

Article

Lubanga and its Implications for Victims Seeking Reparations at the International Criminal Court

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Abstract

This article explores the implications that the historic yet controversial *Lubanga* judgment is likely to have for victims seeking reparations through the International Criminal Court (ICC). It examines the reparations framework of the ICC, and, drawing on the outcomes of *Lubanga*, it outlines some significant obstacles which the case-based reparations scheme confronts. The article concludes that, while reparations are a cornerstone of the ICC arrangements, their provisions are riddled with financial and practical difficulties which, apart from calling into the question the adequacy of reparations for victims in *Lubanga*, also raises doubts about the efficacy of the ICC reparations framework as a whole.

Introduction

A state in transition is extremely fragile and volatile. More often than not, post-conflict societies must deal with dysfunctional institutions, limited resources and traumatised populations in an environment marked by huge failures in the judicial sector and a lack of public confidence in the government's ability to deliver on human rights, peace and security.¹ Justice becomes quite a relative concept in such a context. Oftentimes there is a strong need for national and international interventionist action to ensure effective justice is perceived and actually delivered. This means that, in societies suffering from mass atrocities on a scale incomprehensible to those who have not lived through them, it is crucial that the response is timely and takes a broad view of justice, incorporating both retributive and restorative elements. There is increased recognition that in the delivery of justice outcomes, victims - like perpetrators - must be subjects as well as objects.

The internationalisation of individual criminal accountability through the *ad hoc* tribunals and the International Criminal Court (ICC) has been an important feature of recent efforts to address impunity where national courts are not yet willing or able to do so. There is also a growing recognition that reparations and compensation to victims for loss and trauma have an important role to play in a comprehensive justice approach.

On 14 March 2012 the ICC delivered its first, thus historic, judgment in the case of *Lubanga*.² Shortly afterwards, on 10 July 2012, he was sentenced to 14 years of

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¹ The Rule of Law in Conflict and Post-Conflict Societies: Report of the Secretary-General, S/2004/616, § 6, 2004.

² *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06, T.Ch. I, 14 March 2012.

imprisonment.³ The issue of reparations for victims is still in the preliminary stages of development. The way this is managed will be very important for the further development of restorative justice through the ICC case-based reparations framework. The following analysis seeks to bring out the issues in this regard.

Lubanga was charged and found guilty of conscripting and enlisting child soldiers under the age of 15 and “using them to participate actively in hostilities”⁴ in the Democratic Republic of the Congo (DRC). The judgment marks the first time that a militia leader is held responsible for crimes committed within the DRC.⁵ The case is particularly significant for the development of jurisprudence concerning child soldiers. It builds upon relevant decisions of other tribunals, including those of the Special Court for Sierra Leone, and sets a very high standard for the prohibition of the use of child soldiers. It applies even if, for example, their families support their actions due to the circumstances of the conflict.⁶ A high threshold for accountability is also established in relation to children who played an ‘indirect role’ (who were forced to carry out daily activities which might not necessarily require the use of weapons or combat). The judges examined the level of danger the child was exposed to and “found that both the ‘child’s support and this level of consequential risk’ meant that a child could be actively involved in hostilities even if she or she was absent from the immediate scene of the conflict.”⁷

Even though the judgment attracts praise for its rigorous handling of child soldier issues, it is also critiqued for its overly narrow focus. Groups of victims, particularly victims of sexual and gender-based violence (SGBV) crimes, were not included in the charges against Lubanga despite the many facts cited during the trial that made it clear that such crimes were in fact committed. This is at best inconsistent with a growing appreciation that crimes and human rights violations specific to women are not just a casualty of conflicts, but a deliberate tool thereof. The importance of tackling violence against women more holistically in conflict and post-conflict situations was stressed at the ICC Review Conference held in Kampala in 2010.⁸ The Kampala Conference, the first conference convened to review the ICC Rome Statute, aimed at developing understanding of SGBV crimes and advocated strongly for a more comprehensive approach to justice delivery, identifying reparations as an outstanding issue in this regard.

The exclusion of SGBV crimes has caused much debate within the ICC and the international community about what will happen during the reparations phase. Much will depend on how exclusively the reparations are linked to the crimes actually prosecuted. Should they cover only those deemed to be victims of the crimes committed by the accused, or should a reparations framework also extend to other survivors of related, yet not formally prosecuted, crimes? There is increasing international recognition that justice demands the strengthened implementation of gender-sensitive reparations schemes but the limited scope of *Lubanga* calls into question how this can be achieved when SGBV crimes are not amongst

³ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06, T.Ch. I, 10 July 2012.

⁴ Judgment pursuant to Article 74 of the Statute *Idem*, supra note 2, § 1355-6.

⁵ Women’s Initiatives for Gender Justice, ‘First Conviction by the ICC- The Prosecutor v Thomas Lubanga Dyilo’, at: <http://www.iccwomen.org/documents/Press-Statement-on-Lubanga-conviction.pdf> (accessed on 19 June 2012).

⁶ A. Cole, ‘A Landmark Decision for International Justice’, at: <http://www.lubangatrial.org/2012/03/14/a-landmark-decision-for-international-justice/> (accessed on 14 June 2012).

⁷ *Ibid.*

⁸ 2010 Resolutions and Declarations Adopted by the Review Conference- The Impact of the Rome Statute System on Victims and Affected Communities, RC/Res.2.

those formally prosecuted. Should they have been and should this matter when it comes to the reparations phase, in light of the emerging understanding of the significance of justice for SGBV survivors? These are some of the questions this article analyses, against the background of the ICC's founding, the objectives set for it, and its place within the legal framework of reparations. Some observations will conclude the article.

I. The Vision of the ICC

I.1 The Theory

Prosecution of crimes and redress for victims lie at the heart of what the ICC was set up to do. The fact that both are equally weighted has been hailed as one of the important achievements of the ICC, without parallel among the international criminal institutions in existence at this time. It follows from a holistic understanding of the purpose of international criminal prosecutions: to deliver both retributive and restorative justice.

Retributive justice, as the fundamental concept inherent to all criminal prosecutions, was accepted as a crucial objective for the ICC: to uphold due process rights and the rule of law. Essentially, it is an expression of outrage by the international community against the intolerable and heinous acts of individuals who have "violated societal norms"⁹ and who, as a result, are deemed deserving of punishment in the form of "punitive measures...assigned through unilateral processes".¹⁰

At the international level, retributive justice also plays a fundamental role in educating the public about what happened,¹¹ and in so doing, helps propagate important concepts for international harmony such as the equal worth of all persons and that "no one is above universal human rights criteria and that blatant disregard for those rights will not be condoned."¹²

However, a system that principally rests on prosecution of perpetrators has its limitations. Some argue that international prosecutions alone cannot properly address crimes entailing gross human rights violations: "The strict victim/perpetrator dichotomy...does not account for the variety of ways in which ordinary individuals come to participate in violent actions..."¹³ Moreover, geography does not assist victims, with the *ad hoc* tribunals and ICC located far from the countries where the atrocities were committed. This distance contributes to the isolation of victims from the mainstream of prosecutions. According to some commentators, this practical concern is exacerbated by the fact that these institutions are inclined to characterise victims in a post-conflict situation as driven by a sense of grief or revenge too strong to enable them to contribute either to the immediate trials or efforts to further the peace process through a measured criminal justice process.¹⁴ A further limitation to a system built on retributive justice alone is international criminal law's (ICL) focus on prosecuting high-ranking officials. While it is not an explicit legal requirement that only the

⁹ R. Cryer, H. Friman, D. Robinson & E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, New York: Cambridge University Press 2010, p. 24.

