

REPARABILITY OF VICTIMS' HARM AT THE INTERNATIONAL CRIMINAL COURT: VICTIMS' EXPECTATIONS VERSUS REALITY*

Abstract

Reparation to victims is a unique feature of the Rome Statute of the International Criminal Court (ICC) and a bold innovation in international criminal justice. In two decades of its operation, the Court has successfully decided four reparation cases with award of juridical reparations to thousands of victims cumulatively. In spite of this statistics, it would seem that the expectation for reparations at the ICC is not matched by the outcome of reparation cases. Victims who apply to the Court for juridical reparations are overwhelmingly more than those who eventually get an award. The expectations of victims who eventually get an award may be unmatched by the reality of harm they perceive they have suffered. This paper employs a desktop approach to examine the reparability of victims' harm at the ICC as one of the imperatives of the reparations regime at the ICC. The principles which define reparability at the Court, perhaps, delineate the gulf between victims' expectation and reality for reparations. The principles on eligibility of victims, connectivity of harm etc. play a huge role in reparability. This paper concludes that domestic reparation may provide respite to victims of Rome Statute crimes in the face of the technicalities of juridical reparations at the ICC.

Keywords: Reparations, Trust Fund, eligibility, harm, Rome Statute

1. Introduction

The historical background to the evolution of reparations in international criminal law reveals the convoluted road to its inclusion in the Rome Statute of the International Criminal Court (Rome Statute). Some authors comment that reparation was one of the difficult negotiations in the deliberations on the Rome Statute.¹ Hence, reparation to victims is a laudable feature of International Criminal Court (ICC) compared to preceding international criminal tribunals. This paper examines the reparability of victims' harm within the context of Rome Statute crimes and the available cases law on reparations at the ICC. The paper is divided into five sections. The first section gives an introductory insight into the paper. The second section examines the reparations regime at the ICC. The third section provides a contextual analysis of the decided reparations cases at the ICC. The fourth section evaluates the Court's jurisprudence on reparability of victims' harm, gleaned from the available cases principles on eligibility and the concept of harm. The fifth section makes concluding remarks and suggests corresponding recommendations.

2. Reparations at the International Criminal Court

Reparation at the ICC is regarded as a means of redressing the harm or injury perpetrated against victims.² The reparations system at the ICC is two-pronged, the prominent form being juridical reparations on one hand and administrative reparations by the Trust Fund for Victims (TFV) on the other hand. The Rome Statute provides for both forms of reparations by expressly extending the Court's jurisdiction to; awarding reparations to victims (juridical reparations) and; entrusting the Trust Fund for Victims with a reparations' mandate (administrative reparations).³ Since it started operations in 2002, the ICC has concluded and handed criminal convictions in five cases,⁴ out of which four have involved decisions on reparations.⁵ Procedurally, with respect to juridical reparations at the ICC, the system is set in two phases; the reparations proceedings at the Court; and the implementation stage of the reparations award, which is usually charged on the Trust Fund for Victims.⁶ Reparations proceedings at the ICC are separate and distinct from the trial proceedings although, the initiation of reparations proceedings is largely dependent on the outcome of the trial proceedings.⁷ Reparations proceedings are typically civil in nature. From the practice at the ICC, there are two discernible stages of juridical reparations to victims at the Court. The first stage is the proceeding stage which, can be further categorised into Application/Pre-Trial Stage and the Trial Stage. The second stage is the implementation stage which is handled by the TFV.

The Rome Statute suggests that there are, primarily, two ways by which reparations proceedings may be instituted before the Court. The victims may make a representation to the Court at the commencement of trial stage or the Court on its own motion may initiate reparations proceedings based on the outcome of trial.⁸ Thus, while reparations proceedings can only be initiated

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¹Christoph Sperfeldt, 'Rome's Legacy: Negotiating the Reparations Mandate of the International Criminal Court' *International Criminal Law Review* (2017) (17) (2) 351-377, 366. Dwertmann commented that the negotiations on the Rome Statute were tainted with varying views on the role of victims in criminal justice in the different jurisdictions represented. This further informed the restraint of the drafters of the Rome Statute from detailed provision on the substantive and procedural issues regarding reparation in the Court. Eva Dwertmann, *The Reparations System of the International Criminal Court Its Implementation, Possibilities and Limitations* (Brill Publishers, 2010). 25-26.

² Article 75 of the Rome Statute.

³ Articles 75 (2) and 79 (1) of the Rome Statute.

⁴ ICC The Court Today 17 May 2022 PS-ICC-PIDS-TCT-01- 129/22_Eng <<https://www.icc-cpi.int/sites/default/files/2022-05/TheCourtTodayEng.pdf>> Accessed 20 April, 2022.

