprudence of the Inter-American Court of Human Rights as well as the UN Basic Principles on the Right to Reparations.

In designing the reparation principles, the Court has shown rigidity in some areas that appear to be either in conflict with the Statute or unambiguous regarding what should be done. For example, the Statute empowers the Court to order reparations against convicted persons and not states or organisations. However, the jurisprudence of the Court at the time of writing indicates that orders against the convicted persons are unenforceable for lack of means. The defendants have been adjudged impecunious.

Faced with that enforceability stalemate, one would have expected the Court to stretch its discretion under Article 75 by designing reparations principles that could incorporate third parties, say complicity territorial states or organisations, in the provision of redress to the victims as contemplated under international human rights law that reparations should come from territorial states when the liable party is unable or unwilling to redress the victims. Instead, the Court has adopted a positivist interpretative style by, first, ordering reparations against insolvent defendants, and, secondly, requesting the Trust Fund to operationalise the order. That approach, as it has been shown, does not ensure finality to court decisions and is uncertain and unsustainable.

Similarly, the chapter has demonstrated that the defendant-focused reparation system has limitations that may prevent the ICC from achieving its reconciliatory, transformative, and

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<sup>1000</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Additional Programme Information Filing, ICC-01/04-01/06-3209, para 89.

<sup>1001</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Additional Programme Information Filing, ICC-01/04-01/06-3209, para 90.

deterrence goals for the benefit of the victims. For the ICC reparation system to redress the victims meaningfully, there is a need for support from the states and organisations. Territorial states in particular have to step up their complementarity efforts to fix reparative gaps in the ICC Statute regime.

Another situation that demonstrates the unwillingness of the Court to flex its jurisprudential muscles is the question of redress for the victims in cases that do not end with a conviction. Except for the dissenting interventions by some Judges, this question has not been fully litigated and determined by the ICC.

The ICC Statute does not give guidance on what should be done for the victims when a case terminates with an acquittal or ends with a mistrial. Additionally, the ICC Statute does not say that victims should not receive reparation when there is no conviction. Given that the ICC reparation regime provides for the involvement of states and organisations, one would have expected the Court to liaise with states and interested organisations in reparation proceedings and determine the modality of providing redress to the victims in those circumstances.

In its decisions, the Court has held that reparations should uphold the principle of human dignity and equality. It is submitted that the unpredictable nature of the ICC reparation system and the inherently discriminatory nature of the conviction-based reparations violate the dignity of the victims as right holders. There may not be dignity and equality when victims from the same *situation* are unwittingly categorised into qualified and non-qualified victims. The *Bemba* case is a classic example of the unpredictable nature of ICC proceedings. Initially, he was convicted of war crimes and crimes against humanity and victims of his crimes had applied for reparations. However, such victims may never receive reparations as the Appeals Chamber overturned the whole conviction decision.

It is submitted that the object and purpose of the ICC Statute is to eradicate impunity for egregious human rights violations that plunge the victims into unbearable losses. Ending impunity is not about prosecutions alone. It includes reparative justice for the victims. The absence of convictions at the ICC should not be a burden for the victims. The next chapter provides theoretical proposals on how to overcome statutory obstacles to reparative justice under the ICC Statute.

**CHAPTER FIVE**

**STATE-DEFENDANT REPARATIVE CO-RESPONSIBILITY: A SOLUTION TO  
INDIGENCY AND RESOURCE CONSTRAINTS AT THE INTERNATIONAL  
CRIMINAL COURT?**

**5.1 Introductory Remarks**

The chapter presents an enforcement model that can mitigate economic restrictions emanating from indigence and allow for joint reparative responsibility mechanism for states and defendants.

Chapter four has extensively analysed the ICC's normative framework for reparations. The prevailing framework may not foster full accessibility, equality, equity, non-discrimination, and satisfaction for the victims in the realisation of the right to reparation.

As noted in the previous chapters, ICC reparations tend to suffer from two potentially chronic implementation obstacles. First, most of the defendants are impecunious and therefore they have been adjudged unable to execute reparation orders.<sup>1002</sup> Secondly, while atrocity crime environments imply state participation either directly or indirectly, international criminal tribunals do not have an express jurisdictional mandate to order reparations against states.<sup>1003</sup> Absent such jurisdictional powers, criminal tribunals can only 'encourage' national governments to complement judicial reparations through national redress programs.<sup>1004</sup>

If the international community is to redress the victims effectively, state impunity for reparations in mass violations' cases needs to be addressed. The Judges of the ICC must uphold a victim's right to dignity and effective remedy by choosing realism over formalism in interpreting Article 75 of the ICC Statute.

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<sup>1002</sup> *Katanga* Reparations Order (2017) paras 327-328; *Lubanga* Appeals Chamber Reparations Judgment, para 101; *Al Mahdi* Reparations Order (2017), para 138; *Lubanga* Reparations Judgment (2012), para 269.

<sup>1003</sup> *Appeal Judgement (KAINING Guek Eav)*, Case File 001/18-07-2007/ECCC/SC , Extraordinary Chambers in the Courts of Cambodia, 3 February 2012, paras 702-703, available at: <http://www.refworld.org/cases,ECCC,4f2fbff92.html> (accessed 3 December 2017).

<sup>1004</sup> *Duch* Appeal Judgment, Case File 001/18-07-2007/ECCC/SC , para 717; *Katanga* Reparations Order (2017), para 324.

The formalistic approach to interpreting Article 75 has given rise to mechanical jurisprudence that ties the enforcement of reparations to *indigent* convicted persons. The jurisprudence is mechanical (irresponsive to realities) as all the Judges have persistently ordered massive reparations against impecunious defendants without addressing the enforceability question for such decisions. As it will be shown later, that approach does not fully appreciate the sociological and utilitarian consequences of such decisions for the victims.

The Court has been more concerned with the legal implications of its Article 75 decisions than the sociological and utilitarian effectiveness of such decisions in providing reparative justice to the victims. In its judgments, the Court attaches significant weight in determining the scope of reparations' liability for the defendants. However, little attention has been directed at providing an alternative implementation mechanism as a remedy to the shortcomings of individual reparative responsibility. Arguably, state-defendant reparative co-responsibility may help palliate the inadequacies of defendant-centered reparations at the ICC.

The concept of shared reparative responsibility (co-responsibility) was scantily referred to in *Katanga* reparation decision. In that decision, the Court instructed the implementor of reparations (the TFV) to invite the DRC government to determine how it could contribute to reparations.<sup>1005</sup> The crucial thing to note here is that the invitation was *post factum* to the reparation decision, and the Court did not describe a practical legal avenue for state participation.

Until now, the ICC has not developed any state-defendant partnership mechanism for providing *meaningful* redress to the victims. At best, the practice of the Court has been just to instruct the non-judicial TFV to liaise with governments in view of learning as to how they could contribute to reparations.<sup>1006</sup>

Using various theories of justice, doctrines of international human rights law, customary international law, and positive international law, the author presents a state-defendant reparative co-responsibility mechanism under Article 75(3) of the ICC Statute. Against the backdrop of defendant-focused reparations under Article 75 of the ICC Statute,<sup>1007</sup> the chapter advances legal justifications for dual liability for reparations for both territorial states and defendants.

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<sup>1005</sup> *Katanga* Reparations Order (2017), para 325.

<sup>1006</sup> *Katanga* Reparations Order (2017), paras 325.

<sup>1007</sup> *Katanga* Reparations Order (2017), para 147.



Consequently, it provides normative avenues for the effectuation of reparative co-responsibility without upsetting the traditional individual criminal responsibility regime under the ICC Statute.

## 5.2 The ICC Reparation System: Some Critical Vulnerabilities

The birth of the ICC in 2002 signified the desire and willingness of the international community to ensure that there is no impunity for crimes under international law.<sup>1008</sup> The ICC positions itself at the apex of transnational criminal justice by seeking to investigate and prosecute individuals who bear the greatest responsibility for the commission of core crimes.<sup>1009</sup> Normatively, the ICC Statute, like the Nuremberg Charter, seeks to impose individual criminal responsibility for international crimes.<sup>1010</sup> Unlike previous criminal tribunals, the Statute codifies the victim's right to reparation and provides avenues for participation.

On victim's justice, the ICC Statute has been glorified for being victims' friendly. Substantively, victims are entitled, subject to certain procedural conditions, to participate in all stages of the proceedings to safeguard their interests.<sup>1011</sup> In the same vein, unlike Nuremberg and ad hoc criminal tribunals established in the 1990s,<sup>1012</sup> the ICC is legally empowered to award reparations to victims of core crimes.<sup>1013</sup>

However, in spite of the unprecedented legal provisions on victim's right to participation and reparation, there is skepticism about the outcome of the ICC's reparation regime regarding delivering *meaningful* redress to the victims.<sup>1014</sup> Unlike predecessor criminal courts, the ICC takes a binary approach to dispense justice by combining prosecutions (retributive justice) and reparations (reparative justice). At the ICC, individual criminal accountability is inseparable from

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<sup>1008</sup> Preamble, Rome Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998.

<sup>1009</sup> Article 1 ICC Statute.

<sup>1010</sup> The term 'international crimes' denotes core crimes covered under Article 5 of the ICC Statute namely, genocide, crimes against humanity, war crimes, and the crime of aggression; Werle G *Principles of International Criminal Law* 2 Edn (2009) 29.

<sup>1011</sup> Article 68(1) of the ICC Statute.

<sup>1012</sup> By ad hoc criminal tribunal of the 90's, I mean the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). Both tribunals were established by the UN for the sole purpose of prosecuting perpetrators of human rights violations in Yugoslavia and Rwanda respectively.

<sup>1013</sup> Article 75 of the ICC Statute; Moffett (2013) 371.

<sup>1014</sup> Moffett L *Justice for Victims before the International Criminal Court* (2014) 151.

liability for reparations and therefore the primary duty of providing reparations to the victims goes to the convicted person.<sup>1015</sup>

With the first three reparation judgments in *Lubanga*, *Katanga*, and *Al Mahdi*, the Court has largely opted for collective reparations,<sup>1016</sup> with minimal symbolic compensatory individual reparations in *Katanga* and *Al Mahdi*.<sup>1017</sup> The reparations judgments are a significant step towards the realisation of the right to reparation for victims of egregious human rights violations. Despite the judgments affirming victim's right to redress, there are implementation issues that may derail or potentially scupper the provision of reparation to victims. Reparations must be effective in remedying the actual harm as well as adequate and prompt in their delivery to the victims.

Internationally, prosecution and punishment of individuals responsible for human rights violations has been conceived as the most appropriate method of legal justice. This tradition stems from Nuremberg and it has been maintained as such until now. However, as we shall see later, the normative importance of individual criminal accountability does not augur well with the demands of restorative justice in post-conflict contexts. Specifically, the ICC principle of tying liability for reparations to individual criminal responsibility,<sup>1018</sup> although legally correct, presents critical challenges in the provision of effective redress to victims of core crimes.

This is particularly so as the nefarious capacity of individuals to perpetrate acts that cause large scale harm does not necessarily correspond to their ability to repair the harm caused. Individuals, whether acting on their own or under state directives, have been proved to be unable to pay reparations to victims. This inability to pay may scupper the implementation of defendant-focused reparations at the ICC.