¹⁰ D.M. Gromet & J.M. Darley, 'Retributive and Restorative Justice: Importance of Crime Severity and Shared Identity in People's Justice Responses', *Australian Journal of Psychology* 2009-61, p. 50.

¹¹ K. Andrieu, 'Transitional Justice: A New Discipline in Human Rights', *Online Encyclopedia of Mass Violence* 2010, p. 5.

¹² F. Kurasawa, *The Work of Global Justice: Human Rights as Practices*, New York: Cambridge University Press 2007, p. 82.

¹³ Andrieu 2010, *supra* note 11, p. 7.

¹⁴ P. Lundy & M. McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom up', *Journal of Law and Society* 2008-35, p. 278.

most senior leaders are prosecuted, the reality is that the systems in place, with limited resources, cannot accommodate much more than this. The selectivity of perpetrators (and crimes) is a serious limitation to the justice ICL can deliver to victims and to its healing capacity.

Restorative justice, therefore, is important in making the specific circumstances and needs of victims more integral to the international criminal justice process. By offering “the possibility of taking crime seriously without ever-increasing repression and exclusion”,¹⁵ ICL can come perhaps closer to bringing some form of ‘closure’ for all, in the wake of the atrocities, than through prosecution alone. This is achieved through shifting the emphasis to healing the wounded as well as punishing the guilty, and, in practical terms, to enabling victim participation and access to reparations.¹⁶

Restorative justice also runs into complications as it “is largely practice-led, with significant and obvious gaps and lags in the development of attendant theory, standards and evaluation.”¹⁷ This has spurred scepticism, with observations about legal rights being eroded in the absence of proper procedural safeguards for the protection of offenders.¹⁸ Another point of critique sometimes levelled at restorative justice processes is that they are over-ambitious in their goals. Restorative justice processes can never match the needs they have to address given the often huge number of victims, resulting in partial redress for victims.¹⁹ This has led to scepticism about restorative justice processes being able to make any real and noticeable difference.²⁰

While neither of the justice outcomes sought suffices when pursued separately, combined they can come closer to actually delivering on the promise of justice. The UN promote a holistic approach to transitional justice, which includes both restorative and retributive objectives.²¹ This is argued to be particularly important in post-conflict societies, as they often have to come to terms with the sorts of crimes that fall within the purview of ICL. In fact, it is argued that justice initiatives in post-conflict societies should be driven by the three goals of restoring the rule of law, restoring the rights that were violated and ensuring that there is a distributive element which benefits victims and contributes to addressing political and economic discrimination.²² One may see elements of both retribution and restoration here. To address the human rights violations, the perpetrators must be punished. To restore the rule of law and address unequal distribution of resources, measures must be designed which take the specific needs of the victims and the conditions within society into account.

Many support the position that there is greater strength and efficacy in a combined retributive and restorative justice approach. Gromet and Darley argue that:

[t]he use of an option that contains both restorative and retributive elements allows for respondents to show their condemnation by inflicting retribution upon the

¹⁵ K. McEvoy, H. Mika & B. Hudson, ‘Introduction: Practice, Performance and Prospects for Restorative Justice’, *British Journal of Criminology* 2002-42, p. 469.

¹⁶ M. M DeGuzman, ‘Giving Priority to Sex Crime Prosecutions at International Courts: The Philosophical Foundations of a Feminist Agenda’, *Social Science Research Network* 2011, p. 11.

¹⁷ McEvoy et al. 2002, supra note 15, p. 475.

¹⁸ A. Morris, ‘Critiquing the Critics: A Brief Response to Critics of Restorative Justice’, *British Journal of Criminology* 2002-42, p. 601.

¹⁹ *Idem*, p. 604.

²⁰ *Idem*, p. 606.

²¹ Security Council 2004, supra note 1, § 4.

²² Lundy & McGovern 2008, supra note 14, p. 274.

offender, as well as re-establish value consensus with the offender and repair the harm caused to the victim through restorative measures.²³

Based on experience and research to date, it is fair to conclude that elements of both restorative and retributive justice need to be present for ICL to deliver justice outcomes that are full and fair. ICL deals with the most abhorrent crimes, which undeniably spark deep international moral outrage. Moreover, international crimes often occur in intra-state conflict situations where it is a matter of neighbour against neighbour and community against community. These are circumstances where there is a close relationship between victims and perpetrators, so reconciliation becomes an important objective to achieve. There is considerable room for restorative justice here. Though a pure theory is undoubtedly the preferred choice, “the real world is one of partial theories and compromises.”²⁴ The fact that the ICC has the possibility to provide for both is a big step forward for ICL.

1.2 The ICC Reparations Framework

The ICC reparations framework is multi-faceted. Much depends on who is considered a ‘victim’ and how flexibly the criteria are applied according to the regulations of the Court, since thresholds have to be met to benefit from case-based reparations. ‘Victims’ are defined as follows in Rule 85 of the ICC Rules of Procedure and Evidence:

- (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 organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.²⁵

The case-law of the Court has clarified the meaning of this provision. Pre-Trial Chamber I outlined four criteria for determining the status of victim:²⁶ (1) their identity as a ‘natural person’ must be established; (2) it must be shown that they suffered some form of ‘harm’; (3) the crime committed must fall within the jurisdiction of the Court; (4) there must be a causal link between the crime committed and the harm suffered. These criteria have been confirmed as the norm through decisions in higher Chambers, such as the Appeals Chamber in *Lubanga*.²⁷

Proof of identity normally requires documentation, which is a problem in countries torn by conflict where many people have lost or have never even had identification. This was acknowledged by Pre-Trial Chamber I.²⁸ The Pre-Trial Chamber in *Bemba*²⁹ held that where

²³ Gromet & Darley 2009, supra note 10, p. 55.

²⁴ K. Roach, ‘Changing punishment at the turn of the century: Restorative justice on the rise’, *Canadian Journal of Criminology* 2000-42, p. 258.

²⁵ 2002 Rules of Procedure and Evidence, ICC-ASP/1/3, Rule 85.

²⁶ *The Situation in the Democratic Republic of Congo*, Decision on the application for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, ICC-01/04-101-tEN-Corr, Pre-T.Ch. I, 17 January 2006, § 9.

²⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and The Defence against Trial Chamber I’s Decision on Victim Participation of 18 January 2008, ICC-01/04-01/06-1432, A.Ch., 11 July 2008.