⁵ The Court Today. *Ibid.*

⁶ Regulation 50(b) of the Regulations of the Trust Fund for Victims; *The Prosecutor v Thomas Lubanga Dyilo*, 14 December 2012 ICC-01/04-01/06-2953 A A2 A3 OA21, para. 53. per Appeals Chamber's Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations'.

⁷ *The Prosecutor v Germain Katanga* (Order of Reparations) 24 March, 2017, ICC-01/04-01/07-3728 para. 16.

⁸Case law from the ICC show that the Court has only proceeded to reparation stage in cases where there has been a conviction of an accused before the Court. In cases of acquittal or dismissal, the issue of reparation automatically dies.

subsequent to a conviction by the Court, the Court may receive application for reparations before then.⁹ An appeal against a Defendant's conviction may have adverse effect on the possibility of reparations especially where the conviction is quashed upon final determination of the appeal. The case of Jean-Pierre Bemba presents a classic example.¹⁰ At the reparations stage of the proceedings before the Court, the victims are granted *loci standi* beyond just '*partie civile*' as it is during trial proceedings against the Defendant.¹¹ Both the victims and the Defendant stand as parties before the Court presumably as parties to a civil action.¹² The Court recognises that the Trust Fund may carry out reparations projects without a pronouncement from the Court, in fulfilment of its assistance mandate. This essentially marks the ICC reparations regime as incorporating both juridical and a unique variant of administrative reparations regime where, the former flows from the Court's order and the latter is a sort of a reparations programme which is unconnected with the Court's proceedings but emanating from the International Criminal Court system. According to the ICC, the main purpose of reparations is to hold the perpetrator accountable for the crimes they have committed and to repair the harm they have caused the victims resulting from the crimes.¹³ Whereas the reparations system of the Court is still a going concern and may not be conclusively developed, the case law on reparations at the Court thus far, reveal some form of uniform pattern and established principles. The four reparations cases thus far concluded by the Court have been decided on the basis of the principles.¹⁴ These principles determine the reparability of victims' harm and the eventual award of reparations.¹⁵

3. An Overview of Reparations Cases at the International Criminal Court

The Prosecutor v Thomas Lubanga Dyilo

Thomas Lubanga Dyilo's reparations case was the first reparations case before the Court. The Trial Chamber of the Court had earlier convicted Thomas Lubanga for war crimes of enlisting and conscripting child soldiers among many charges brought against him, in March 2012. His conviction was confirmed on appeal in 2014. The Court received application for reparations from victims at different stages of the proceedings. Pursuant to the provisions of the Rome Statute,¹⁶ the Court, in August 2012, decided on the applicable principles on reparations to victims in the case. In March 2015, the principles were amended on appeal and thirteen principles were distilled.¹⁷ In *Lubanga*'s case, the Court awarded symbolic collective reparations in favour of the victims with particular focus on service to the community, through the TFV. The Court relied heavily on the provisions of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Declaration of Justice)¹⁸ and the 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 (UN Reparations Principles)¹⁹ in establishing its own principles.²⁰ The Court has held that the 'principles may be applied, adapted, expanded upon, or added to by future Trial Chambers' to fit the context of each case.²¹ In addition, through *Lubanga*'s reparations case, the Court has established certain principles which may be specifically applicable to child victims, determining their needs and interest, taking into cognizance age-specific harm and appropriate modalities for their reparations.²² Following the Court's amended award on appeal, the Trust Fund for Victims presented a draft implementation plan for collective

⁹ Luke Moffett, 'Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the International Criminal Court' *The International Journal of Human Rights*. (2013) (17) (3) 368-390, 375.

¹⁰ *The Prosecutor v Jean-Pierre Bemba Gombo*'s Case. Jean-Pierre Bemba was charged and initially convicted of three counts charge of war crimes and two counts charge of crimes against humanity by the trial chamber of the ICC in March, 2016. In June, 2018, the Appeals Chamber of the Court reversed the decision of the trial chamber and acquitted Bemba of all the charges. The reversal and acquittal dashed the victims' hopes for reparation as the case had the highest number of victims' participation and probable request for reparation at the Court, so far. *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08 -CAR-01-020/18.

¹¹ *The Prosecutor v Thomas Lubanga Dyilo* Reparation 'Decision on the Request of the Trust Fund for Victims for Leave to Appeal against the Order of 9 February 2016', 4 March 2016, ICC-01/04-01/06-3202-tENG, para. 12; Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 29: the chamber decided that victims should have the right to participate in the reparation proceedings and receive adequate support for a meaningful participation. '*The Prosecutor v Germain Katanga* (Order for Reparations), (n. 9) para. 15. This bears semblance with the conception of the concept of '*partie civile*' at the ECCC which permits victims to make civil claim of reparation in the criminal proceedings in line with the domestic provisions of the law of Cambodia.