Thus, there is a need for reforming international criminal justice approaches to victim's justice (reparation) to pave way for a working reparation regime. I shall elaborate on that at a later stage. Victims need to be sure that they will have access to *adequate, effective, and prompt* reparations

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<sup>1015</sup> *Katanga* Reparations Order (2017), para 158; *Al Mahdi* Reparations Order (2017), para 50; *Lubanga* Appeals Chamber Reparations Judgment, para 99.

<sup>1016</sup> *Lubanga* Reparations Order (2015), para 53; *Katanga* Reparations Order (2017), para 281; *Lubanga* Appeals Chamber Reparations Judgment, para 143; *Al Mahdi* Reparations Order (2017), para 84.

<sup>1017</sup> *Katanga* Reparations Order (2017), para 306; *Al Mahdi* Reparations Order (2017), paras 81, 133 and 134.

<sup>1018</sup> *Lubanga* Reparations Judgment (2015), para 99.

as required under international law.<sup>1019</sup> One would pose a question: how can this be possible at the ICC when its justice terrain bears all the hallmarks of a traditional criminal justice system that focuses on the perpetrator?

The three reparations judgments expose the vulnerability of the ICC reparation system. The ICC reparation system requires a nexus between the victim, the harm suffered, and the charges which the convicted person has been convicted for. This normative triangle presents implementation problems that spring from indigency and scarce resources. In three convictions at the ICC, the convicted persons have been adjudged impecunious and therefore they cannot provide redress for victims.

That is the problem that the ICC grapples with right now. Lubanga, Katanga, and Al Mhadi have all been declared indigent and so far there has not been any resources traced to their names which could be confiscated for reparations.<sup>1020</sup> Logically, victims of horrendous mass crimes that have been proved in those cases may not receive *effective* reparations from the convicted persons. What has the ICC done to overcome that shortcoming?

In the three reparation decisions handed down by the ICC until now, the Court has opted to deal with indigence by ‘requesting’ the TFV to execute reparation orders against the defendants.<sup>1021</sup> While convicted persons are still legally liable to pay reparations, the ICC requests the TFV to use its resources to implement the reparation orders and consequently it may be able, in the future, to reclaim the advanced resources from the convicted persons whose asset acquisition will be monitored by the court for confiscation.<sup>1022</sup>

Given limited resources of the TFV and attendant legal issues, I argue that the solution provided by the Court in Lubanga, Katanga, and Al Mahdi may not work out effectively in providing *meaningful* redress to the victims. The TFV may never succeed in overcoming the inherent

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<sup>1019</sup> Principle 15, UN Basic Principles on Reparations.

<sup>1020</sup> *Katanga* Reparations Order (2017), para 327; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, The Registry’s Observations on Mr Ahmad Al Faqi Al Mahdi’s Solvency and Conduct while in Detention, ICC-01/12-01/15, 21 July 2016, paras 5-7.

<sup>1021</sup> *Katanga* Reparations Order (2017), paras 330 and 342; *Lubanga* Appeals Chamber Reparations Judgment, para 115; *Al Mahdi* Reparations Order (2017), para 138.

<sup>1022</sup> *Lubanga* Appeals Chamber Reparations Judgment, paras 104 and 116; *Lubanga* Reparations Order (2015), paras 61-62; *Katanga* Reparations Order (2017), para 329.

limitations of ICC reparations.<sup>1023</sup> The ICC's over dependence on the TFV as the reparations implementor could prove catastrophic for the victims due to the following reasons.

First, the TFV has a dual mandate of extending localised reparative assistance (rehabilitation and psychological treatment) to the victims and, if asked by the Court and approved by its governing board, implementing court ordered reparations.<sup>1024</sup> The twin mandate of the TFV applies to all *situations* before the Court. The TFV, which depends on voluntary contributions from states and private entities,<sup>1025</sup> has limited financial resources which are expected to cater for reparative justice for all cases before the Court at a given period.

Until December 2017, the ICC's reparation reserve stood at € 5.5 million.<sup>1026</sup> Since it is a decision of the TFV Board to decide whether or not to accept the court's request,<sup>1027</sup> it may happen that TFV does not have the resources to cater for reparative demands of all the victims before the court at a given time.

In *Lubanga*, the TFV admitted that:

...the funds available to the Trust Fund to complement the payment of awards for reparations are inherently limited so that, if reparations are primarily funded out of the Trust Fund's reparations reserve, it is unrealistic that there will be sufficient financial means to remedy all harm to all victims in all cases.<sup>1028</sup>

That would beget discrimination as some victims could access redress while others may not be lucky.<sup>1029</sup> That would run counter to international human rights law as victims are not to be subjected to unfair treatment<sup>1030</sup> or any form of discrimination.<sup>1031</sup>

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<sup>1023</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Additional Programme Information Filing, ICC-01/04-01/06, para 90.

<sup>1024</sup> Regulation 50 of Regulations of the Trust Fund for Victims, Resolution ICC-ASP/4/Res.3; *Lubanga Appeals Chamber Reparations Judgment*, para 107.

<sup>1025</sup> Regulation 20, Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3, 3 December 2005.

<sup>1026</sup> Report of the Board of Directors of the Trust Fund for Victims, Sixteenth Session of the Assembly of States Parties New York, 4 December 2017, page 7. Available at <https://www.trustfundforvictims.org/sites/default/files/reports/ASP-16-BDTFV.pdf> (accessed 20 March 2018).

<sup>1027</sup> *Lubanga Appeals Chamber Reparations Judgment*, para 113.

<sup>1028</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Additional Programme Information Filing, ICC-01/04-01/06, para 18.

<sup>1029</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Additional Programme Information Filing, ICC-01/04-01/06, para 19.

<sup>1030</sup> *Al Mahdi Reparations Order* (2017), para 29; *Katanga Reparations Order* (2017), para 30.

<sup>1031</sup> *Al Mahdi Reparations Order* (2017), paras 31 and 34.

Secondly, until now, the TFV has not obtained funds from primary sources such as reparation awards and proceeds of fines and forfeiture as contemplated under the law.<sup>1032</sup> All the money held at the TFV is from ‘other resources’, meaning voluntary contributions from states and organisations.<sup>1033</sup> The point I advance here is that, after almost two decades in operation, victims’ reparation purse at the ICC depends on *unpredictable* contributions from donors. That means the TFV is not sustainable and therefore it may eventually not be able to implement any reparation orders.

Thirdly, the implementation of court-ordered reparations through the TFV does not have the element of certainty and authoritativeness expected of judicial decisions. It is particularly so since the decision to implement or not rests with the *non-judicial* TFV Board.<sup>1034</sup> The ICC jurisprudence confirms that the TFV has the discretion to use its resources to execute reparation orders against defendants.<sup>1035</sup> The Court has also affirmed that it lacks legal authority to order the TFV to implement reparations.<sup>1036</sup> Despite the ICC Appeals Chamber holding that a reparations order is at par with a conviction or an acquittal decision,<sup>1037</sup> the ICC lacks a predictable and authoritative enforcement mechanism for its reparation decisions.

The Court can only ‘request’ or ‘encourage’ the TFV to provide redress to the victims on behalf of impecunious defendants. In *Katanga*, the court stated that “...the Chamber directs the Board of Directors of the TFV to advise the Bench whether it is minded to use its “other resources” for the funding and implementation of reparations...”.<sup>1038</sup>

The same trend was replicated in *Al Mahdi* in which the court held that “The Chamber encourages the TFV to complement the individual and collective awards to the extent possible...”.<sup>1039</sup> This legal atmosphere throws the victims into the unknown. While the ICC is legally correct to seek to

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<sup>1032</sup> Regulation 47, Resolution ICC-ASP/4/Res.3; Article 79 (2) ICC Statute.

<sup>1033</sup> Trust Fund for Victims Annual Report 2016 at page 29, available at [https://www.trustfundforvictims.org/sites/default/files/reports/Annual%20Report-2016\\_ENG\\_September\\_Online.pdf](https://www.trustfundforvictims.org/sites/default/files/reports/Annual%20Report-2016_ENG_September_Online.pdf) (accessed 20 March 2018).

<sup>1034</sup> Regulation 56, TFV Regulations; *Lubanga* Appeals Chamber Reparations Judgment, para 111.

<sup>1035</sup> *Lubanga* Appeals Chamber Reparations Judgment, para 111; *Al Mahdi* Reparations Order (2017), para 112;

<sup>1036</sup> *Lubanga* Reparations Order (2015) paras 112 and 114.

<sup>1037</sup> *Lubanga* Reparations Order (2015) para 67.

<sup>1038</sup> *Katanga* Reparations Order (2017) para 342.

<sup>1039</sup> *Al Mahdi* Reparations Order (2017), para 138.

implement reparations orders through the TFV,<sup>1040</sup> the situation in which the TFV operates does not afford assurances that victim's reparations will be implemented adequately and effectively.<sup>1041</sup> Although the TFV has not yet refused to implement court-ordered reparations, it is highly probable that it may not be able to implement reparations in all *situations* and cases before the Court.

Aptly put, the ICC reparation mandate faces two potentially chronic obstacles; first, indigent convicts, and secondly, weak resource base at the TFV.<sup>1042</sup> It is submitted that reparative responsibility in atrocity crime environments should not be left to individual perpetrators alone. Accountability for reparations should be reflective of the perpetration dynamics in a given situation. At a later stage, I will explain how *reparative co-responsibility* can be operationalised under the current reparation framework of the ICC.

The section below provides an account of the intersection between state and individual responsibility for crimes under international law perpetrated in the Congo conflict.

### **5.3 Intersection of State and Individual Responsibility in the Congo Conflict**

#### **5.3.1 Is State-Individual Dual Responsibility Possible Under International Law?**

Crimes under international law (genocide, war crimes, and crimes against humanity) entail systematic or large scale use of force<sup>1043</sup> that results into massive damage. Perpetration of such crimes presumes participation of states or state-like organisations.<sup>1044</sup> Even though states may have a critical role in the perpetration of core crimes, international criminal law focuses on the individual perpetrator.<sup>1045</sup> The logic behind this norm is that crimes under international law can only be ascribed to an individual and therefore the principle of individual accountability seeks to prevent individuals from hiding behind state sovereignty.<sup>1046</sup>

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<sup>1040</sup> Article 75(2) ICC Statute; Rule 98 of the ICC RPE.

<sup>1041</sup> *Lubanga* Reparations and Draft Implementation Plan, para 118.

<sup>1042</sup> *Lubanga* Reparations and Draft Implementation Plan, para 115.

<sup>1043</sup> Werle (2009) 32.

<sup>1044</sup> Werle (2009) 32.

<sup>1045</sup> Werle (2009) 40.

<sup>1046</sup> Cryer R 'International Criminal Law vs State Sovereignty: Another Round?' (2006) 16 *The European Journal of International Law* 979-1000.