²⁸ *The Situation in the Democratic Republic of Congo*, Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation, ICC-01/04-374, Pre-T.Ch. I, 17 August 2007, § 14.

²⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, Situation in the Central African Republic, Fourth Decision on Victims’ Participation, ICC-01/05-01/08, Pre-T.Ch. III, 12 December 2008.

the necessary documentation could not be provided, a signed witness statement attesting to identity would be sufficient.³⁰ This “flexible” approach shows how the Court is willing to adapt “to the realities in the individual Situation country.”³¹ Even though it is a Pre-Trial Chamber decision, it builds on previous Chambers decisions.

As for the level of harm suffered, though Article 75 of the Statute refers to “damage, loss or injury”³², it is unclear “whether there is any limit to the type of harm that may be claimed for purposes of reparations.”³³ In *Lubanga*, the Appeals Chamber accepted that harm can be direct (physical, psychological or material harm suffered by the victims themselves) or indirect, which can include harm suffered by a third person who may have a close relationship with the victim.³⁴ While there has been a degree of inconsistency as to whether victims suffering from indirect harm can participate in proceedings, the “jurisprudence...seems to indicate a willingness to presume that close family members or next of kin have suffered on account of the harm to the direct victim.”³⁵

The third requirement, that the crime falls within the jurisdiction of the Court, is set down in Rule 85 of the Rules of Procedure and Evidence (RPE). The charges against the accused determine the crimes a victim can be considered to have suffered from, increasing the possibility that “the charges proven at trial will also define the scope of eligibility for reparation.”³⁶ The Court has a wide range of discretion here to determine the scope of the crimes.

The final requirement is the causal link between the crime and the harm suffered. As recognised by Pre-Trial Chamber II, the determination of the causal link is “one of the most complex theoretical issues in criminal law”.³⁷ It notes the importance of this requirement in determining reparations. Overall, the courts have not elaborated in great detail upon this requirement, so the scope remains to be defined.

To be eligible to receive reparations, an individual must satisfy the above criteria. Assuming one meets the requirements for the status of victim, reparations of various sorts are envisaged. The rationale for providing reparations can be found in a series of considerations. The reparations framework “is seen in the restorative justice movement as a progressive step that can help to mend some of the social bonds destroyed by the crime and, ideally, restore a sense of moral equity between victim and offender.”³⁸ In the first place, reparations are intended to bring tangible benefits to the recipients.³⁹

³⁰ *Idem*, § 37.

³¹ ‘Justice for Victims: The ICC’s Reparations Mandate’, *Redress Trust*, at: http://www.redress.org/downloads/publications/REDRESS_ICC_Reparations_May2011.pdf (accessed on 4 April 2011), p. 40.

³² 1998 Rome Statute of the International Criminal Court, A/CONF.183/9, Art. 75(1).

³³ ‘The Case-Based Reparations Scheme at the International Criminal Court’, *War Crimes Research Office*, at: <http://www.wcl.american.edu/warcrimes/icc/documents/report12.pdf> (accessed on 4 April 2011), p. 36.

³⁴ Judgment on the Appeals of the Prosecutor and The Defence, *supra* note 27, § 31.

³⁵ *Redress Trust*, *supra* note 31, p. 58.

³⁶ *Idem*, p. 60.

³⁷ *Situation in Uganda*, Decision on Victims’ 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-02/04-101, Pre-T.Ch. II, 10 August 2007, § 14.

³⁸ F. Mégret, ‘Justifying Compensation by the International Criminal Court’s Victims Trust Fund: Lessons From Domestic Compensation Schemes’, *Brooklyn Journal of International Law* 2010-36, p. 146.

³⁹ C.T. McLaughlin, ‘Victim and Witness Measures of the International Criminal Court: A Comparative Analysis’, *The Law and Practice of International Courts and Tribunals* 2007-6, p. 215.

Reparations can also benefit the wider community,⁴⁰ speeding up the process of coming to terms with what has happened. Another long-term benefit is the fact that reparations may help counter deeply-felt concerns about the internationalisation of criminal justice, particularly in countries still in or just coming out of a conflict where the perpetrators of crimes still have a support base.

Finally, reparations can serve as an overall “act of atonement”⁴¹ and demonstrate society’s willingness to make amends. In post-conflict societies where the rule of law is no longer prevalent, it is particularly important that reparations are not framed in such a way that they appear an act of vengeance.

Turning to the ICC reparations framework more specifically, reparations are provided for in the ICC Statute through a hybrid model.⁴² There are two avenues for reparations to victims: the case-based reparations scheme and the Trust Fund for Victims (TFV). Regarding the former, the scheme “represents the first international process designed to award reparations to victims of mass atrocities in the context of criminal proceedings against individual perpetrators.”⁴³ Pursuant to Article 75 of the Statute, the Court can award reparations once it has, either upon request or of its own accord (although the latter is exceptional), determined the “scope and extent of damage, loss and injury caused”.⁴⁴

As for the form of possible reparations, three are outlined in the Statute, in conformity with the UN Basic Principles:⁴⁵ restitution, compensation and rehabilitation. ‘Restitution’ aims to return the victims, as far as possible, to the situation they were in before the crime was committed. For situations involving mass atrocities this is likely to be impossible, due to the scale and nature of harm suffered. ‘Compensation’ is given based on the economically assessable damage the victim has suffered. Monetary reparations can never provide full compensation though. ‘Rehabilitation’ refers to “remedies intended to assist victims in reintegrating in the society under the best possible conditions by providing, for instance, medical, psychological, legal or social services.”⁴⁶ This is arguably the most important form of reparation as it goes to the root causes of societal problems.

Even though the Statute only explicitly mentions three forms, it is understood that these are not “exhaustive”.⁴⁷ There are less tangible, more symbolic forms like ‘satisfaction’, entailing things such as public apologies, construction of memorials, tracing the missing, and full truth disclosure. These can foster community healing, but also individual healing through public acknowledgement of the injustices inflicted upon and the suffering of the victims.

Reparations can be required on an individual or collective basis. Principle 18 of the UN Basic Principles requires that, when assessing the scale of reparations, due account should be taken of the “individual circumstances...as appropriate and proportional to the gravity of the violation.”⁴⁸ Individual reparations are most appropriate where the harm to the victim is

⁴⁰ *Idem*, pp. 215-216.

⁴¹ K.D. Wenger, ‘Reparations Within the Rule of Law’, *Thomas Jefferson Law Review* 2007-29, p. 241.

⁴² Mégret 2010, *supra* note 38, p. 125.

⁴³ *War Crimes Research Office*, *supra* note 33, p. 25.

⁴⁴ Rome Statute 1998, *supra* note 32, Art. 75(1).

⁴⁵ 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147.

⁴⁶ M. Henzelin, V. Heiskanen & G. Mettraux, ‘Reparations to Victims Before the International Criminal Court: Lessons from International Mass Claims Processes’, *Criminal Law Forum* 2006-17, p. 332.