¹² It is instructive that Rule 94 (1) of the ICC RPE refers to victims as 'Claimants' rather than applicants in the provisions for application for reparations. This is slightly different from the position at the ECCC where victims are entitled to reparation are regarded as *partie civile* in the criminal proceedings.

¹³ *Lubanga* (Order for Reparations), (n. 8) para. 2. Dwertmann highlights some of the purposes of reparations. Dwertmann 2010 (n. 1) 37.

¹⁴ *Germain Katanga* (Reparations Order), para 30. *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) 17 August, 2017 ICC-01/12-01/15 para. 26.

¹⁵ Reparability as used in this context literally means the possibility of reparation award being made to the victim.

¹⁶ Article 75 (1).

¹⁷ Appeals Chamber in *Lubanga*, (n. 13) paras. 3 and 52. paras. 1-52.

¹⁸ United Nations General Assembly Resolution 40/34. 29 November 1985, UN Doc. A/RES/40/34.

¹⁹ United Nations General Assembly Resolution A/RES/60/147 of 16 December 2005. *Lubanga*, (n. 8) para. 24.

²⁰ Appeals Chamber in *Lubanga*, (n. 13) paras. 1-52. *Al Mahdi* (n. 16) para. 24.

²¹ Appeals Chamber, *The Prosecutor v Thomas Lubanga Dyilo*, Judgment on the appeals against '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, 3 March 2015, para. 5, 55.

²² *Lubanga*. (Order of Reparations) para. 25-28.

reparations to a newly constituted Chamber in November 2015, which the Court ordered to be modified in February 2016 ordered approved for start of implementation in October 2016. The Court also approved the TFV's programme plan for the implementation of the reparations award. Although, the Court declared Lubanga indigent after he so claimed, in December 2017, the Court set the amount of Lubanga's liability for collective reparations at ten million (10, 000 000) USD and subsequently confirmed on appeal in July 2019. Until September 2020, the TFV found 854 eligible beneficiaries of the reparations order in Lubanga's case. As at 2021, the TFV had been able to complement about half of the award and was still seeking contributions towards for the remaining amount of the award.²³

The Prosecutor v Germain Katanga

Germain Katanga was initially charged together with *Mathieu Ngudjolo Chui* in 2008 but their charges were severed in 2012.²⁴ *Katanga* was convicted of a count charge of crime against humanity and 4 counts of war crimes committed on 24 February 2003 during the attack on the village of *Bogoro* in the *Ituri* district of the Democratic Republic of Congo (DRC) and sentenced in 2014 to 12 year term of imprisonment.²⁵ At the reparations proceedings, 341 applications for both participation and reparations were presented to the Court.²⁶ In 2015, the Court began reparations processes against *Germain Katanga*. The Court found that the principles established in Lubanga's case were equally applicable to *Katanga's* case.²⁷ In 2017, the Court awarded both individual and collective reparations order to 297 victims. The Court awarded individual symbolic compensation of 250 US Dollars per victim and collective rehabilitative reparations to victims, in the form of support for housing, support for income-generating activities, education aid and psychological support.²⁸ The Court found *Mr Katanga* indigent hence, the Court implored the TFV to consider using its resources for the reparations and to present an implementation plan.²⁹ The TFV set the full amount of the reparations award at one (1, 000 000) million USD. By 2019, the TFV had successfully executed individual awards. By 2020, it had concluded the implementation of collective reparations in form of educational support, while aid for income generating activities was nearly completed. However, implementation of the other forms of collective awards is still ongoing by the TFV.³⁰

The Prosecutor v Ahmad Al Faqi Al Mahdi

In September, 2016, Al Mahdi was found guilty as a co-perpetrator of war crimes of intentional attack against historic monuments and religious buildings. The Court held Al Mahdi liable for the destruction of all the protected buildings in Timbuktu, Mali.³¹ Al Mahdi was subsequently sentenced to nine years of imprisonment. First, in respect of *Al Mahdi's* conviction, the victims sought reparations to restore, maintain and protect the protected buildings. Although the Court noted that UNESCO and other stakeholders had restored the destroyed buildings, this did not exculpate *Al Mahdi* of his liability for the damage caused by the destruction.³² The Court established that remedial efforts by a third party to repair damage perpetrated by a Defendant in the time elapsed between the perpetration of the damage and issuance of the reparations order do not expunge the amount of damage originally done.³³ While UNESCO did not make any representation to the ICC concerning reparations, the Court refrained from making any order as to the right of third parties in reparations against the Defendant.³⁴ However the Rome Statute clearly states that *bonafide* third parties may make a claim against the Defendant in respect of reparations. Second, based on the destruction of the protected buildings, the victims applied to the Court for compensation for the economic damage the destruction had effected on their livelihood.³⁵ This, consequentially, had economic

²³ Practically, the TFV has implemented some of the collective reparation awards through the construction of symbolic structures, rehabilitative programmes to on mental and physical health, vocational trainings and projects to enhance generation of income for victims. TFV on Lubanga's reparations <<https://www.trustfundforvictims.org/what-we-do/reparation-orders/lubanga>> Accessed 20 April, 2022.