Conversely, states can only be held responsible under international law if a violation can be attributed to it. Accordingly, state responsibility would be due when individual violations qualify as acts of state.<sup>1047</sup> However, as a rule, perpetration of an act that violates international criminal law does not necessarily create a responsibility on the part of the state.<sup>1048</sup> Likewise, state responsibility under international law does not necessarily impose individual liability on state agents involved. Despite such strict rules on the attribution of responsibility to individuals and states under international law, there would often be an intersection between individuals and states especially in the context of crimes under international law.<sup>1049</sup> Werle rightly submits that “...crimes under international law and wrongful acts by a State will often coincide”,<sup>1050</sup> leading to the *duality of responsibility* under international law.<sup>1051</sup>

The concept of *duality of responsibility* under international law was upheld in the ICJ judgment in the genocide reparations case between *Bosnia and Herzegovina v. Serbia and Montenegro*.<sup>1052</sup> Double attribution of responsibility to states and individuals is also supported under the ICC Statute which provides that individual responsibility does not affect state responsibility.<sup>1053</sup> Although positive international law does not provide for state criminality, anecdotal evidence indicates that a *criminal state* may exist when internationally wrongful acts such as genocide and torture are systemically perpetrated by individuals as part of state policy.<sup>1054</sup>

Conversely, a criminal state may exist when government orders, encourages, or tolerates the commission of grave crimes by individuals.<sup>1055</sup> That was the case with post-world war II Germany and Japan; Balkan crimes in the 1990s; Khmer Rouge crimes in Cambodia;<sup>1056</sup> the 1994 genocide

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<sup>1047</sup> Nollkaemper A ‘Concurrence between Individual Responsibility and State Responsibility in International Law’ (2003) 52 *The International and Comparative Law Quarterly* 616.

<sup>1048</sup> Article 25 (4) of the ICC Statute.

<sup>1049</sup> Nollkaemper (2003) 618.

<sup>1050</sup> Werle (2009) 41.

<sup>1051</sup> On co-responsibility between states and individuals, see; Nollkaemper (2003) 619.

<sup>1052</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, [2007] ICJ Reports 43, para. 173.

<sup>1053</sup> Article 25(4) ICC Statute; Nollkaemper (2003) 620.

<sup>1054</sup> Nollkaemper (2003) 625.

<sup>1055</sup> Nollkaemper ‘Systemic Effects of International Responsibility for International Crimes’ (2010) 8 *Santa Clara Journal of International Law* 316.

<sup>1056</sup> ‘Top Khmer Rouge Leaders Guilty of Crimes against Humanity’, BBC News, 7 August 2014, available at <http://www.bbc.com/news/world-asia-28670568> (accessed 4 April 2018).

in Rwanda; the Darfur genocide in Sudan; and the Derg crimes in Ethiopia,<sup>1057</sup> just to name a few. Therefore, international crimes are systemic in nature and, although their perpetration is attributed to individuals, state involvement has been manifested in many conflicts.<sup>1058</sup>

In short, states may participate in the commission of international crimes through aiding and abetting, omissions through lack of action to protect people and to prevent violations from taking place, and failure to investigate and prosecute perpetrators.<sup>1059</sup>

Thus, in atrocity crime situations, state responsibility may exist on account of failure to protect and prevent,<sup>1060</sup> notwithstanding whether individuals involved are agents of the territorial state or not.<sup>1061</sup> When state responsibility sits next to individual responsibility, states cannot be criminally punished but they are obligated to provide reparations under international law.<sup>1062</sup> While international law does not provide room for holding states accountable for state criminality,<sup>1063</sup> this author seeks to propose a mechanism for attributing reparative responsibility under the auspices of the ICC to the territorial states and other states that were complicit in the commission of core crimes in the Congo conflict, especially during the Second Congo war.

### 5.3.2 The Congo Conflict and State Criminality

Historians agree that the causes of modern day instability of the DRC, the second largest country in Africa and a country well-endowed in natural resources, stretches back to pre-independence Belgian rule that sowed seeds of corruption, nepotism, embezzlement of public resources, and unequal distribution of public wealth.<sup>1064</sup> Many conflicts have taken place in the DRC since its independence in 1960. However, this scholarship draws its arguments and conclusions relating to

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<sup>1057</sup> Tiba FK 'The Mengistu Genocide Trial in Ethiopia' (2007) 5 *Journal of International Criminal Justice*.

<sup>1058</sup> Nollkaemper (2010) 317-319.

<sup>1059</sup> Nollkaemper (2010) 314 and 319-320.

<sup>1060</sup> Botte A 'Redefining Responsibility to Protect as a Response to International Crimes' (2015) 19 *The International Journal of Human Rights*.

<sup>1061</sup> Moffett (2013) 379.

<sup>1062</sup> Nollkaemper (2003) 622; Bonafè BI 'Reassessing Dual Responsibility for International Crimes' (2016) 37 *Sequência: Estudos Jurídicos e Políticos* 28.

<sup>1063</sup> Bonafè (2016) 21; While the term 'state crimes' has been colloquially used to mean atrocity crimes perpetrated by state agents, there is no such thing as 'state criminality' under positive international law; Fletcher LE 'A Wolf in Sheep's Clothing? Transitional Justice and the Effacement of State Accountability for International Crimes' (2016) 39 *Fordham International Law Journal* 453; Moffett (2013) 370.

<sup>1064</sup> Turner (2007); Ikambana (2007); Lemarchand (2003).



state responsibility for reparations in the context of the Second Congo War that lasted between 1998 and 2003.

The Second Congo, characterised as the worst humanitarian crisis since World War II, was triggered by the invasion of Rwanda and Uganda in the DRC in August 1998.<sup>1065</sup> The war, although it later on turned to be a war of partition and plunder,<sup>1066</sup> was started by Rwanda and Uganda as an attempt to oust President Laurent Kabila who had turned his back on his allies (Rwanda-RPF and Uganda-UPDF) who had helped him topple Mobutu Sese Seko in May 1997. Despite the fact that the invaders created rebel movements in the Eastern part of the DRC to hasten the removal of Kabila, the rebellion against Kabila was unsuccessful mainly due to the support he got from foreign forces.<sup>1067</sup>

It must be recalled that the First Congo War (1996-1997) was also triggered by an invasion of Rwanda's RPF into the DRC to eliminate Hutu refugees and former soldiers of the Rwandan army (ex-FAR/*Interahamwe*) who had supposedly perpetrated genocide against Rwandan Tutsis in 1994. To legitimize the invasion and camouflage the real intentions of the war, Rwanda created and extended logistical support to an anti-Mobutu rebel movement called 'Alliance of Democratic Liberation Forces' – known by the French acronym AFDL- which succeeded in claiming power in 1997. AFDL was under the leadership of Laurent Kabila. The success of AFDL in toppling Mobutu was an easy project as the Congolese population had tired of Mobutu's dictatorial tendencies and also the regime had lost the support of the West following the end of cold war.<sup>1068</sup>

As earlier alluded to, the invasion of the DRC by Rwanda and Uganda was vigorously resisted by neighbouring foreign forces who fought alongside government forces. A total of eight countries participated in the military confrontation during the deadly Second Congo War.<sup>1069</sup> Foreign forces of Angola, Chad, Namibia, Zimbabwe, and Sudan backed Kabila while Rwanda, Burundi, and Uganda supported rebel movements. The engagement of such military forces in the DRC resulted in the commission of egregious human rights violations which could be characterised as crimes

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<sup>1065</sup> Nzungola-Ntalaja (2004).

<sup>1066</sup> Naidoo S (ed) 'The War Economy in the Democratic Republic of Congo' (2003) *IGD Occasional Paper No.37*.

<sup>1067</sup> 'Conflicts in the Democratic Republic of Congo: Causes, Impact and Implications for the Great Lakes Region' (2015) *United Nations Economic Commission for Africa* 14; Turner (2007) 5.

<sup>1068</sup> Meldon J 'Long U.S. Dance with Mobutu Ends' (1997) *The Consortium*.

<sup>1069</sup> Williams (2013) 89.

under international law. In particular, mass rapes were committed on a large scale in the Eastern part of the DRC.<sup>1070</sup> The war fed on deep-rooted historical ethnic conflicts and the scramble for the mineral-rich Eastern DRC.

It is submitted that war crimes and crimes against humanity were perpetrated against defenceless civilian population especially in the Eastern region of the DRC (Kivu, Goma, Ituri, and Bunia). The crimes were committed by both state forces and rebel militia groups. Thus, states were highly complicit in the perpetration of atrocity crimes in the DRC.<sup>1071</sup> It is in this context that the author proposes the attribution of reparative responsibility by the ICC to states that had a role in the Congo wars.

I shall revert to this proposition at a later stage. Let us turn to the issue of state responsibility in relation to the manner, level, and degree of involvement of foreign government forces in the military confrontation during the Second Congo War. For this chapter, the focus will be on Uganda and Rwanda (the aggressors).

Uganda's participation in the DRC conflict was focused on Ituri, a region close to its border with the DRC. The 2005 Judgment of the International Court of Justice (ICJ) in the case of *Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda)* confirms that Uganda was the occupying power in Ituri during the relevant period of the conflict.<sup>1072</sup> General Kazini, the commander of Ugandan forces in the DRC, established a new province called Kibali-Ituri and handpicked Ms. Adele Lotsove as Governor.<sup>1073</sup> As the occupying power, Uganda was responsible, under The Hague Regulations of 1907, for making sure that public order was restored and that inhabitants were protected against violations.<sup>1074</sup>

Sadly, Uganda did not honor its obligations under international law. Its troops (UPDF) were involved in ethnic conflicts in Ituri, mostly siding with the Hema tribe,<sup>1075</sup> and child recruitment – children were subjected to massive abduction in areas of Bunia, Beni, and Butembo and sent to

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<sup>1070</sup> 'The War Within the War Sexual: Violence Against Women and Girls in Eastern Congo' (2002) *Human Rights Watch*.

<sup>1071</sup> Hüls (2004) 21.

<sup>1072</sup> *Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda)* para 178.

<sup>1073</sup> ICJ Judgment (2005) para 175.

<sup>1074</sup> Article 43 of The Hague Regulations of 1907.

<sup>1075</sup> ICJ Judgment (2005) para 187.

Kyankwanzi military camp for training.<sup>1076</sup> The ICJ made a finding that Uganda's UPDF soldiers were heavily involved in the perpetration of gross human rights violations and grave breaches of international humanitarian law.<sup>1077</sup>

On particular violations committed by Ugandan forces on Congolese soil, the ICJ held that: "Having examined the case file, the Court considers that it has credible evidence sufficient to conclude that the UPDF troops committed acts of killing, torture and other forms of inhumane treatment of the civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers, and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories."<sup>1078</sup>

Even more, the ICJ made a finding that Ugandan troops were also responsible for "looting, plundering, and exploitation of the DRC's natural resources".<sup>1079</sup> The court concluded that Uganda, as a fully-fledged state under international law, was internationally responsible for the violations of international human rights and humanitarian law perpetrated by its soldiers in the DRC during the relevant period.<sup>1080</sup>

As for Rwanda, there is massive documentation by the UN and human rights NGOs that point to the fact that Rwanda was responsible for the perpetration of atrocity crimes in the DRC conflict. Rwanda has a very long history of involvement in armed conflicts that took place in the DRC in the 90s. According to the 2010 UN Mapping Report on Congo, Rwandan soldiers, alongside AFDL, perpetrated serious violations of human rights and international humanitarian law during the first Congo war.<sup>1081</sup>

The UN report has also documented serious crimes of an international character committed by the Rwandan forces in the DRC during the Second Congo War.<sup>1082</sup> Despite Rwanda's rejection of the

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<sup>1076</sup> ICJ Judgment (2005) para 185.