⁴⁷ *War Crimes Research Office*, *supra* note 33, p. 43.

⁴⁸ Basic Principles 2006, *supra* note 45, Princ. 18.

direct and reparations are enforceable against the perpetrator. Collective reparations reach larger numbers of people, which is more beneficial to communities in the longer term. Much depends on the number of victims, the types of harm they suffered and the accused's guilt in relation to them.

Article 75(2), supported by Rule 98 of the RPE, gives the Court the authority to award individual reparations directly against the convicted person which it can transfer either directly or 'order' the TFV to.⁴⁹ Further, where the Court deems that a collective award is more appropriate, it may order reparations through the TFV.⁵⁰

The RPE⁵¹ provide additional guidance to the Court. Rule 94 outlines the procedure that a victim must follow when applying for reparations. This can be done prior to the commencement of the trial or when the trial is in motion.⁵² Rule 97 reiterates what is stated in Article 75: the Court can assess the scope and extent of the damage, loss or injury. Upon this basis it can award individual reparations to victims.⁵³ The Court can also appoint experts to help determine the appropriate reparations.⁵⁴

The TFV arguably fills important gaps in the reparations scheme. It was created in 2002 by the first session of the Assembly of States Parties and began its operations in 2007, relying on voluntary funding from outside sources.⁵⁵ It was established "for the benefit of victims within the jurisdiction of the Court, and of the families of such victims."⁵⁶ In other words, it is not limited to only providing reparations in relation to specific crimes being adjudicated.

The TFV has been described as "one of the unique features"⁵⁷ of the Court and has the dual function of reparations and general assistance. The Court can award three kinds of reparations: fines, forfeitures and reparations can be included in a sentence. The TFV has an obligation to carry out the orders of the Court. However, it also has a more general "proactive"⁵⁸ function whereby it can launch projects, at any time, to assist victims. Currently, it has thirty-four projects to assist over 200,000 victims and families.⁵⁹

Despite this, there is a caveat. During the Fourth Assembly of States Parties meeting, there was disagreement about whether the TFV should be fully independent from the Court. A compromise was reached where the TFV was required to inform the Court about its intentions concerning the voluntary contributions which can then determine the impact of

⁴⁹ Rome Statute 1998, supra note 32, Art. 75(2) & Rules of Procedure and Evidence 2002, supra note 25, Rule 98(2).

⁵⁰ Rules of Procedure and Evidence 2002, supra note 25, Rule 98(3).

⁵¹ *Idem*, Rules 94-9.

⁵² *Idem*, Rule 95.

⁵³ *Idem*, Rule 97(1).

⁵⁴ *Idem*, Rule 97(2).

⁵⁵ 2005 Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3, Chapt. II.

⁵⁶ Rome Statute 1998, supra note 32, Art. 79(1).

⁵⁷ W.A. Schabas, *An Introduction to the International Criminal Court*, New York: Cambridge University Press 2011, p. 363.

⁵⁸ T. Ingadottir, 'The International Criminal Court: The Trust Fund for Victims (Article 79 of the Rome Statute) – A Discussion Paper', at: http://www.pict-pcti.org/publications/ICC_paprs/Trust_Fund.pdf (accessed on 4 April 2011), p. 4.

⁵⁹ Mégret 2010, supra note 38, p. 141.

the projects on its proceedings.⁶⁰ The Court, therefore, can stop the TFV from carrying out its activities if it feels they will interfere with its proceedings.⁶¹

II. How Lubanga Challenges the Reparations Framework

Lubanga is a challenge to the proper operation of this framework in a number of ways. For the first time, the ICC can implement case-based reparations, and how it does so will perhaps prove or disprove the theory that restorative justice enjoys equal weight to retributive justice in the ICC system.

An immediate issue in this regard is the limited scope of the crimes charged by the prosecution, which has put the Court in a highly delicate situation. The exclusion of SGBV crimes is a serious omission. One commentator suggests three reasons which account for this exclusion:⁶² firstly, the lack of gender expertise among the investigators; secondly, their failure to seek any assistance from women's groups in informing investigations; finally, a general disinclination to prosecute such crimes. Another critic also singles out failures at the investigation stage, quoting one investigator as having stated: "We knew that during killings, rapes happened (but) the idea was that the first ICC trial could not fail. To organise a good trial, the Prosecutor selected child soldiers..."⁶³

Whatever the reasons, the decision of the Court concerning the scope of reparations is seriously affected. As outlined by Trial Chamber I in *Lubanga*, the Trial and Appeals Chamber together determined who was to be considered a 'victim' within the case. It summarised the decision reached as follows:

Only those who suffered harm as a result of the crimes charged may be considered victims in the case. Applicants need to demonstrate a link between the harm they suffered and the crimes faced by the accused, and they should demonstrate in written applications that they are victims of these offences.⁶⁴

Trial Chamber I determined that child soldiers under the age of 15 were considered direct victims and their parents and relatives were indirect victims.⁶⁵ However, individuals "who suffered harm as a result of the (later) conduct of direct victims"⁶⁶ were excluded from the group of indirect victims. The effect of this ruling is that only child soldiers or persons related to them can apply for reparations. The problem is further exacerbated by the fact that *Lubanga* is charged with conscripting and enlisting children from the Ituri region of the Democratic Republic of the Congo (DRC) and primarily from his own ethnic group, the Hema.⁶⁷ This means that not only other victims, such as victims of SGBV crimes, are

⁶⁰ A.-M. De Brouwer, 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families', *Leiden Journal of International Law* 2007-20, p. 232.

⁶¹ Regulations for the Trust Fund for Victims 2005, supra note 54, Chapt. II, Reg. 50(a)(i) & (ii).

⁶² S. O'Connell, 'Gender-based Crimes at the International Criminal Court', *Plymouth Law Review* 2010-1, pp. 73-5.

⁶³ 'Special Report Sexual Violence in the Democratic Republic of Congo', *Institute for War & Peace Reporting*, at:

<http://www.ceipaz.org/images/contenido/Sexual%20violence%20in%20the%20Democratic%20Republic%20of%20Congo.pdf> (accessed on 4 April 2011), p. 11.

⁶⁴ Judgment pursuant to Article 74 of the Statute, supra note 2, § 14(iv).

⁶⁵ *Idem*, § 17.

⁶⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Redacted version of "Decision on 'indirect victims'", ICC-01/04-01/06-1813, T.Ch. I, 8 April 2009, § 52.

⁶⁷ Judgment pursuant to Article 74 of the Statute, supra note 2, § 543 & 911.

excluded, but so are child soldiers in other regions of the DRC and of other ethnicities. Clearly, a considerable number of victims are disregarded.