²⁴ ICC Case Information Sheet ICC-PIDS-CIS-DRC-03-014/18_Eng.<<https://www.icc-cpi.int/drc/katanga/Documents/katangaEng.pdf>> Accessed 12 April, 2022.

²⁵ *The Prosecutor v Germain Katanga*, (Judgment handing Down Conviction) 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1652, 1681 and 1691. The Court acquitted Katanga of rape and sexual slavery charges as a crime against humanity and the use of child soldiers as a war crime for lack of sufficient evidence against the accused on the criminal responsibility for those crimes. Nevertheless, the Court found beyond reasonable doubt that those crimes were committed. Although the parties appealed against the judgment, they discontinued their appeals and the Court judgment became final. In 2015, the Appeals Chamber reviewed the sentence and decided to reduce it. Subsequently, *Katanga* was transferred to a prison facility in the DRC to complete his sentence of imprisonment.

²⁶ *Germain Katanga* (Reparations Order), para. 32.

²⁷ *Germain Katanga* (Reparations Order), para. 30.

²⁸ The total value of the collective award is over 925 000 US Dollars.

²⁹ The Court ordered the TFV to present an implementation plan by 27 June 2017. 24 March 2017 and subsequently confirmed the reparation order on appeals in March 2018.

³⁰ TFV on *Katanga's* reparations <<https://www.trustfundforvictims.org/what-we-do/reparation-orders/katanga>> Accessed 20 April, 2022.

³¹ The Court dismissed the charge alleging destruction of burial sites which were adjacent the protected buildings, although no reparation request was made to the Court in respect of the allegation. This affirms that reparations at the ICC rests on the points of conviction of the accused. *Al Mahdi's* Reparation para 66.

³² *Al Mahdi* (Reparations Order) para 65.

³³ *Al Mahdi* (Reparations Order) para 65.

³⁴ UNESCO had made representation to the Court affirming that it would support the Court in making reparations to the local communities. UNESCO Submissions. *Al Mahdi* (Reparations Order), paras. 15, 63.

³⁵ Economic harm was established for victims who worked as guardians of the mausoleums and *maçons* (French word for 'Mason') who had the duty of maintaining them were solely dependent on the protected buildings for their livelihood. This

effect on the entire community and not just individual losses.³⁶ The victims sought both individual and collective reparations in form of compensatory, rehabilitative and symbolic reparations. There were 139 individual reparations sought by natural person applicants.³⁷ The applications included reparations for each of the destroyed protected buildings to repair the spiritual harm and facilitate their daily maintenance. The application also included a monetary compensation of 250 Euros per person to each victim applicant to reflect the collective harm suffered and a symbolic 1 (one) Euro award to the Malian State for the material and moral harm suffered.³⁸ The Court ruled *Al Mahdi* was actual and proximate cause of the destruction hence, he was directly liable for the harm inflicted on victims therefrom.³⁹ In 2017, the Court issued both individual and collective reparations order worth 2.7 million (2, 700 000) Euros. The reparations award was subsequently, confirmed on appeal in 2018. In the same fashion as previous Defendants, Al Mahdi claimed indigence and the Court enjoined the TFV to complement the reparations award. Implementation of the awards in *Al Mahdi*'s case is still ongoing as the TFV has identified implementing partners. As at the end of 2021, the TFV was still receiving applications in order to identify victims, eligible for individual awards which it estimates runs into hundreds of victims.⁴⁰ While the TFV has been able to complement about half of the award, it is still seeking contributions towards for the remaining amount of the award.