<sup>1077</sup> ICJ Judgment (2005) para 207.

<sup>1078</sup> ICJ Judgment (2005) para 211.

<sup>1079</sup> ICJ Judgment (2005) para 250.

<sup>1080</sup> ICJ Judgment (2005) 220.

<sup>1081</sup> UN Mapping Report, para 565.

<sup>1082</sup> UN Mapping Report on Congo, para 578; Yearbook of the United Nations (1998) Volume 52, pp.80-83.

UN Mapping Report on Congo for allegedly using unverified sources and assumed evidence,<sup>1083</sup> there is a clear admission of Paul Kagame regarding the deployment of Rwandan troops in Congo during the conflict period.<sup>1084</sup>

Likewise, in the recent wave of bloody fighting in the Eastern DRC, Rwanda has been confirmed as the creator and supporter of the rebel group M23<sup>1085</sup> which was under the leadership of Rwandan-born Congolese General Bosco Ntaganda who is currently on trial at the ICC for charges of war crimes and crimes against humanity.<sup>1086</sup> According to findings of experts commissioned by the UN Security Council,<sup>1087</sup> Rwanda, acting through Defence Minister James Kabarebe, extended logistical assistance to M23 by giving them weapons and ammunition;<sup>1088</sup> provision of information and financial resources; and provision of recruits from Rwanda including child soldiers.<sup>1089</sup> To sum up, the M23, under the assistance and support of Rwanda and Uganda, committed several violations of international humanitarian law especially in the Kivus in Eastern DRC.<sup>1090</sup> Having established state responsibility for Rwanda and Uganda in the perpetration of crimes under international law in the DRC, let us turn to conceptual issues on state responsibility through the lens of international criminal justice.

The preceding section has demonstrated that two States – Rwanda and Uganda – were highly complicit in the commission of crimes under international law in the DRC during the relevant period of the conflict. Surely, attribution of criminal responsibility to individual perpetrators

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<sup>1083</sup> ‘Official Government of Rwanda Comments on the Draft UN Mapping Report on the DRC’ (30 September 2010). Available at <[http://www.ohchr.org/Documents/Countries/CD/DRC\\_Report\\_Comments\\_Rwanda.pdf](http://www.ohchr.org/Documents/Countries/CD/DRC_Report_Comments_Rwanda.pdf)> (accessed 29 May 2016).

<sup>1084</sup> ‘Rwanda admits having troops in Congo’ (1998) BBC News, available at <http://news.bbc.co.uk/2/hi/africa/209319.stm> (accessed 29 May 2016).

<sup>1085</sup> Rebel Group created mainly by Congolese [Tutsi] soldiers on 6 May 2012. This was a new version to the then defunct rebel group called CNDP that was commanded by General Laurent Nkunda. On 23 March 2009, Nkunda’s CNDP signed a peace deal with the Government of Congo, agreeing to, among other things, cessation of the violence on the condition that there would amnesty for the fighters and that they would be incorporated into the DRC National Army. Three years later, CNDP decided that the peace deal was not being implemented by the government hence the formation of a new rebellion called M23, named after the date of truce in 2009.

<sup>1086</sup> *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06.

<sup>1087</sup> ‘Letter dated 12 November 2012 from the Chair of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council’ (2012).

<sup>1088</sup> UN Security Council Report, paras 10-18.

<sup>1089</sup> UN Security Council Report, paras 23-24.

<sup>1090</sup> UN Security Council Report, paras 156-160.

without invoking state responsibility for internationally wrongful acts committed by such countries may not work out well for the victims regarding reparative justice at the ICC.

The ICC's reparation paradigm is restricted normatively by the individuality of responsibility for reparations and, for it to work in favour of victims, there is a need to broaden, subject to certain conditions, the reparative responsibility to states also. It is trite law that individual criminal responsibility for violations of international law does not preclude state responsibility for the same if such violations could be attributed to a state under international law. Let us now contextualise the law relating to State responsibility in relation to the participation of Rwanda and Uganda in the DRC conflict.

The international law of state responsibility provides that responsibility of a state is due when a particular violation can be attributed to it either by being a violation committed by its organs or other actors under its control and direction.<sup>1091</sup> This customary rule has also been endorsed by the ICJ.<sup>1092</sup> So, whoever with a working connection to any branch of state power (whether it is the executive, parliament, or judiciary) may trigger responsibility of the respective state if their conduct represents violations of international law.<sup>1093</sup>

As for private actors, the general rule is that their violations may not be attributed to a state save if a state failed to take necessary preventive measures to palliate effects of a violation.<sup>1094</sup> However, international law dictates that states would be responsible for a violation of international law not only when it is involved through its agents but also when it fails to prevent the violations and punish the perpetrators.<sup>1095</sup>

In *Velazquez-Rodriguez v. Honduras*, the Inter-American Court of Human Rights rightly held that:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to

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<sup>1091</sup> 'Draft Articles on Responsibility of States for Internationally Wrongfully Acts with Commentaries', Report of the International Law Commission, 53<sup>rd</sup> Session (2001), page 38; Brownlie I *System of the Law of Nations: State Responsibility* (1983) 132-166; Przetacznik F 'The International Responsibility of States for Unauthorised Acts of Their Organs' (1989) 1 *Sri Lanka Journal of International Law* 151.

<sup>1092</sup> Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1. C. J. Reports 1999, p. 62, para 62 at page 87.

<sup>1093</sup> ILC Draft Articles on State Responsibility (2001), at page 40.

<sup>1094</sup> ILC Draft Articles on State Responsibility (2001), para 4 at page 39; ICJ Judgment in 'United States Diplomatic and Consular Staff in Tehran' (1980).

<sup>1095</sup> Nollkaemper (2003) 620.

international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.<sup>1096</sup>

That important human rights jurisprudence has also been upheld by the European Court of Human Rights in *Opuz*.<sup>1097</sup>

State responsibility, not being criminal, comes with a consequence under international law.<sup>1098</sup> The consequence is an obligation to repair what has been damaged by an internationally wrongful act.<sup>1099</sup> State responsibility for reparation is unavoidable even when perpetrators did no act in an official capacity.<sup>1100</sup>

Therefore, the states of Rwanda and Uganda, having been implicated in the Congo conflict through violations committed by their armed forces and other governmental actors, should be held responsible for reparations to the victims of atrocity crimes committed in the DRC during the relevant period of the conflict. In the same vein, the DRC, as the state of commission,<sup>1101</sup> should also be at the forefront in providing reparations to the victims.<sup>1102</sup> How can state responsibility be connected to individual responsibility at the ICC despite the court's lack of jurisdiction over states? The following section addresses the issue of state-defendant joint responsibility for reparations under the auspices of the ICC Statute.

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<sup>1096</sup> Case of *Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988, para 172.

<sup>1097</sup> *Opuz v. Turkey*, Application no. 33401/02, Council of Europe: European Court of Human Rights, 9 June 2009, paras 83-86.

<sup>1098</sup> It is submitted that state responsibility is neither criminal nor civil, it is *sui generis*. See, Boggero G 'Without (State) Immunity, No (Individual) Responsibility' (2013) 5 *Goettingen Journal of International Law* 395.

<sup>1099</sup> Article 31, ILC Draft Articles on State Responsibility (2001); Fletcher (2016) 453 – 455.

<sup>1100</sup> Article 2 (3) of the ICCPR.

<sup>1101</sup> 'State of Commission' is an international criminal law terminology meaning a state on whose territory a core crime has been committed. For more on this; Werle (2009) 69.

<sup>1102</sup> Manirabona AM and Wemmers J 'Specific Reparation for Specific Victimization: A Case for Suitable Reparation Strategies for War Crimes Victims in the DRC' (2013) 13 *International Criminal Law Review* 1007; Bassiouni CM 'International Recognition of Victim's Rights' (2006) 6 *Human Rights Law Review* 213.

## 5.4 State-Defendant Reparative Co-Responsibility Under the ICC Statute System

### 5.4.1 Arguments for State-Defendant Co-Responsibility for Reparations

As noted in previous chapters, the ICC reparations system may suffer enforcement hitches if the liability model is not revitalised to respond to its chronic limitations. The current reparations enforcement system does not promise full and effective enforceability of reparations orders.

The trend of the Court has been to seek to provide redress to the victims ‘through’ resources of the TFV, not those of the defendants because they have nothing to offer. That is liability without accountability as a defendant’s responsibility for reparations is executed by a third party (the Trust Fund). That may affect the rights of the victims as there is a high possibility that redress through the Trust Fund’s scarce resources will not be effective, at least in the long run.

Victims of human rights violations have a right to enforceable remedies.<sup>1103</sup> International law demands that reparations ordered must have an enforceability element for them to be certain, meaningful, and effective. As stated by the ECCC in *Duch*, unenforceable awards would be violative of victim’s right to effective redress.<sup>1104</sup>

From the standpoint of legal pragmatism, I posit that the ICC’s practice of ordering reparations against indigent defendants and seeking to enforce them through the TFV creates uncertainty. The uncertainty stems from the failure of the Court to appreciate the fact that; first, the impossibility of providing meaningful reparation through impecunious defendants, and secondly, the need to develop a reparation mechanism that ensures full accountability by extending enforcement responsibilities to other complicity actors such as states and organisations.

Defendant’s indigence is surely an impediment to effective redress.<sup>1105</sup> While all ICC reparation decisions are unanimous that impecuniosity is no bar to ordering reparations against defendants,<sup>1106</sup> the Court should heed to the fact that ‘the inability to pay’ would be a valid justification for extending reparative accountability to complicity states and organisations. The

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<sup>1103</sup> Article 2(3)(a) ICCPR.

<sup>1104</sup> *Duch Appeal Judgment*, Case File 001/18-07-2007/ECCC/SC , para 667.

<sup>1105</sup> *Duch Appeal Judgment*, para 684.

<sup>1106</sup> *Lubanga Appeals Chamber Reparations Judgment*, para 104; *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3778-Red, para 189.

Inter-American Court of Human Rights has rightly held that the right to an effective remedy is satisfied when the court's decisions or judgments are fully enforced.<sup>1107</sup>

That, the right to an 'enforceable right' is intrinsic in victim's right to a remedy. Of particular interest to my point is a statement made by the Court that "It is also necessary that there are effective mechanisms to execute the decisions or judgments, so that the declared rights are protected effectively".<sup>1108</sup>

It is argued that a formal existence of the right to reparation under Article 75 of the ICC Statute is of no relevance to the victims if the court's reparation orders are inexecutable.<sup>1109</sup> As held in the European Court of Human Rights decision in *Airey*, positive international law guarantees rights that are 'practical and effective'.<sup>1110</sup>

To make the victim's right to reparation practical and effective, the ICC needs to craft an enforcement mechanism that would deplete the effects of defendant's indigence and scarce resources at the TFV. Indigence is increasingly becoming a huge burden for the victims<sup>1111</sup> as economic considerations than victims' needs appear to determine the reparation package at the ICC. The attendant consequence to that conundrum could be a partial implementation of reparation orders or the provision of reparations that are practically unresponsive to the actual harms suffered by the victims.