This reality has provoked much discussion as to whether other groups of victims, particularly victims of SGBV crimes (especially child soldiers), should nevertheless have a claim to reparations. Some argue that reparations should be broad because a “broad-based, even-handed approach would be much more effective in healing the scars left by conflict and extensive human rights abuses.”⁶⁸ Ruben Carranza⁶⁹ supports adopting a more inclusive approach and warns that keeping the scope this limited ignores the guidelines for reparations issued by the UN.⁷⁰ Carranza states that a broader reparations framework acknowledges “the experiences of a significantly larger number of victims, and the loss and harm from a wider range of violations”.⁷¹ Similarly, Brigid Inder⁷² argues that “...any harm which can be reasonably assessed to be a consequence of the crimes for which the accused has been convicted could legitimately be considered for inclusion in an order for reparations.”⁷³ She states that this is an option because the judges left the door open to address the issue of SGBV crimes at the reparations stage when they stated that “these matters ought to be taken into account for the purposes of sentencing and reparations.”⁷⁴

To assist the Court in making a decision, Trial Chamber I ruled that, among others, the Women’s Initiatives for Gender Justice (Women’s Initiatives) and the International Center for Transitional Justice (ICTJ) were allowed to make representations to the Court regarding the issue of reparations.⁷⁵ The Women’s Initiatives argue strongly for the inclusion of victims of SGBV crimes in the reparations phase. They suggest that the Rome Statute requires that the ICC “provide gender-inclusive justice”⁷⁶ at all stages and that the Court is obligated to adhere to international human rights standards. As such, it must include “specific gender-responsive methodologies”⁷⁷ when constructing a reparations scheme. Further, they argue that not incorporating victims of these crimes would “further compound the disparate impact upon them resulting from the Prosecution’s selective charging strategy.”⁷⁸ Finally, when discerning the nature of ‘harm’, the Women’s Initiatives argue that harm occurs as a direct consequence of the crimes committed. It should “not be limited to a narrow assessment of the harms attached to the charges, but should be inclusive of the breadth of harm suffered as a result of these crimes.”⁷⁹ As such, they call for a reinterpretation of the definition of harm for the purposes of the reparations phase.⁸⁰

⁶⁸ B. Evans-Pritchard & M. Gouby, ‘Lubanga Verdict Prompts Debate on Reparations’, at: <http://iwpr.net/report-news/lubanga-verdict-prompts-debate-reparations> (accessed on 14 June 2012).

⁶⁹ Director of the Reparations Program in the ICTJ.

⁷⁰ Ibid.

⁷¹ ‘Reparations and the Lubanga Case: Learning from Transitional Justice’, ICTJ Briefing, at: <http://ictj.org/sites/default/files/ICTJ-DRC-Reparations-Lubanga-ICC-Briefing-2012-English.pdf> (accessed on 14 June 2012).

⁷² Executive Director of the Women’s Initiatives for Gender Justice.

⁷³ Evans-Pritchard & Gouby, *supra* note 68.

⁷⁴ Judgment pursuant to Article 74 of the Statute, *supra* note 2, § 631.

⁷⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Decision granting leave to make representations in the reparations proceedings, ICC-01/04-01/06, T.Ch. I, 20 April 2012.

⁷⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Observations of the Women’s Initiatives for Gender Justice on Reparations, ICC-01/04-01/06, T.Ch. I, 10 May 2012, § 8.

⁷⁷ Ibid.

⁷⁸ *Idem*, § 21.

⁷⁹ *Idem*, § 37.

⁸⁰ *Idem*, § 41.

The ICTJ states in its submissions that due to the limited resources available, reparations should “prioritise the immediate and direct victims of the crime.”⁸¹ That being said, the “larger universe of victims”⁸² should also be provided for. It calls for the Court to adopt a broad approach to victims by retaining an “open list of applicants” enabling it to have a greater number of persons registering and “to retain the flexibility to adjust awards for reparations of the basis of mapping and needs-assessment results.”⁸³

Two other organs of the Court - the TFV and the Registry - have also made submissions to the Chamber on this point. The TFV shares the position that reparations should not be limited to the crimes charged. It states that the limited charges should not restrict reparations addressing “in a meaningful way the suffering of women and girls who have been victims of the enlistment and conscription”⁸⁴ since they were forced to play a variety of roles, such as being forced into sexual slavery and marriage.⁸⁵ It justifies this stance by saying that the objective of reparations may differ from those of the trial, namely “to provide redress for victims following a guilty verdict”⁸⁶ and that this is possible under Article 75(2), which allows the Court to order reparations ‘in respect of’ victims thus broadening its scope to reach a greater number of victims.⁸⁷ The ICTJ agrees with this interpretation.⁸⁸

The TFV states that excluding other victims might undermine the effectiveness of a reparations award, causing victims to view it as “inequitable and unfair”.⁸⁹ It stresses that the goal of reparations is to “redress harm and not create any further harm”⁹⁰, since excluding affected communities might actually result in the child soldiers concerned being stigmatised.⁹¹ Further, the TFV states that addressing SGBV crimes against the direct victims will also be difficult to achieve if the restricted charges are maintained at the reparations stage.⁹² It provides evidence, both from its research and from experts, about the prevalence of such crimes and quotes from the Women’s Initiative closing arguments which posited that:

A decision which recognises the gender dimensions of enlistment, conscription and the forced participation of children in hostilities could transform the legal definition of child soldiers and pave the way for similar prosecutions.⁹³

Another argument against keeping the selective charges is that this might fuel tensions and conflict in the Ituri region⁹⁴ as only a limited number of ethnic groups are deemed to be victims.⁹⁵ The TFV claims that the situation is still fragile in Ituri, rendering it even more important that reparations are inclusive⁹⁶ and that the exclusion of groups “will make it more

⁸¹ *Prosecutor v. Thomas Lubanga Dyilo*, Submission on reparations issues, ICC-01/04-01/06, T.Ch. I, 10 May 2012, § 15.

⁸² *Idem*, § 16.

⁸³ *Idem*, § 29.

⁸⁴ *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, T.Ch. I, 1 September 2011, § 30.

⁸⁵ *Idem*, § 31.

⁸⁶ *Idem*, § 43.

⁸⁷ *Idem*, § 44.

⁸⁸ Submission on reparations issues 2012, *supra* note 81, § 58.

⁸⁹ Public Redacted Version 2011, *supra* note 84, § 45.

⁹⁰ *Idem*, § 151.

⁹¹ *Idem*, § 153.

⁹² *Idem*, § 156.

⁹³ *Idem*, § 168.

⁹⁴ *Idem*, § 170.

⁹⁵ *Idem*, § 174.