The Prosecutor v Bosco Ntaganda

In July 2019, *Bosco Ntaganda* was convicted of 18 counts charge of war crimes and crimes against humanity cumulatively, committed in Ituri community, in the Democratic Republic of Congo (DRC) between 2002 and 2003. He was subsequently sentenced to thirty (30) years of imprisonment. In March 2021, the Appeals Chamber confirmed his conviction on appeal. In March, 2021, the Court made the order for reparations against *Bosco* for the war crimes and crimes against humanity of which he had been convicted. A total of 2, 121 victims participated in the trial and perhaps applied for reparations, however about 1460 victims were deemed eligible for reparations by the registry. An additional 1, 100 victims were deemed potential victims, with a significant number of undetermined eligible victims at the time of the order of reparations. Victims in *Ntaganda*'s case expressed their preference for rehabilitative and restitutive reparations which are targeted at sustainable livelihood and well-being rather than short-term symbolic reparations. The Court awarded a total of thirty million (30, 000 000) USD reparations against *Ntaganda* and set the number of eligible beneficiaries at a minimum of 1, 100 to 100, 000 victims.⁴¹ The Court found overlapping number of about 933 eligible victims for reparations in both *Lubanga* and *Ntaganda*'s case. The modalities of the reparations award included all the five basic forms of reparations. Reparations measures of compensation, rehabilitation, restitution and symbolic and preventive reparations were awarded in favour of the victims. The Court found for both direct and indirect victims, child soldier victims and victims born as a result of sexual violence and crimes. The Court awarded collective reparations with individualised component. In essence, the Court distinguished between collective reparations which confers benefits on a community as a whole without focusing on any individual within the group and collective reparations with specific recognition and focus on individual victims within the group.⁴² In addition to child soldier victims, the Court gave non-discriminatory priority to victims of sexual and gender based violence especially rape and sexual slavery. Consequently, the Court established six additional reparations principles which incorporated gender approach to reparations. The Court has directed the TFV to draw up an implementation plan for the reparations award, in consultation with the victims and experts. The Court set the deadline for the draft implementation plan for 8 September, 2021. As at April, 2022, the Court had not made any decision on the implementation plan.

4. Principles Underlying Reparability of Victims' harm at the ICC: Gleanings from Case Law

Reparability as used in this context strictly connotes the eventual success of any claim made by victims for juridical reparations at the ICC. While the Court developed the general principles on reparations in the reparations case of *Lubanga*, certain principles have defined the victims' actual success for reparations claims. This paper examines two of the principles, thus far. Reparability of victims' harm is not necessarily tied to their participation in the trial proceedings but largely determined by the principles which underlie reparations proceedings. The applicable procedure governing victims' right to participate in the Court trial proceedings and the right to participate in reparations proceedings as a victim are different. Victims' right to reparations and the right to participate are clearly two distinct concepts and different from each other although, one may inform the other. In fact, the application to participate in the Court proceedings is separate and distinct from the application for reparations.⁴³ In practice, victims may present their application for participation in the proceedings and reparations simultaneously but, separately and the applications are determined independently of each other. Thus, it appears that victims who were not admitted to take part in the proceedings may participate and benefit from reparations proceedings at the Court.

also applied to people whose businesses depended on the existence of the protected buildings. This also extended to harms incurred by reason of losses from lack of tourism and economic activity in the years following the attack. *Al Mahdi* (Reparations Order) para. 73.

³⁶ *Al Mahdi* (Reparations Order), para. 64, 75.

³⁷ *Al Mahdi* (Reparations Order), para. 9.

³⁸ Application a/35140/16. In addition to the specific reparation sought by the victims, they applied to the Court to '[d]ecide on the measures of collaboration between the LRV and TFV for the implementation of the award; and [a]llow the LRV to draw up plans for the implementation of the award and to report back to the TFV and possibly the Chamber.'

³⁹ *Al Mahdi* (Reparations Order) para. 64, 75.

⁴⁰ TFV on Al Mahdi's Reparations <<https://www.trustfundforvictims.org/what-we-do/reparation-orders/al-madhi>> Accessed 20 April, 2022.

⁴¹ Para. 246.

⁴² *The Prosecutor v Bosco Ntaganda* (Reparations Order) 8 March, 2021 ICC-01/04-02/06-2659 para. 81.

⁴³ Appeals Chamber's dictum in *Lubanga*'s admissibility decision (n. 8) para. 70: The Court established that the procedural rules for determining the concept of a victim for the purpose of reparation proceedings are conceivably different since the reparations proceedings are a distinct stage before the Court.