Ideally, the Court may not be able to fully repair the atrocious harm suffered by victims of international crimes. In 2014, the registry of the Court admitted that "...it seems likely that the resources available for reparations for victims in the case will not be sufficient to remedy all the harm caused by the crimes and re-establish the situation prevailing previously for all the victims concerned".<sup>1112</sup>

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<sup>1107</sup> *Case of Acevedo Jaramillo et al v Peru*, Preliminary objections, merits, reparations and costs, IACHR Series C no 144, IHRL 1541 (IACHR 2006), 7th February 2006, Inter-American Court of Human Rights, para 220.

<sup>1108</sup> *Acevedo Judgment* (2006) para 220.

<sup>1109</sup> *Acevedo Judgment* (2006) para 213.

<sup>1110</sup> *Case of Airey v. Ireland* (Application no. 6289/73), European Court of Human Rights, Judgment, 9 October 1979, para 24.

<sup>1111</sup> *Katanga Reparations Order* (2017) para 335.

<sup>1112</sup> Report on Applications for Reparations in accordance with Trial Chamber II's Order of 27 August, ICC-01/04-01/07-3512-Conf-Exp-Anx1 notified on 16 December 2014, para 87.



However, it is expected reparations judgments granted by Court should be fully responsive to the needs of the victims by covering as many harm categories as possible. Sadly, it appears that the implementation of reparation orders will always respond to redress needs, not on the basis of what a victim is entitled to, but on account of economic resources available.<sup>1113</sup>

In other words, reparations are extended on the basis of what kind of redress could be provided from a certain amount of money. The scarcity of resources could also affect the scope of victims' eligibility for reparations in a given situation. In *Lubanga*, the TFV admitted that reparations may not be extended to all potentially eligible victims due to lack of resources.<sup>1114</sup> Therefore, it is clear that the ICC reparation scheme needs to be revitalised to respond to the critical challenge of resource scarcity.

That can be achieved if the reparation provision of the ICC Statute is broadly interpreted to be responsive to pragmatic challenges facing the Court. Broadening the scope of reparation actors to states and organisations could be possible through judicial innovations. The ICC jurisprudence is unanimous that the principle of strict interpretation only applies to criminal responsibility and definition of crimes.<sup>1115</sup> Article 75 is a human rights provision that seeks to enforce a victim's right to reparation. As held by the European Court of Human Rights in *Baykara*, human rights must be interpreted in a manner that renders them practical and effective.<sup>1116</sup> As such, the ICC reparation provision should not be subjected to strict interpretation. Arguably, any interpretative method to Article 75 must bring about results that reinforce the right to reparation under international human rights law.<sup>1117</sup>

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<sup>1113</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Second Report of the Registry on Reparations, ICC-01/04-01/06-2806, para 14.

<sup>1114</sup> Trust Fund for Victims, Draft Implementation Plan for collective reparations to victims Submitted to the Amended Reparations Order of 3 March 2015 in the case against Thomas Lubanga Dyilo (ICC-01/04-01/06), ICC-01/04-01/06-3177-AnxA 03-11-2015, para 27.

<sup>1115</sup> *Katanga* Article 74 Judgment, paras 52 and 57.

<sup>1116</sup> *Demir and Baykara v Turkey*, Merits and just satisfaction, App no 34503/97, (2009) 48 EHRR 54, IHRL 3281 (ECHR 2008), 12th November 2008, European Court of Human Rights, para 66.

<sup>1117</sup> Article 21(3) ICC Statute.

Since Article 75 is unrelated to criminal responsibility and definition of crimes, it is highly critical for the ICC to adopt the European Court of Human Rights' 'living instrument doctrine'<sup>1118</sup> in interpreting Article 75 by coming up with a forward-looking reparations enforcement formula that appreciates 'present day conditions'<sup>1119</sup> that defendants are unable to deliver reparations in mass crime cases.

In my submission, an evolutive approach to reparation adjudications under Article 75 would not be averse to the fact that individuals are not mere perpetrators of core crimes. Since the concern of victims is redress for harm suffered, the apportionment of reparative responsibility should not be limited to criminal defendants. Instead, reparative accountability at the ICC should be reflective of potentially multi-layered perpetration dynamics of international crimes. That underscores the significance of state-defendant partnership in providing redress to victims.

However, it should be noted that the ICC Statute has no express provision for substituting individual responsibility for state responsibility for reparations.<sup>1120</sup> So the question for discussion is whether state-defendant reparative co-responsibility for reparations would be inconsistent with the ICC Statute and international law as alluded to under Article 21(1)(c) of the ICC Statute; and whether it would affect rights of defendants.<sup>1121</sup> I argue that state-individual joint liability for reparations in atrocity crime cases is legally justifiable on account of the following reasons.

First, the ICC is not legally obligated to order reparations against the defendants. The statute provides that "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".<sup>1122</sup> Use of the word 'may' under Article 75(2) is indicative that ordering reparations against defendants is a "discretionary power as opposed to the mandatory cause of action".<sup>1123</sup> Therefore, the Court has the discretion to order or not to order reparations against the

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<sup>1118</sup> Mowbray A 'The Creativity of the European Court of Human Rights' (2005) 5 *Human Rights Law Review* 60-61; See also, Letsas G 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' (2013) *Cambridge University Press Online* 106 – 141.

<sup>1119</sup> *Demir and Baykara v Turkey* (2008) para 68; *Tyrer v. The United Kingdom*, 5856/72, Council of Europe: European Court of Human Rights, 15 March 1978, para 31.

<sup>1120</sup> *Lubanga Appeals Chamber Reparations Judgment*, para 105.

<sup>1121</sup> *Al Mahdi Reparations Order* (2017), para 37.

<sup>1122</sup> Article 75(2) ICC Statute.

<sup>1123</sup> *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09-

convicted defendant.<sup>1124</sup> Does this mean that victims will not have access to redress if reparations are not ordered against the defendant? I would answer this question in the negative.

It is submitted that victims could still receive reparations even when there is no court order against the defendants. The relevant *Article 75(2)* is not a source of substantive rights for the victims but a mere procedural provision on how to effectuate a reparations award for the victims.

Victims' substantive right to reparation is captured under Article 75(1) of the ICC Statute which obligates the Court to establish reparation principles in respect of reparations to the victims.<sup>1125</sup> Since Article 75(1) does not espouse as to when, how, and under what circumstances can the Court establish such reparation principles, the Court may establish reparative accountability precepts that can be applied to complicity states or organisations. Therefore, in the absence of an order against the defendant, victims could still receive reparations from third parties.<sup>1126</sup> In other words, there is nothing in the ICC Statute to suggest that victim's reparative burden cannot be taken up by states or organisations.

Secondly, state obligation to provide reparation under international law does not depend on the result of a criminal trial.<sup>1127</sup> Whether there is a conviction or an acquittal, territorial states are obligated to provide reparations to the victims. In its General Comment 4, the African Commission on Human and Peoples' Rights provides that:

Victims' access to reparation shall not depend on the initiation of and/or successful outcome of an investigation or criminal proceedings against a perpetrator.<sup>1128</sup>

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30, 11 December 2017, para 24; *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09-30, para 61;

<sup>1124</sup> *The Prosecutor v. Uhuru Muigai Kenyatta*, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", ICC-01/09-02/11 OA 5, 19 August 2015, para 41.

<sup>1125</sup> *Lubanga Appeals Chamber Reparations Judgment*, para 55.

<sup>1126</sup> *Duch Appeal Judgement* (2012), para 666.

<sup>1127</sup> Article 25(4) and 75(6) ICC Statute.

<sup>1128</sup> General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), African Commission on Human and Peoples' Rights, 2017, para 33 at page 10.

In essence, a person does not become a victim on account of a perpetrator's prosecution and conviction or acquittal. Victimhood exists even when the perpetrator has not been identified, prosecuted, and convicted or acquitted.<sup>1129</sup>

Thirdly, the drafting history of the ICC Statute and even the current reparation framework of the ICC point to the fact that states are indispensable in the provision of *meaningful* reparations to the victims in mass crime situations. The drafting history of the ICC Statute indicates that the idea of state responsibility for reparations is not farfetched.<sup>1130</sup>

The Draft Statute presented by the ICC Preparatory Committee for discussion at a Diplomatic Conference in Rome included a proviso under Article 73 (Reparation to Victims) which would have allowed the ICC to order reparations against states if convicted persons were indigent or they acted for their states. The relevant part of the draft Article 73 read:

(b) The Court may also make an order or [recommend] that an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation, be made by a State:

- if the convicted person is unable to do so himself/herself; and  
- if the convicted person was, in committing the offence, acting on behalf of that State in an official capacity, and within the course and scope of his/her authority;

(c) In any case other than those referred to in subparagraph (b), the Court may also recommend that States grant an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

The draft Article 73 on reparations was subject to difficult negotiations in Rome.<sup>1131</sup> States were strongly opposed to the idea of enabling the ICC to award reparations against them.<sup>1132</sup> One critical point which was raised in opposition to that was that the ICC was meant to deal with individual culpability and not state responsibility.<sup>1133</sup> The rationale for the argument gathered from Japan's point of view is that awards against states would make the doctrine of individual responsibility dysfunctional.<sup>1134</sup>

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<sup>1129</sup> UN Basic Principles on Reparations, para 9.

<sup>1130</sup> Moffet (2014) 152; Benedetti et al *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (2014) 154 – 159.

<sup>1131</sup> Lee R (ed) *The International Criminal Court: The Making of the Rome Statute* (1999) 267.

<sup>1132</sup> Khan S *Rights of the Victims: Reparation by the International Criminal Court* (2007) 39; Moffett (2014) 152;

<sup>1133</sup> Lee (1999) 268; Moffett (2014) 151.

<sup>1134</sup> Lee (1999) 268.

In the end, France and UK submitted a compromise formulation that omitted state responsibility for reparations, which was then accepted by states.<sup>1135</sup> Succinctly, Article 73 embodied the customary position of international law that reparation for victims of human rights violations should come from the state if the perpetrator is impecunious.<sup>1136</sup> Even more, prosecution and punishment of state officials responsible for human rights violations do not alleviate state responsibility for such violations.<sup>1137</sup>

Fourthly, co-responsibility is not an introduction of a new norm under international law, but a theoretical proposal on how state responsibility could be operationalised under the ICC legal regime without upsetting the individuality of criminal responsibility. Furthermore, reparations entail civil responsibility as opposed to criminal liability (the concept of guilt). Consequently, the invocation of state responsibility under the ICC framework would not necessarily mean that states are guilty for the crimes charged against the defendants.

Holding states accountable for reparations does not cause dysfunctionality of individual criminal responsibility. Individual and state responsibility are complementary and not substitutional for each other. States are merely responsible to provide reparations to territorial victims.

The intersection of individual and state responsibility for reparation in criminal contexts may hinge on the deconstruction of the concept of guilty and responsibility. While individuals have been perceived as direct perpetrators of violations, states have largely participated as aiders, abettors, and supporters of individuals who carry out state criminal policies (for example, Sudan, Syria). Indeed, the commission of international crimes involves many actors and international criminal law does not reject the notion that states could have a role in the perpetration of such acts. In a broader sense, the harm occasioned to victims of violations could result from actions or inactions of both states, individuals, and organisations.

In principle, criminal law assigns culpability to individuals on the basis of *mens rea* (guilt mind) and *actus reus* (criminal conduct). It follows that all individual perpetrators, whether as principals or accessories, are equally responsible for the crimes committed, meaning that guilt is indivisible

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<sup>1135</sup> Schabas W *The International Criminal Court: A Commentary on the Rome Statute* (2010) 880; Lee (1999) 269; Moffett (2014) 152.