⁹⁶ *Idem*, § 179.

difficult for reparation awards to promote reconciliation...”⁹⁷ The TFV stresses that conscription and enlistment is a problem which goes well beyond the scope of the charges in Lubanga.⁹⁸

The Registry, in its submission, reiterates the principle that ‘harm’ equates to harm caused ‘as a result’ of the alleged crimes committed by the accused and states that it is up to the Court to determine the extent of harm ‘as a result’ of the crimes charged.⁹⁹ However, it states that even though victimisation can only be considered with regard to child soldiers who were enlisted and used in hostilities, Rule 98(5) allows for reparations to benefit a wider category of victims “as long as their victimisation occurred ‘as a result of’ a crime committed by Thomas Lubanga under Rule 85.”¹⁰⁰

It goes on to suggest, however, that due to the limited resources available for reparations, the Court could consider prioritising “in favour of some victims but not others on the basis of equitable criteria in those many cases where the resources at its disposal for redress are insufficient to provide meaningful redress to all victims potentially eligible.”¹⁰¹ A set of criteria can be used to determine which victims should be prioritised: for example, the gravity of the harm or the circumstances of particular groups of victims.¹⁰² Specific options that were suggested include: prioritising the most vulnerable victims (for example, children, elderly or SGBV crime victims) who may not receive adequate care from their under-resourced national systems;¹⁰³ or the most needy ones who cannot receive adequate care from their families.¹⁰⁴ Another way of prioritising victims could be selection according to the type of act committed or the gravity of the harm caused by it,¹⁰⁵ or finally, prioritising in a way as to ensure the maximum use and effect of limited resources, which would avoid an uneven distribution of those resources among the victims.¹⁰⁶ It continues by stating, although it acknowledges that this is controversial, that maximising resource effectiveness could also be done by prioritising resources “according to the impact that they will have or are likely to have.”¹⁰⁷ The Registry stresses that, before prioritisation of resources takes place, a form of mapping exercise should be carried out to be able to properly identify which groups are more in need of reparations than others and which criteria should have the greatest sway.

Clearly, there is common agreement that a reparations framework should be more inclusive rather than less inclusive. This, while more than understandable, raises a number of significant issues which not only shed doubts upon whether the scope of reparations should be extended to include other groups of victims, but it also calls into question the potential for benefit that reparations in *Lubanga*, and in the ICC more generally, might have. The various issues can be divided into three main categories: financial, practical and realistic.

III. The Constraints to the Framework

III.1 The Financial Challenge

⁹⁷ *Idem* § 180.

⁹⁸ *Idem*, § 184.

⁹⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Second Report of the Registry on Reparations, ICC-01/04-01/06, T.Ch. I, 1 September 2011, § 17.

¹⁰⁰ *Idem*, § 159.

¹⁰¹ *Idem*, § 31.

¹⁰² *Idem*, § 33.

¹⁰³ *Idem*, § 34-38.

¹⁰⁴ *Idem*, § 39-42.

¹⁰⁵ *Idem*, § 43-44.

¹⁰⁶ *Idem*, § 45-47.

¹⁰⁷ *Idem*, § 47.

Simply put, the financial challenge underscored by *Lubanga* is where the money for reparations should come from. Article 75(2) stipulates that the order is made “directly against the convicted person”, and “[w]here appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79.”¹⁰⁸ First and foremost, it is up to the convicted person to pay reparations through “fines and forfeitures”.¹⁰⁹ While straightforward in theory, realistically this is problematic. *Lubanga*, for example, does not have the means since he has “no identified assets”.¹¹⁰ Thus, the fundamental principle that the perpetrator pays is immediately called into question.

It seems that the drafters of the Rome Statute foresaw this possibility; hence the inclusion of the second paragraph that reparations might be provided through the TFV. This, however, will not solve the problem. Rule 98(5) provides that the TFV’s ‘other resources’ may be used for the benefit of victims.¹¹¹ The term ‘other resources’ pertains to resources that have been set aside by the Assembly of State Parties “to mitigate the effects of insufficient funds ... from a convicted person”.¹¹² Currently, the TFV has set aside 1.2 million Euros to assist in this matter, but “this amount is intended for all eventual reparations awards in cases currently before the Court.”¹¹³

There is a major point of disagreement between the Registry and the TFV on how to use the funds allocated to the TFV. Originally, they were supposed to file a joint submission, but because they could not agree on the scope of the term ‘other resources’, they filed separately.¹¹⁴ Essentially, the Registry submits that the Court can order the TFV to use its other resources for the purposes of case-based reparations.¹¹⁵ It reaches this decision by interpreting the term “through” the TFV to mean “by means of” and argues that this interpretation is supported by Pre-Trial Chamber I which stated that the TFV’s assistance mandate is “subject to the responsibility of the Trust Fund to ensure that there are sufficient funds to comply with any reparation order that the Court may make under article 75 of the Statute”.¹¹⁶ Another argument it puts forth concerns Regulation 56 of the TFV which, it argues, leaves no room for doubt that:

[The] Trust Fund’s Board of Directors is under an obligation to “make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources” for various forms of reparations award. This is indicated by the use of the mandatory “shall” in TFV Regulation 56.¹¹⁷

Finally, the Registry argues that the Court has the final say anyway because, under Regulation 57 of the TFV, the plan for implementation proposed by the TFV must be approved by the Court and, thus, it has the power to determine whether to accept the plan or not. This, if challenged by the TFV, could be a long, complicated process detrimental to its reputation.¹¹⁸

¹⁰⁸ Rome Statute 1998, supra note 32, Art. 75(2).

¹⁰⁹ *Idem*, Art. 75(5)

¹¹⁰ Second Report of the Registry on Reparations 2011, supra note 99, § 10.

¹¹¹ Rules of Procedure and Evidence 2002, supra note 25, Rule 98(5).

¹¹² Public Redacted Version 2011, supra note 84, § 120.

¹¹³ E. Rehn, ‘Speech given Wednesday 21 March 2012 on the occasion of the 9th Annual Board Meeting’, Trust Fund for Victims 2012, p. 3.

¹¹⁴ Second Report of the Registry on Reparations 2011, supra note 99, § 3.

¹¹⁵ *Idem*, § 122.

¹¹⁶ *Idem*, § 125-126.

¹¹⁷ *Idem*, § 134.

¹¹⁸ *Idem*, § 139.

The TFV, on the other hand, argues that it has the discretion to determine when and how to use its ‘other resources’. It interprets the term “through” to imply an “intermediary quality” and uses the French version of Article 75(2)¹¹⁹ to support its position.¹²⁰ It stresses that during the drafting of the Rules of Procedure and Evidence, it was discussed whether the Court can ‘order’ the TFV to make its funds available; however, this was rejected because the Court was not deemed to have sufficient control over the TFV since it is accountable to the Assembly of State Parties on account of its dependence on voluntary contributions.¹²¹ It states that if it were to be ordered by the Court on the issue of reparations, it would have to be heard in reparations hearings and it should have the right to appeal a decision by Chambers.¹²²

Further, the TFV stresses that these resources need to be carefully managed because they serve several purposes, including the funding of its assistance mandate. Both aspects of its mandate are mutually supportive, and also “possess distinctive and intrinsic qualities and independent dynamics.”¹²³ Given the advance planning and length of time required to mount an assistance programme, these could be set back considerably if the Court ordered that its need of the limited funds were to take precedence.¹²⁴

The foregoing analysis demonstrates just how complex court-ordered reparations are from the very outset. The disagreements surrounding the use of the TFV funds need to be sorted to enable meaningful progress on court-based reparations. Until this time, and because resources are scarce anyway, there is a strong argument to be made to approach the grant of reparations cautiously so that, at a minimum, the identified victims in *Lubanga* can be compensated.