In addition to applying for reparations before the Court, the victims have a right to participate in the reparations proceedings.⁴⁴ An application for reparations does not automatically translate to eligibility to receive reparations. Even though the Rome Statute is clear on who may apply to the Court for reparations, the criteria of a victim's eligibility for reparations is further defined and streamlined from the general concept of a victim within the context of core international crimes. Following the provision of the Rome Statute and the ICC Rules, victims shall make a written application to the Court via its registry for reparations either individually or collectively.⁴⁵ Although reparations is a right implicitly bestowed on the victim by the express provisions of the Rome Statute, the Court holds firmly, the principle that reparations is equally voluntary and the informed consent of the victim is required prior to the reparations award and in the participating in reparations programme.⁴⁶ Reparations proceedings are essentially between the victims as the Claimant/Applicants and the Convict as the Defendant. Other organs of the Court such as the Office of the Prosecutor, the Registry, the Trust Fund and neutral organisations which have been granted leave by the Court may also participate in the proceedings but not as substantive parties to the proceedings.⁴⁷ The Court has held that the Prosecutor is not a party to the reparations proceedings, hence the decisions of the Court with respect to reparations are not directed to it.⁴⁸ The Court however, receives submissions comments and views from these nominal parties who have no significant impact on the outcome of the Court proceedings.⁴⁹ It is only the victim who have been so identified by the Court that may apply for reparations. Hence, an applicant who has not been identified by the Court as a victim cannot apply to the Court for reparations.⁵⁰ It is however notable that an applicant for participation in the trial proceedings, whose application has been refused for participation is not automatically shut out from the opportunity of applying for reparations since the eligibility of such victim for reparations is determined separately.⁵¹ The Court has established that there is a distinction between a victim in the general sense who may apply for participation in the Court proceedings and the victim who is eligible to apply for reparations.⁵²

The concept of a victim within the context of reparations is the first principle identified by the Court, upon which reparations decision must rest. The Rome Statute provides no express definition of a victim. However, the Court adopts the traditional definition of victims as natural or juridical persons who have been inflicted with harm, owing to the perpetration of any of the crimes within the jurisdiction of the Court.⁵³ Hence, the definition of a victim is expressed in terms of harm inflicted on them, by reason of the perpetration of any of the core international crimes. This definition suggests that only persons who have incurred harm are regarded as victims before the Court. An alleged victim who cannot establish any harm suffered as a result of the perpetration of any of the crimes under the Statute may not be regarded as a victim by the ICC. Thus, the concept of harm largely influences and contextualises the concept of victim at the ICC. As objective as the definition of a victim appears to be, the operational context of the jurisdiction of the Court largely defines some of the limitations of the Court with respect to victims' reparations. The Prosecutor largely determines which situations to investigate and subsequently the offences to be charged within the jurisdiction of the Court. Certainly, there are instances where victims, but not of the alleged crimes in the specific situation before the Court may be shut out of the proceedings by the definition and victims are unable to influence the decision of the Office of the Prosecutor (OTP) to capture their interests even though, they are emanating from the same situation. With respect to reparations, the Court seems to apply a different approach to the construction of a victim who may be entitled to apply for reparations.⁵⁴ A victim within the context of reparations at the Court is defined by the combined provisions of Rome Statute Rules of Procedure and Evidence (RPE) and Regulation of Trust Fund for Victims (RTF).⁵⁵ Case law further reveals that victims will only be entitled to reparations for harms suffered occasioned by crimes of which, the perpetrator has been convicted. Thus, it does not suffice that the crime is within the jurisdiction of the Court or that it is established that the victim has been inflicted harm resulting from the crime but it must be further established that the Court

⁴⁴ The Appeals Chamber of the ICC held that victims have right to participate in the reparations process and they should receive adequate support in order to make their participation substantive and effective' *Lubanga*, (n. 13). para. 29.

⁴⁵ Article 75 (1) of the Rome Statute, Rule 89 and 94 (1) of the ICC RPE. *Lubanga* (Order of Reparations), para. 57-58. *Germain Katanga* (Reparations Order). para. 52.

⁴⁶ *Lubanga*. (n. 13). para. 30.

⁴⁷ In *Lubanga's* reparation proceedings, the prosecutor, the VTF and some organisation granted leave by the Court submitted their observations to the Court with respect to reparations. *Lubanga* (Order of Reparations) para.14. The same procedure was applied in the reparations proceedings of *Germain Katanga* and *Al-Mahdi*. *Katanga* (Reparations Order), para. 5. *Al Mahdi*, (Order of Reparations), para. 4. *Ntaganda* (Order of Reparations), paras 13-16.

⁴⁸ The Appeals Chamber of the Court ruled that the Prosecutor was not a party to reparation proceedings and refused to invite submission from the Prosecutor's office with respect to the appeal against the trial chamber's decision in *Lubanga's* case. *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, (n. 13) paras. 85-87.

⁴⁹ *Katanga* (Order of Reparations), para. 290. In *Katanga's* case, the Court received comments from the UN. para. 291.

⁵⁰ Reparation cases thus far show that the number of victim/applicants considered eligible for reparation is always a smaller number compared to the actual number of application.

⁵¹ This effectively answers the concerns and questions raised by authors such as Contreras- Garduño and Fraser in respect of victims who may be qualified for reparation. 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?' *Inter-American and European Human Rights Journal* (2014) 7 174-203.

⁵² *Lubanga*, (n. 13), para.8.