<sup>1136</sup> Moffett (2014) 152; Article 16 of the UN Basic Principles on Reparations.

<sup>1137</sup> Draft Articles on State Responsibility (2001) page 143.

even though there is state involvement.<sup>1138</sup> However, when it comes to harm, it would be improper to say that an individual is liable for 100% of the harm.

That is to say, Thomas Lubanga who has been convicted for the war crime of conscripting child soldiers, may not necessarily be responsible for 100% of the harm resulting from child conscription in Ituri, as there were many players in the conflict including foreign states who also recruited and used children in the war. At sentencing, in addition to claiming that he was not the most responsible person for the crimes committed in Ituri, Lubanga argued that the governments of the DRC, Rwanda, and Uganda were extensively involved in the crimes.<sup>1139</sup> What comes out of this sentence mitigation attempt underscores the point that defendants are not to blame for the whole harm occasioned to the victims in atrocity environments.

Harm can be quantified. For victims, harm is harm, whether it results from a single or multiple causations. Therefore, the causation of the harm could be divisible between states and individuals, especially in the context of mass crimes.<sup>1140</sup> Thus, the argument that a confluence of individual and state liability for reparations in the context of ICC proceedings diffuses individual criminal liability falls as both could still be held liable for reparation under international law.

Likewise, in the context of atrocity crimes, it would sometimes be difficult to draw a line between individual liability and state responsibility as such crimes entail participation of states. Consequently, both states and individuals, albeit on different levels of accountability rules, can be jointly and severally held liable for reparations in the wake of massive human rights violations. Unlike individuals, states have deeper pockets and governmental structures that may enable them to initiate viable reparation programs, as was the case with the transitional Latin American States.

Fifthly, prevailing international criminal tribunal's jurisprudence is unanimous that large scale reparations for mass crime victims can only be successfully implemented by governments and not individual defendants.<sup>1141</sup>

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<sup>1138</sup> Mégret (2016) 10.

<sup>1139</sup> *Lubanga* Sentence Decision, para 83.

<sup>1140</sup> Mégret (2016) 11.

<sup>1141</sup> *Duch Trial Judgment*, Case File/Dossier No. 001/18-07-2007/ECCC/TC, paras 674 and 675.

As discussed, there are legal justifications under international law for twin reparative responsibility for reparations between states and individuals. How then could reparative co-responsibility be triggered under the ICC system?

#### **5.4.2 Operationalisation of State-Defendant Co-Responsibility**

As noted earlier, the ICC Statute neither grants the Court with jurisdiction over state responsibility nor provides for powers to issue reparation orders against states. In *Lubanga*, the Appeals Chamber noted that there is no provision under the ICC Statute that would allow replacement of individual liability<sup>1142</sup> with state responsibility for reparations.

Legally, a court of law cannot adjudicate on a matter over which it has no jurisdiction.<sup>1143</sup> Therefore, absent express provision granting jurisdictional mandate, international tribunals do not have *inherent powers* to order enforcement measures against states.<sup>1144</sup> Granting orders that are incapable of enforcement would be a mockery of the victims and potentially retraumatizing. In law, remedies must be enforceable for them to be effective.<sup>1145</sup>

In *Duch*, the ECCC refused to endorse victims' reparation demands for lack of jurisdiction as orders sought were directed at the national government.<sup>1146</sup> Incapable of issuing binding orders against the government, the ECCC could only request the government of Cambodia to participate in the implementation of reparations by providing financial resources.<sup>1147</sup> The ECCC further observed that it would be legally untenable to issue reparation orders against the government since the state was neither a party to the proceedings nor had been allowed making observations.

The specific paragraph reads, in part:

...unlike the framework applicable before the ICC, the ECCC legal framework does not provide for a mechanism to invite representations from the State. It would run counter to basic principles of procedural fairness to issue binding orders against the Cambodian State, or, to the same effect, any individual or legal

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<sup>1142</sup> *Lubanga Appeals Chamber Reparations Judgment*, para 105.

<sup>1143</sup> *Duch Appeal Judgement* (2012) para 663.

<sup>1144</sup> *Prosecutor v. Tihomir Blaskic*, Judgement on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ICTY, para 25.

<sup>1145</sup> *Duch Appeal Judgement* (2012) para 663.

<sup>1146</sup> *Duch Appeal Judgement* (2012) paras 663, 710, 712, and 716.

<sup>1147</sup> *Duch Appeal Judgement* (2012) para 717.

entity, which has neither been a party to the proceedings nor been afforded the opportunity to submit observations.<sup>1148</sup>

The rationale that could be garnered from the courts' observations is that it would have been legally tenable for the ECCC to order reparations against the state if the government was a party to the case and it submitted observations in which it accepted responsibility for reparations.

Transposing the ECCC jurisprudence to the ICC, I posit that it would be legally acceptable for the ICC to order reparations against states or directly requesting state assistance in implementing reparation orders if a particular state has accepted responsibility and participated in reparation proceedings pursuant to Article 75(3) of the ICC Statute and Rule 98(4) of the REP. Article 75(3) allows for state participation in reparation proceedings and the mandatory requirement is that the Court is obligated to take into account the state's reparation observations in the final order.<sup>1149</sup>

Thus, governments could use Article 75(3) procedure to record their commitment with the Court on how they would contribute to providing reparations to victims. This voluntary approach to state responsibility could provide an avenue for national governments to earmark, plan, and submit redress proposals before the Court. Given the indigence of most defendants, the Court could be willing to accept and endorse state reparation programs.<sup>1150</sup>

Likewise, Rule 98(4) of the ICC RPE provides for judicial consultations in consequence to which the Court may order that reparations be implemented by national authorities.<sup>1151</sup> This is another opportunity for governments to voluntarily accept reparative responsibility.

However, the crucial point here is that the whole state participation procedure under Article 75(3) and Rule 98(4) is optional to the states.

Empirical evidence indicates that conflict states have not made use of that process. The question then is, how could the Court order reparations against states or effectively ask for state assistance

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<sup>1148</sup> *Duch* Appeal Judgement (2012) para 656.

<sup>1149</sup> Article 75(3) of the ICC Statute provides: "Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States".

<sup>1150</sup> *Duch* Appeal Judgement (2012) para 703.

<sup>1151</sup> Rule 98(4) provides: "Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund".



in providing reparations when states have not activated and accepted reparative responsibility under the participatory procedure alluded to? The section below provides a two-pronged approach to effectuating state-defendant reparative co-responsibility under the ICC Statute.

### **5.4.3 State’s Voluntary Acceptance of Reparative Responsibility under Article 75(3)**

As explained above, states may opt to voluntarily accept reparative responsibility under Article 75(3). This procedure could be triggered by the Court or any interested state. However, the current practice indicates that the Court has been using this process *post factum* to the reparation decisions.<sup>1152</sup> It would be meaningful if state cooperation is sought before the Court delivers a reparation decision.

In *Katanga*, it was clear to the Court that the DRC government wanted to participate in reparations. However, instead of using its powers under Article 75(3) and Rule 103<sup>1153</sup> to invite the DRC government to submit its observations before the reparation decision, the Court delivered its judgment without the government’s input and then ordered the TFV to contact the government to learn how it would contribute to reparations.<sup>1154</sup>

Similarly, on 15<sup>th</sup> July 2016 in *Lubanga*, the Court made an order *post factum* to its 2015 reparation decision in which it requested the DRC government and interested organisations to “...present it with proposals for future collective projects to support the setting up of a range of collective reparation projects for the former child soldier victims of Mr Lubanga”.<sup>1155</sup>

While Rule 103 of the RPE empowers the Court to solicit for observations on any matter from states or organisations at any stage of the proceedings, I argue that it would not be in the interests of victims to have such observations after a reparation decision. As demonstrated, the Court tries to use Rule 103 to request for help of the DRC government in delivering redress to the victims.

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<sup>1152</sup> *Katanga* Reparations Order (2017) para 325; *Lubanga* Reparations Judgment (2012), para 278.

<sup>1153</sup> Rule 103 of the ICC RPE provides: “At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate”.

<sup>1154</sup> *Katanga* Reparations Order (2017) para 325.

<sup>1155</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Order Pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/04-01/06-3217-tENG, 15 July 2016, para 8.

That procedure could be helpful if done before the decision and as per Article 75(3) so that third party observations could be incorporated in the final reparation order.

It is submitted that the Court could *encourage* territorial states to use Article 75(3) procedure to accept reparative responsibility, in whole or in part, for the harm caused to the victims. Voluntary acceptance of responsibility may apply to both territorial states and third states since victim's reparations could also come from third parties, including those not responsible for the harm. The significance of state's reparative interventions is buttressed by the wording of Article 75(3) whereby the Court is obligated to issue a reparation order that considers representations made by governments, victims, and interested persons. The Article reads:

Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

Therefore, when a state participant in reparation proceedings voluntarily commits to the Court of its desire to provide redress to the victims, that would serve as 'consent to jurisdiction' in consequence to which the Court may issue a binding reparation order against the particular state. Therefore, if a national government submits reparation observations under Article 75(3) in which it records a commitment to implement certain reparations for the victims, the Court would be legally justified to heed to that commitment in its final reparation order notwithstanding the scope of the defendant's reparative responsibility.

The basis of a court's reparation order against a state would be its **voluntary acceptance** of responsibility to provide redress to the victims under the auspices of the ICC. Arguably, that would be an *ad hoc* acceptance of the ICC's jurisdiction on reparations. In *Duch*, the ECCC hinted that it would have been able to issue a reparation order against the Cambodian state if there was voluntary acceptance of responsibility for reparations.<sup>1156</sup>

Arguably, voluntary acceptance of legal obligations or court's jurisdictions by *consent* is a standard practice for states under international law. For example, a state's consent is key for the functioning of the International Court of Justice.<sup>1157</sup> Also, absent state consent, a treaty cannot

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<sup>1156</sup> *Duch* Appeal Judgement (2012) para 703.

<sup>1157</sup> Article 36, Statute of the ICJ.

create rights or obligations for non-signatories.<sup>1158</sup> There are also scenarios through which non-party states could accept the jurisdiction of the ICC.<sup>1159</sup>

Therefore, Article 75(3) approach to co-responsibility is predicated on obtaining state consent before the ICC can order reparations. It would be conceivable that not many states will take that route and therefore the ICC may lack a basis for ordering reparations against governments. The following part offers an escape route to this conundrum.

#### **5.4.4 Invocation of State's Reparative Responsibility by *Recommendatory Orders***

Considering that individual criminal responsibility does not negate state responsibility,<sup>1160</sup> and in response to the state's violation of the duty to prevent and protect people against violations, the ICC could invoke international human rights law principles through Article 21(3) of the ICC Statute by demanding that *territorial* states should provide redress to the victims. State obligation to redress harm suffered by its territorial citizens is well enshrined under international law.<sup>1161</sup>

In *Maritza Urrutia v. Guatemala*, the Inter American Court of Human Rights held that impunity, which entails non-prosecution and punishment of the perpetrators, constitute a violation of state's human rights obligations towards the victims and it precipitates repetition of violations.<sup>1162</sup> Consequently, the Court deemed that the conduct of investigations on the violations and the punishment of the perpetrators by the territorial state constitute an important segment to the victim's right to redress.<sup>1163</sup>

In fact, during the preparatory work for the ICC Statute, the DRC government submitted that the ICC should be enabled to order reparations against territorial states for failure to protect.<sup>1164</sup> In *Lubanga*, Women's Initiative for Gender Justice rightly requested the Court to assign reparative responsibility to the DRC government as the territorial state concerning victims of the Lubanga

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<sup>1158</sup> Article 34 Vienna Convention on the Law of Treaties of 1969.