Under the current financial circumstances surrounding reparations, it might well be most beneficial for reparations to be approached in a more focused and concentrated manner, rather than for the process to be more inclusive but thereby too diluted, with the end result being too little for any group to make a tangible difference to their circumstances.

III.2 Practical Considerations

The ICC will not and cannot investigate and prosecute all crimes that fall under its jurisdiction. It is selective out of necessity. This begs the question as to whether this selective approach towards perpetrators and crimes should also govern the reparations phase, or should more lenience be applied?

In an ideal world, fairness and equity would prevail for all victims. Sadly, the world is not a utopia and the ICC is a judicial body that has limiting definitions to work with and scarce resources to apply to reparations. Moreover, the ICC is not the only entity working to deliver just outcomes. The TFV puts this point neatly:

Reparations should not be understood or designed in isolation from other reconstruction efforts. Conceptually, as well as in practice, reparations should be

¹¹⁹ “Le cas échéant, la Cour peut décider que l’indemnité accordée à titre de réparation est versée par l’intermédiaire du Fonds visé à l’article 79.”

¹²⁰ Public Redacted Version 2011, supra note 84, § 99.

¹²¹ Idem, § 103.

¹²² Idem, § 104.

¹²³ Idem, § 130.

¹²⁴ Idem, § 134.

understood to be one part of a much larger restorative and transitional justice agenda.¹²⁵

In fact, more needs to be made of the capacities and opportunities available through the TFV's community projects. The TFV, unlike the Court, can take a broad focus, with beneficiary victims not limited by the terms of the specific prosecutions. The main limitation, though, is the amount of money coming to it through the voluntary contributions on which it is dependent.

The TFV and the Court should be seen as but two among many actors, international and national, who work together in a complementary fashion towards the shared goals of peace and rehabilitation in fractured states. If approached in this way, it becomes more reasonable to accept that the reparations capacity of the Court is, and can remain, limited. There is, though, still the problem of inflated expectations.

Expectations have perhaps been allowed to go unrealistically high when it comes to the Court, with a fairly big gap between perceptions of what it should do and the reality of what it can actually do. The TFV offers the explanation that victims view the assistance programmes of the TFV "as a form of recognition by the International Criminal Court, which in turn, impacted the way they viewed the ICC and its role in ending impunity in their communities."¹²⁶ Perceptions, it says, were dependent upon the way the support available was conveyed to them. Arguably, there has been insufficient effort to manage the expectations among victims through outreach and promotional activities.

Such perceptions of what the Court should achieve require early attention. Otherwise there is a danger that these ideas will put too much pressure on the system and, through early judgments like *Lubanga*, precedents will be set that will rapidly exhaust the Court's finances and the TFV, making it less and less likely that future reparations needs can be met. Setting the bar too high too early could also have a floodgate effect, drawing in an unmanageable number of victims in future cases.

Amongst the other international actors whose roles require clearer articulation is the Office of the High Commissioner for Human Rights (OHCHR), which has more recently been strengthening its transitional justice activities with a focus on victims of SGBV crimes, among others.¹²⁷ Other organisations like the United Nations High Commissioner for Refugees and UN Women also play roles, ranging from advocacy to reconciliation programmes and rehabilitation assistance in conflict-torn societies. The assistance activities of NGOs are very important as well. Their outreach is broad and their mandates can be more flexible than those of intergovernmental organisations.

However, the main actor in all this is the nation state, which has the principal responsibility to take care of the needs of its citizens. The OHCHR reports that the most common request from victims (in the DRC) was for "peace and security".¹²⁸ Without this, the victims felt that no reparation scheme could be successful. Ending impunity and providing redress to its nationals is a state responsibility which no international court can, or should, substitute for.

¹²⁵ *Idem*, § 6.

¹²⁶ *Idem*, § 196.

¹²⁷ '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', *OHCHR*, at: http://www.ohchr.org/Documents/Countries/ZR/DRC_Reparations_Report_en.pdf (accessed on 25 April 2011).

¹²⁸ *Idem*, p. 17.

In the DRC, this responsibility is being taken more seriously, particularly with regard to SGBV crimes. The Constitution now deems sexual violence a crime against humanity.¹²⁹ Further, in 2006 the Government introduced a “revolutionary”¹³⁰ law that prohibits many new SGBV crimes, going beyond the Constitution. Though it marks a very significant breakthrough in the legislative framework, the law is limited in its temporal scope and does not apply to the period between 1993 and 2003. Prosecutions for SGBV crimes are on the rise, with Military Courts using ICC provisions defining sexual violence as a guide. In February 2011, a Congolese lieutenant was sentenced to 20 years imprisonment by a mobile court, after he and three other army officers were charged with crimes against humanity, for offences committed upon their orders in Fizi (South Kivu), including rape. This is “the first time a senior ranking Congolese army officer has been arrested, tried and convicted for rape crimes.”¹³¹ That said, the other officers have yet to come to trial, rendering it a partial victory.

At a more grassroots level, specially targeted community projects have also been part of the response to the SGBV crisis in the DRC. The ‘City of Joy’, officially opened on 4 February 2011. It was “[c]onceived, created and developed by the women on the ground”,¹³² as a town meant to house and support victims of SGBV crimes. It provides a range of services, including self-defence lessons and education to raise awareness of issues like HIV/AIDS. “It is the product of a shared vision that the women don’t just need help, they need power.”¹³³ The aim is empowerment, not aid. “Thus, through education, the woman can be given the knowledge and strength to rise above it. In other words, the City of Joy is all about a Congolese kind of feminism.”¹³⁴

The foregoing makes clear that the Court is not alone in its efforts to redress crimes and bring support and justice to victims. This is not an argument that supports limiting the scope of the charges too much, like in *Lubanga*, but it at least points to other available avenues to reinforce victim support where the Court cannot. By no means should the ICC fail in its obligation to provide case-based reparations where due; however, reparations “are of a judicial nature”¹³⁵, designed with a specific purpose in mind, and it is unrealistic and unwise to over-burden their possibilities.

III.3 A Legal Conundrum

A further issue for reflection, which is in fact an argument in support of a measured approach to reparations from the Court, has to do with possible appeals. The TFV observes that, were an appeal to be solely based on the reparations award, this would be insufficient to suspend their distribution unless it was granted by the Appeals Chamber under Rule 153 of the RPE.¹³⁶ That being said, if an appeal challenging the accused’s conviction is lodged, according to the TFV:

¹²⁹ 2006 Constitution de la République Democratique du Congo, Art. 15.

¹³⁰ G. Breton-Le Goff, ‘Ending Sexual Violence in the Democratic Republic of the Congo’, *The Fletcher Forum of World Affairs* 2010-34, p. 23.