⁵³ Rule 85 of the International Criminal Court RPE. Moffett describes the definition offered by Rule 85 as 'wide' Moffett 2013 (n. 11) 375. In the case of *Lubanga*, the Court held that victims are those whose harm and personal interest are connected with the charges against the Accused before the Court.

⁵⁴ *Lubanga*. (n. 13), par.8; *Germain Katanga* (Reparations Order), (n. 9) para. 36.

⁵⁵ Rule 85 (a) of the RPE and regulation 46 of the RTF. *Lubanga*. (n. 13). para. 211.

has convicted the perpetrator of such crime.⁵⁶ In reparations proceedings, a natural person must have incurred harm personally but not necessarily directly.⁵⁷ Thus, a natural person may be a direct or indirect victim.⁵⁸ The Court recognises such concepts as direct and indirect victims.⁵⁹ Victims must be properly identified by the Court in each case to determine whether they are entitled to reparations.⁶⁰ An indirect victim is further defined in four categories.⁶¹ First, there are the family members of direct victims.⁶² The concept of 'family' in relation to 'family members' admit of contextual variations as it applies to different societies but the Court recognises the general presumption that a person's family members include his spouse and children.⁶³ By extending the concept of a victim to the family members of direct victims, the Court shares a similar conception of victims with the provisions of the UN Basic Principles and Declaration of Justice. Second, anyone who attempted to prevent the perpetration of any of the crimes for which the perpetrator has been convicted. Third, persons who incurred harm when helping or intervening on behalf of direct victims. Fourth, there are other persons who suffered personal harm occasioned by the crimes for which the perpetrator has been convicted.

A victim is not limited to natural persons but also includes juridical persons such as schools, government/statutory bodies, corporate and religious organisations.⁶⁴ Although, it appears the ICC RPE seem to qualify juridical persons as victims, only where, direct harm has been inflicted to any of their property owing to the crime, however, by the definition of the concept of indirect victim, juridical persons may also stand as indirect victims eligible for reparations. Unlike the provision of the Declaration of Justice, the context of victim at the ICC is largely dependent on the identification and conviction of the perpetrator. Regardless of the evidence of harm inflicted on the victim, the Court will not be able to award reparations without a conviction. It may be possible for the Trust Fund to provide assistance measures to victims within a particular region, but the probability of this is very low, given the limited resources of the Trust Fund and even such assistance measures may not suffice as reparations. There could be situations where victims may also be involved in the commission on convicted crimes. The dual-face of such categories of victims questions their eligibility for reparations, First, because they are not pure strains of victims as they can be held culpable for the crimes occasioning the alleged harm they have been inflicted. Secondly, with regard to the principle of contributory fault which negates the obligation to repair damage where the victim has made some form of contribution to occasioning the alleged harm, it is difficult to accord such victims eligibility for reparations. The Court seem to maintain a stance of individualised analysis in such situations.⁶⁵ The case of *Lubanga* and *Ntaganda* elicited this possibility of finding low level non-culpable perpetrators as eligible victims. Child soldiers in both cases were found to be victims eligible for reparations.

The Court has adopted the five requirements test in determining the eligibility of victims for reparations.⁶⁶ The applicant must be a natural or legal person and have incurred harm.⁶⁷ The harm inflicted on the applicant must have been caused by a crime within the jurisdiction of the Court. The Defendant must have been convicted of the crime which caused the harm to the applicant. There must be a causal link between the harm suffered and the alleged crime. Victims who meet the eligibility criteria for reparations are allowed to participate in the reparations proceedings and supported towards substantive and effective participation.⁶⁸ Participation in reparations proceedings by victims is however voluntary. The standard of proof in determining the eligibility of victims for reparations proceedings appears more stringent than that which is required for victim participation at trial. In all the reparations cases, the Court has had to contextualise each case and make recourse to the peculiar circumstances of each case⁶⁹ and certain relevant international legal instruments for the purpose determining the eligibility of victim for reparations in each case. Victims who did not apply for reparations may still be represented by the Office of Public Counsel for Victims (OPVC) and may eventually benefit from an award of collective reparations.⁷⁰ It is clear from the criteria laid

⁵⁶ *Lubanga* (n. 13). para.8; *Al Mahdi* (Order of Reparation), para. 42.

⁵⁷ *Germain Katanga* (Reparations Order), para.39.

⁵⁸ By the decision of the Court in *Al Mahdi's* reparation proceedings, the Court identified three categories of victims for the purpose of reparation each defined by the concepts of direct and indirect victim. The Court ruled that the war crime of destroying protected buildings and other cultural heritages in Mali affected both the direct victims who are the people and the 'faithful' of Timbuktu community and indirect victims such as the entire citizens of Mali and the international community.⁵⁸ The Court only acknowledged victims or organisations which were resident in Timbuktu at the time of the devastation. *Al Mahdi* (Reparations Order), para. 22, 80.