<sup>1159</sup> Articles 12(3) and 11(2) ICC Statute.

<sup>1160</sup> Article 25(4) ICC Statute; *Lubanga* Reparations Order (2015) para 50.

<sup>1161</sup> Paras 16 and 16 of UN Basic Principles on Reparations.

<sup>1162</sup> Inter-American Court of Human Rights, Case of *Maritza Urrutia v. Guatemala*, Judgment of November 27, 2003 (Merits, Reparations and Costs), para 176.

<sup>1163</sup> Case of *Maritza Urrutia v. Guatemala*, para 177.

<sup>1164</sup> Preparatory Committee on the Establishment of an International Criminal Court 16 March-3 April 1998, Proposal by the Democratic Republic of Congo, A/AC. .249/1998/WG.4/DP.38, 27 March 1998.

crimes.<sup>1165</sup> However, that request was not acted upon by the Court in an authoritative manner as explained earlier.

When a territorial state does not trigger the Article 75(3) mechanism to accept responsibility, the ICC could issue semi-binding recommendatory orders by requesting such states to, first, implement certain complex and resource-intensive reparations measures, and secondly, ask them to cooperate effectively in the enforcement of reparation judgments against defendants.

I refer to such orders as semi-binding recommendations as they would not emanate from the court's express statutory powers, but from customary international law. In *Duch*, the ECCC has, albeit with a soft language, issued recommendations to the government of Cambodia concerning reparations that may never be enforced against the convicted person.<sup>1166</sup>

The drafting history of the ICC Statute proves that the concept of recommendatory reparation orders against states is possible. The Drafters, perhaps with the understanding that executing state responsibility in criminal settings would be impossible, came up with a provision that would have allowed the ICC to recommend victims' reparations against states that are complicit in the crimes or when the defendant is impecunious.<sup>1167</sup> Despite being in line with international human rights law, the state responsibility aspect in that provision was dropped at the Rome Diplomatic Conference for the fear that states would reject it.<sup>1168</sup>

Alternatively, recommendatory orders for reparations could also be issued under the *obligation to cooperate* provision.<sup>1169</sup> In all reparation orders, the ICC has called upon states to 'facilitate' the enforcement of its decisions.<sup>1170</sup> Such requests for cooperation have been rather general and they do not relate to specific reparation questions. Since the obligation to cooperate provisions are

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<sup>1165</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Observations of the Women's Initiatives for Gender Justice on Reparations, ICC-01/04-01/06, 3 October 2016, para 27.

<sup>1166</sup> *Duch* Appeal Judgement (2012) para 712.

<sup>1167</sup> Preparatory Committee of the Establishment of the International Criminal Court, 16 March – 3 April 1998, A/AC.249/1998/CRP.12, 1 April 1998, at page 19 and 20.

<sup>1168</sup> See "Article 73, Reparations to Victims, available at <http://www.legal-tools.org/doc/dc15c8/> (accessed 3 April 2018).

<sup>1169</sup> Article 86 of the ICC Statute.

<sup>1170</sup> Katanga Reparations Order (2017) para 324; *Lubanga* Reparations Judgment (2012) paras 256 and 278; *Lubanga* Reparations Order (2015) para 50.

meant to ensure that international tribunals operate smoothly,<sup>1171</sup> the Court could use Article 86 of the ICC Statute to ask for state participation in specific reparation measures for the victims.

Aptly put, state responsibility for reparations in the ICC context could be operationalised by way of voluntary acceptance of responsibility or through reparative recommendations endorsed by the Court. It is highly probable that the enforcement limitations intrinsic to the defendant-based reparations could be overcome or immensely reduced if there are state interventions under the proposed modalities. Participation of states could smoothen the identified enforcement huddles and possibly enhance the effectiveness of the ICC reparation system.

## **5.5 Benefits of State Participation in Atrocity Crime Reparations**

State cooperation is essential for the proper functioning of any international tribunal. Reparative co-responsibility could enhance participation of national governments in the implementation of reparations. Cases before the Court have proved that governments are indispensable for successful court-ordered reparations.

In light of the foregoing, I argue that states, other factors remaining constant, could be better placed to facilitate the provision of meaningful redress to the victims due to the following reasons.

### **5.5.1 Wider Resource Base**

Governments, compared to individuals and the TFV, have a relatively wider resource base that may work out well for victims. That has been the case with reparations granted to victims of past crimes in Latin American states following dictatorships, enforced disappearances, and extra-judicial killings. Such reparations came in the form of ‘state-sponsored programs’ that ranged from a return of illegally acquired property, compensation for economic losses, provision of education and healthcare, monthly pensions, erection of commemorative monuments, one-off payments, and provision of housing.<sup>1172</sup>

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<sup>1171</sup> *Prosecutor v. Tihomir Blaskic*, ICTY, para 31; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-151 , 26 March 2013, para 22.

<sup>1172</sup> Comparative Country Studies Regarding Truth, Justice, and Reparations for Gross Human Rights Violations: Brazil, Chile, and Guatemala, April 2014 IHRLC Working Paper Series No. 2, page 9. Available at <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Working-Paper-2-India-Comparative-Country-Studies-151027.pdf> (accessed 3 April 2018).

### **5.5.2 In Situ Understanding of the History of Atrocities**

In situ knowledge of the perpetration dynamics of atrocity crimes is needed for the proper planning and implementation of reparations. Naturally, governments have a good understanding of the nature and types of crimes perpetrated in their territories. For example, in *Lubanga*, the ICC requested the DRC government to provide it with local information on the crimes and past or future collective reparation programs for the child soldiers.<sup>1173</sup>

### **5.5.3 Large Number of Victims**

Mass victimisation creates a large pool of victims with different needs. For the Courts, it could be an uphill and resource-intensive task to identify every victim for reparations.<sup>1174</sup> Ideally, atrocity crime victims are too many to identify through a judicial process which suffers from complex procedural rules and scarcity of time and resources. Administrative reparations by states may not be worked out by strict adherence to ‘crime for harm’ causation principles. That would allow for larger victim participation and easier identification of eligible victims.

### **5.5.4 Network of Civil Servants**

Implementation of reparation programmes for victims of mass victimisation is highly demanding in terms of human resources. Governments have an ever-ready civil service that could be used to identify and verify victims as well as gather, collate, and analyse information on victims. Public resources could also be used for planning and for the provision of logistical necessities for enforcing reparations.

### **5.5.5 Access to Information on Victims**

The planning and implementation of reparation programmes require an avalanche of information on victims. Obtaining complete and precise information on mass crime victims would be difficult for a court of law. Governments, through state institutions, could be able to obtain and piece together crucial information on the victims.

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<sup>1173</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Order pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/04-01/06-3217-tENG, paras 7 and 8.

<sup>1174</sup> *Al Mahdi* Reparations Order (2017), para 141.

The absence of critical information on the victims has been identified as one of the main obstacles in the *Lubanga* reparation case. The TFV has admitted that state cooperation is necessary for it to be able to obtain information on victims of the Lubanga crimes in Ituri.<sup>1175</sup> The Court has requested the DRC government to disseminate information on ‘disarmament, demobilisation, and rehabilitation’ programs undertaken in the country to enable the Court to identify eligible former child soldiers for collective reparations.<sup>1176</sup> In certain situations, governments may be reluctant to share such information with the Court especially when it is apparent that they do not ‘own’ the reparation program. State-defendant partnership for reparations could make governments feel part of the process.

#### **5.5.6 Local Partners are Critical for ICC Reparations**

The Hague based ICC may not have local expertise and experience to enable it to implement reparation programmes in remote territories of foreign countries. The Court has already held that reparations should be provided in accordance with the local conditions in a given situation.<sup>1177</sup> To do that, one must have a good understanding of the culture, administrative and political hierarchies, social values, and the prevailing local challenges. The TFV could only be able to implement reparations that adhere to local values if it seeks and obtain the collaboration of local implementing partners such as NGOs and local authorities.<sup>1178</sup> This could be done easily through co-responsibility.

#### **5.5.7 Mass Reparations Entail Extensive Planning and Implementation**

Redress for mass violations are by nature very extensive in scope and extremely demanding regarding resources and administrative logistics. In the absence of non-cooperation from governments, certain collective reparation programmes cannot be implemented as they may require legal clearances and administrative approvals from national authorities. For example, in

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<sup>1175</sup> *Lubanga* Reparations Draft Implementation, ICC-01/04-01/06-3177-Red, at para 41.

<sup>1176</sup> *The Prosecutor v. Thomas Lubanga Dyilo* , Order inviting the Government of the Democratic Republic of the Congo to Submit Observations on the Participation of Child Soldiers in Programmes for the Disarmament, Demobilisation and Reintegration of Armed Groups in Ituri, ICC-01/04-01/06-3260-tENG , 22 November 2016, paras 4-6.

<sup>1177</sup> *Al Mahdi* Reparations Order (2017), para 148.

<sup>1178</sup> *The Prosecutor v. Thomas Lubanga Dyilo* , Additional Programme Information Filing, ICC-01/04-01/06-3209, paras 46-48.

*Katanga*, the Court has requested the government to waive taxes and school fees for certain reparation projects and to provide free land as restitution for the victims who lost their land during the conflict.<sup>1179</sup> Issues such as these could be dealt with easily when national authorities become reparation partners through co-responsibility.

## 5.6 Chapter Conclusion

The chapter has proposed *co-responsibility* as a mechanism for solving the identified inherent limitations of the ICC reparation regime. While the ICC is firmly committed to making sure that victims receive meaningful redress, the thesis demonstrates that the ICC reparation regime is vulnerable to structural and legal limitations relating to scarce resources, prosecutorial limitations, and indigence of the defendants.

Such structural and legal impediments may not palliate if the ICC is unable to exercise *ad hoc* jurisdiction over [conflict] states when it comes to reparations. Reparative complementarity springing from co-responsibility between individual perpetrators and complicity states could serve as an antidote to such impediments.<sup>1180</sup>

The involvement of states in court-ordered reparations should, whenever possible, be earmarked for reparations that require significant financial resources as well as those that are inexecutable in the absence of state cooperation.<sup>1181</sup> For example, collective reparations for former child soldiers in the Eastern DRC can only be successfully implemented by national authorities. Same applies to service-based reparations such as psychological and physical rehabilitation and the provision of educative and other preventative redress measures.

As discussed, states could be able to somehow fill the gaps of the defendant-focused reparations. Making the ICC able to award reparations against states is not a novel idea. Regional human rights courts<sup>1182</sup> and even domestic courts have been issuing reparation orders against states. When territorial states refuse to implement reparation orders or recommendations stemming from co-

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<sup>1179</sup> *The Prosecutor v. Germain Katanga*, Draft implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017 (ICC-01/04-01/07-3728), ICC-01/04-01/07-3751-Red, para 70.