¹³¹ K. Winer, ‘City of Joy: New hope for Congo’s brutalised women’, at: <http://www.guardian.co.uk/world/2011/apr/09/city-of-joy-congo-women-rape> (accessed on 23 June 2011).

¹³² VDay, ‘City of Joy’, at: <http://drc.vday.org/city-of-joy> (accessed on 23 June 2011).

¹³³ Winer, *supra* note 131.

¹³⁴ *Ibid.*

¹³⁵ Public Redacted Version 2011, *supra* note 84, § 112.

¹³⁶ *Idem*, § 404.

While this is not expressly addressed in the law, it seems that it would make sense to suspend the implementation of any reparations order analogous to Article 81 (4) of the Statute until a final decision by the Appeals Chamber is reached to confirm the conviction of a particular charge or to overturn it.¹³⁷

The relationship between implementation of reparations and the continuation of the Court processes should be made clearer. Suspension of reparations might eventually actually mean no reparations will ever be made.

What constitutes 'eventually' is a contentious issue. International trials have proven to take a very long time. *Lubanga* alone took six years before judgment was delivered. There are many understandable reasons for this, but the fact remains that this is a very long time to wait for victims whose frustrations only mount and in relation to whom reparations may become less and less relevant.

IV. Final Observations

Based on the above analysis, I would offer some modest observations. First, regarding the ICC, as the current reparations framework stands it is not intended and is unable to provide reparations to all of the victims implicated in any one situation under investigation. This should not, at least for the present, be seen as a failure of the reparations system. For the purposes of case-based reparations it is only realistic to maintain the interpretation that a victim is someone whose harm suffered can be directly linked to the crime(s) under prosecution as the working principle. This is particularly recommended in the case of *Lubanga*, given that this will be the first time that case-based reparations are being implemented and will in effect undoubtedly serve as a precedent for future ICC reparations arrangements. The Court's possibilities must not be put under impossible strain at this very early stage.

This should not preclude the Court from actively advocating for reparations of other sorts, involving the actors who might reasonably be called upon to engage with processes of victim justice and societal reconciliation. These might even include symbolic reparations which can take the form of a public apology, the building of memorials, making an account of what happened available to the public, etcetera. It is true that reparations alone cannot be symbolic because "the crimes were not symbolic".¹³⁸ However, the ICTJ summarises the positive force of symbolic reparations in its submissions to the ICC:

Symbolic reparations can be effective ways of acknowledging the loss and harm suffered by victims and survivors, particularly where the loss is irreparable and can never have an equivalent in compensation or other material forms of reparations.¹³⁹

Further, the judgment itself is properly understood as a form of reparation, stressed by both the Women's Initiatives¹⁴⁰ and the Registry.¹⁴¹ The Registry suggests that the Court could "treat its judgment as a form of reparation and in consequence establish a public education or

¹³⁷ *Idem*, § 409.

¹³⁸ IRIN, 'DRC: Thorny issue of reparations for Lubanga's victims', at: <http://www.irinnews.org/Report/95257/DRC-Thorny-issue-of-reparations-for-Lubanga-s-victims> (accessed on 15 June 2012).

¹³⁹ Submission on reparations issues 2012, *supra* note 81, § 64.

¹⁴⁰ Observations of the Women's Initiatives for Gender Justice on Reparations 2012, *supra* note 76, § 55.

¹⁴¹ Second Report of the Registry on Reparations 2011, *supra* note 99, § 79.

information initiative”¹⁴² which it could do in tandem with the TFV. Going on, the ICTJ argues that ordering Lubanga to pay even one Congolese Franc could have a significant impact as the “payment...represents a public acknowledgement of the prejudice a victim has suffered at the hands of the perpetrator, and a form of restoration of their dignity.”¹⁴³

For the future, it is strongly recommended that SGBV crimes be more expansively interpreted and prosecuted. In this regard, the Dissenting Opinion of Judge Odio Benito deserves careful study. While concurring on Lubanga’s criminal responsibility, she contested the failure of the Majority Chamber to include SGBV crimes under the notion of ‘using’ child soldiers and therefore within the justiciable charges.¹⁴⁴

Also, the TFV itself needs to reconsider its own contribution. As it operates in the field, it can contribute to raising awareness and managing the expectations of victims. Further, it might reconsider its fundraising approaches to try to stimulate voluntary contributions, which it is obligated to do anyway. The TFV acknowledges this commitment; however it cautions that states may not be as inclined to contribute more for court-based reparations since they may feel that it is the responsibility of the convicted person.¹⁴⁵ Perhaps complementing voluntary contributions with a system of compelling additional funds from states involved in the crimes could be further considered.

Furthermore, at the national level ways must be found to address impunity through strengthening the rule of law. Governments should be encouraged to conduct a more rigorous pursuit and prosecution of perpetrators. The setting up of truth commissions, trust funds and symbolic gestures should be encouraged. This could be done through public apologies and guarantees of non-repetition, for example.

A more radical proposal, which is certainly an interesting idea, has been put forward by Liesbeth Zegveld, in an interview by the IWPR. She called for the creation of an international civil court, allowing victims to claim reparations for the harm they suffered and which “are dependent neither on political will, nor on the will of the prosecutor.”¹⁴⁶ She stressed the distinction between victims’ needs and the goals of criminal courts and asserted “it is important not to confuse the individual interest of victims to be compensated with the interest that justice is done.”¹⁴⁷ It is an idea worthy of further reflection.

Conclusion

This article has sought to review some of the main issues brought to light by the *Lubanga* judgment, which the ICC must address as it moves forward to put in place reparations schemes for victims. The narrow scope of *Lubanga* has helped crystallise the possibilities and

¹⁴² *Idem*, § 81.

¹⁴³ Submission on reparations issues 2012, *supra* note 81, § 63.

¹⁴⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute- Separate and Dissenting Opinion of Judge Odio Benito, ICC-01/04-01/06, T.Ch. I, 14 March 2012, § 16: Although the Majority of the Chamber recognises that sexual violence has been referred to in this case, it seems to confuse the factual allegations of this case with the legal concept of the crime, which are independent. By failing to deliberately include the sexual violence and other ill treatment suffered by girls and boys within the legal concept of “use to participate actively in the hostilities”, the Majority of the Chamber makes this critical aspect of the crime invisible. Invisibility of sexual violence in the legal concept leads to discrimination against the victims of enlistment, conscription and use those who systematically suffer from this crime as an intrinsic part of the involvement with the armed group.

¹⁴⁵ Public Redacted Version 2011, *supra* note 84, § 139.

¹⁴⁶ Evans-Pritchard & Gouby, *supra* note 68.

¹⁴⁷ *Ibid.*

limitations of case-based reparations which, taken together, serve to reinforce the argument for caution at this early stage of the ICC's work. Given the many hurdles that devising any such reparations scheme has to take, it is essential for the Court to approach its responsibilities in a sympathetic yet careful and realistic manner, in tandem with contributing to expanding other ways to make reparations.