<sup>1180</sup> Moffett (2013) 383-384.

<sup>1181</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Observations on Issues Concerning Reparations, ICC-01/04-01/06-2863, 18 April 2012, paras 124 and 128.

<sup>1182</sup> The Inter-American Court of Human Rights; The European Court of Human Rights, and the African Court of Human and People's Rights.



responsibility, the Court could make a finding of non-cooperation under Article 87(7) of the ICC Statute and refer the matter to the Assembly of States Parties for action.

In addition, bilateral countermeasures by individual states or collective sanctions by the ICC Statute signatories may force recalcitrant states to act for the victims. For ICC cases that originate from the UN Security Council,<sup>1183</sup> the ICC could seek interventions of the UN through sanctions or diplomatic pressure.<sup>1184</sup>

Another radical solution is for state parties to the ICC Statute to change the wording of Article 75<sup>1185</sup> to enable the ICC to issue reparation orders against states and or individuals especially when the perpetrator is impecunious and there is proven state involvement in the perpetration of gross violations.

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<sup>1183</sup> Article 13(b) of the ICC Statute.

<sup>1184</sup> *Prosecutor v. Tihomir Blaskic* (1997) para 33.

<sup>1185</sup> Amendments to Article 75 could be moved by States parties to the ICC Statute as per Article 121 of the ICC Statute.

## CHAPTER SIX

### GENERAL CONCLUSION

The overriding objective of the thesis has been to study the role of the ICC in the provision of reparative justice to victims of international crimes. The study has focused on the DRC as a *situation* country at the ICC. Specifically, the study has examined the reparation judgments in *Lubanga*, *Katanga*, and *Al Mahdi* to determine their compatibility with international human rights law.

As indicated in chapter one, the specific objectives of the study have been to: provide a historical account of the Congo conflict and the resulting intervention of the ICC; analyse the role of victims in mass crime prosecutions; analyse the specific legal and factual issues surrounding the ICC reparation regime to determine the potential contribution of the Congolese cases to the development of the jurisprudence of the Court; examine the implementation framework for reparation orders issued by the Court to determine their utility level in ensuring effective, adequate, and prompt reparations as required under International Law.

Throughout the thesis, the study grapples with the following questions. First, is the ICC legal regime adequately capable of providing meaningful reparations to the victims of atrocity crimes? Secondly, is the Congolese legal system and post conflict justice supportive of reparative complementarity? The section below provides some general conclusions to these questions.

The following issues are the major findings of the study.

1. The ICC's reparation system as currently constituted does not ensure accessibility, equality, equity, non-discrimination, and satisfaction for the victims as required under international human rights law.
2. Defendant-based reparations are inherently limited in scope due to selective charges.
3. The defendant-focused enforcement model, despite being legal under Article 75, does not ensure an effective remedy for the victims for lack of an enforceability element owing to indigence and resource constraints.
4. The ICC reparation system creates a pyramid of victims with unequal status – qualified and unqualified victims due to acquittals, non-prosecutions in crucial cases (Al-Bashir and Kenyatta), narrow charging (Lubanga), and mistrials (Bemba and Ruto and Sang cases).

5. The implementation mechanism for reparations is uncertain and unsustainable. The enforcement uncertainty stems from the fact that the resource-strained Trust Fund for Victims cannot enforce reparation orders in full and promptly.
6. The inherent limitations of the ICC reparation regime are compounded by the fact that there has been very weak positive reparative complementarity on the part of Congo as a *situation* country. That could also be the case with other *situation* countries before the Court.

On the role of victims, the study has demonstrated that victims have a dual status. In criminal proceedings, victims have been regarded as ‘participants’ with limited rights to be determined at the discretion of the Court. In reparation proceedings, victims assume the role of ‘parties’ with more specific rights enshrined in the ICC Statute.

In the general framework of criminal proceedings, the thesis provides a rights-based analysis of the victim participation regime. In chapter three, an analysis of various decisions of the Court has revealed that the Court does not have a ‘unified’ admission system that would ensure meaningful participation of victims.

As demonstrated, the standard admission system for the victims under Rule 89 is not suitable for mass crime prosecutions. The study makes a case for a new system that not only upholds the rights of the parties and participants but also creates an admission procedure that is certain, time-conscious, effective, and sustainable. To cure the deficiencies of the victim participation procedure at the ICC, the study has proposed a hybrid mechanism that allows for both individual and collective application and participation.

Furthermore, it has been argued that, to effectuate participation as *collectives*, the Court may develop a set of judicial principles on the participation criteria of victims as communities or associations. That could maximise resources and serve the interests of victims who are not attuned to participating in individualised settings.

Regarding post conflict justice and reparative complementarity, it has been demonstrated, in chapter two and three, that the magnitude of the Congo conflict required multi-faceted accountability measures domestically. That underscores the presence of a transitional justice mechanism that, while striving for peace, introduces justice and accountability measures to deal with a vast array of perpetrators and violations to enable the victims to obtain the truth regarding the crimes and to be redressed effectively for the harms suffered.

However, as discussed in chapter two, the post conflict transitional justice in the DRC was based on ‘rebuilding the state’. As such, justice for the victims was not a priority. The study has indicated that the state reconstruction perspective was not attuned to building strong rule of law institutions as an essential step for the provision of justice. As a result, state institutions of justice became weak and ineffective, leading to very few and inconsequential prosecutions. In general, it is safe to conclude that the DRC did not act for the victims as required under International Human Rights Law.

On the ICC reparation system, the study demonstrates that the implementation framework for reparations suffers from two major shortcomings. First, impecunious defendants, and, secondly, scarcity of resources.

To palliate what appears to be chronic shortcomings of its reparation system, it has been argued that the ICC should disentangle itself from the inherently limited defendant-focused reparations by encouraging the participation of territorial states and organisations in the provision of reparations to the victims. In chapter two, a case is made for reparative complementarity that presupposes an active role for states in redressing the victims. It has been submitted that the concept of reparative complementarity is not novel. The ICC Statute, under Articles 25(4) and 75(6) recognises that individual criminal responsibility does not absolve states of their responsibilities under international law.

Furthermore, chapter two provides an account to the fact that reparative complementarity is also applicable to the ICC through a five-pronged state participation regime in the reparation proceedings. For clarity, it has been noted that states could participate in the reparation proceedings by commenting on expert reports on reparations; in the implementation of reparation decisions (the ICC can order an implementation of reparations through inter-governmental organisations); in the enforcement of reparation decisions; in informational reparations and publicity of reparation proceedings and decisions; and in the provision of reparation resources through the Trust Fund.

It has further been demonstrated that reparative complementarity is critical for reparations in atrocity crime environments for a number of reasons.

1. The selective nature of international prosecutions brings about limited reparations due to limited charges.

2. Violations of certain socio-economic and cultural rights cannot be redressed through case-based reparations.
3. Certain categories of reparations such as preventative redress measures that guarantee non-repetition of the violations and non-economic reparations such as *satisfaction* cannot possibly be ordered through defendant-focused criminal reparations.
4. The concept of ‘no conviction no reparation’ is against a human rights principle that recognises victimhood in the absence of prosecutions or convictions. Consequently, reparative complementarity, which is not necessarily judicial-based, could extend reparations to victims who have been left out in the cold due to acquittals or mistrials.
5. The difficulty with victim identification systems in criminal trials makes it near impossible to identify all eligible victims. Thus, the unidentified but existing victims could be able to receive reparations outside of the judicial framework, for example, through state administrative reparations.

To enforce reparative complementarity through the ICC reparation system, the thesis, in chapter five, presents a state-defendant reparative co-responsibility as an enforcement mechanism under Article 75(3) of the ICC Statute to mitigate limitations of conviction-based reparations as discussed. The author understands that the ICC Statute creates the ICC as an institution to end impunity for egregious violations of human rights. The Court may never achieve this goal if victims of core crimes are not redressed adequately, effectively, and promptly as required under international human rights law.

It has been argued that the formal recognition of the right to reparation for the victims of international crimes may not mean anything to the victims if they do not receive meaningful redress. Meaningful redress calls for reparation orders that are enforceable. To achieve the object and purpose of the ICC Statute of ending impunity for atrocity crimes through prosecutions and reparations, it has been submitted that the ICC needs to quickly move away from its formalistic approach to interpreting Article 75 by inventing an alternative reparation’s implementation mechanism that involves states and organisations.

The quickest way to fix the limitations of the ICC reparation system would have been through statutory amendments aimed at expanding the jurisdictional mandate of the Court on reparations.

However, that approach may not be feasible as history shows that substantive parts of international instruments cannot be amended easily.<sup>1186</sup>

The proposed state-defendant reparative co-responsibility can still be implemented without amending the ICC Statute. As noted in chapter five, contemporary international law recognises the existence of duality of responsibility between states and individuals in mass crime violations. As per conventional international law, the only consequence for violations of international law by states is the obligation to provide reparations. For the individuals, they may be subjected to both criminal sanctions such as imprisonment and reparations.

Since state responsibility for reparations is not criminal, it has been demonstrated that the ICC could deal with that issue in the context of its powers under the ICC Statute and through the application of customary international law and international human rights law. State responsibility for reparations could result, not only from breaches of international law attributable to a state, but also from the failure to prevent or protect people from the violations. The proposed implementation mechanism is neither inconsistent with the ICC Statute nor international law.

Since Article 75 of the ICC Statute is not a provision dealing with substantive criminal law issues (definitions of crimes and modes of responsibility), it should be interpreted progressively as a human rights provision. Reading the living instrument doctrine into Article 75 of the ICC Statute, the author argues that the said provision should be interpreted in a manner that appreciates the attendant obstacles to enforcing reparations through impecunious defendants. Therefore, present day circumstances of the unenforceability of reparations through defendants should necessitate the Court to look beyond the convicted persons, by also extending reparative liability to complicity states and organisations.

Chapter five has demonstrated that co-responsibility can be triggered as ‘voluntary acceptance of reparative jurisdiction of the ICC’ when a state accepts reparative responsibility and participates in the reparation proceedings pursuant to Article 75(3) of the ICC Statute and Rule 98(4) of the

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<sup>1186</sup> Klabbers J ‘Treaties, Amendment, and Revision’, Max Planck Encyclopedia of Public International Law (2006), para 20, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1483> (accessed 3 September 2018).

Rules of Procedure and Evidence. Acceptance of jurisdiction by consent is a standard practice by states in their various legal engagements in international settings.

When a state has chosen not to accept reparative responsibility through the Article 75(3) statutory avenue, the Court could still apply international human rights law and customary international law by issuing semi-binding recommendatory reparative orders to *territorial* states. I refer to them as ‘semi-binding orders’ because they are made at the behest of customary international law as opposed to positive international law. When the duty to protect and prevent is breached especially with respect to gross human rights violations reaching the threshold of crimes under international law, territorial states cannot escape the responsibility to redress the victims.

In the alternative, it has also been argued that such reparative orders directed at territorial states could also be issued by the ICC on the basis of the obligation to cooperate provision under Article 86 of the ICC Statute. Since the main objective of such a provision is to enable the Court to discharge its mandate effectively, the ICC can establish, through reparation principles under Article 75, that reparations in a certain case cannot possibly be implemented through the defendants and, pursuant to that, it may direct that the territorial state should take charge of reparations.

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