⁵⁹ *Lubanga* (Order of Reparations), para. 6. *Germain Katanga* (Reparations Order), para. 39.

⁶⁰ *Lubanga* (Order of Reparations), para. 1. *Germain Katanga* (Reparations Order), para. 31.

⁶¹ *Lubanga*, (n. 13), para.6.

⁶² As Henzelin et al assert, the concept of victims is extended to families of victims by virtue of the provision of Article 79 of the Rome Statute. Henzelin, M., Heiskanen, V. and Mettraux, G. 'Reparations to the Victims Before the International Criminal Court: Lessons from International Mass Claim Processes' *Criminal Law Forum* (2006) 17 317-344, 323.

⁶³ *Lubanga*, (n. 13). para.7.

⁶⁴ Rule 85 (b) of the RPE. *Lubanga* (Order of Reparations), para. 8.

⁶⁵ *Katanga* (Reparations Order), para. 43.

⁶⁶ The Court adopted the requirement for determining victim participation laid down in *Lubanga's* case with an additional requirement relating to reparations. *The Prosecutor v Thomas Lubanga Dyilo*, Appeals Chamber, 'Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008', dated 11 July 2008, ICC-01/04-01/06-1432, paras. 61-65. The Court subsequently relied on the same requirements in the reparations proceedings of *Germain Katanga* and *Al Mahdi*. *Germain Katanga* (Reparations Order), paras. 36-37.

⁶⁷ In the case of natural persons, directly/indirectly and for legal person, directly. *Katanga* Paras. 39.

⁶⁸ *Lubanga*, para. 29.

⁶⁹ *Lubanga*, para. 80. *Germain Katanga* (Reparations Order), para. 38.

⁷⁰ *Lubanga*, para. 12.

down by the Court that, an application for reparations is largely determined by the charges which the Prosecutor has brought before the Court and the set of facts applicable to charges before the Court.⁷¹ There seems to be a huge burden on the victim to furnish the Court with all the necessary information in the determination of a reparation proceeding. The legal burden of proof rests essentially with the victim/applicant as in any civil proceeding which requires that he who alleges must prove while the standard of proof is based on the preponderance of evidence between the victims and the Defendant. As far as juridical reparation at the ICC is concerned, the Court has drawn the distinction between eligibility and reparability.⁷² In addition to its main duties, the TFV is intrinsically involved in the reparations proceedings at the Court. Although, it does not have judicial powers to determine reparations' application, as conferred on the Court, it may determine post-judgement eligibility of victims who had been earlier declared ineligible for reasons of insufficient notice of the eligibility requirements. Practically, where the Court has not identified specific victims in its reparations award, it conducts field missions to determine eligible individual victims for each form of award made by the Court for the purpose of implementation. Recommendations by the TFV, following such subsequent application is subject to approval by the Court. For instance, in *Katanga's* reparations case, the court refrained from further consideration of applications of participating victims, who died during the proceedings.⁷³

The principle of eligibility for reparations at the ICC incorporates the concept of harm. The concept of harm and its determination in each reparations proceedings determines the entitlement of a victim in reparations and the scope/extent of the liability of the Defendant. For the purpose of reparations, the Court has drawn a distinction between identifying the types of harm which victims may have suffered and assessing the nature and the extent of harm for the purpose of determining the form of reparations award.⁷⁴ The Court holds that both identification and assessment of harm are important to the rights of the parties to the proceedings and indispensable part of the reparations proceedings. It is the duty of the Court to determine the types of harm inflicted on the victims, the absence of which could form a ground of appeal by either party.⁷⁵ Harm denotes 'hurt, injury, damage'.⁷⁶ Thus, harm could be physical, material or psychological⁷⁷ or moral.⁷⁸ The Court cannot find a category of harm that did not emanate from the crimes for which the Defendant has been convicted by the Court.⁷⁹ This principle however, does not preclude victims of such harm from benefitting from the assistance programme of the TFV.⁸⁰ Practically, the Court has adopted the practice of defining harm with respect to direct and indirect victims of the crimes for which Defendant has been convicted.⁸¹ A chain of harm such as harm ensuing from another harm is considered harm for which victims may lay claim.⁸²

While the Court has not made any express pronouncement on the existence of a minimum threshold of harm which a victim must have suffered before the victim can be entitled to reparations, the decisions of the Court suggest the existence of a threshold requirement with respect to harm inflicted on victims. In reparations proceedings, the victims' claim for reparations must be against harm resulting from crimes which the Court has found the Defendant guilty of/a crime which the perpetrator has been convicted.⁸³ What is important is that the victims must establish a link between the crimes committed by the Defendant and the harm they are claiming against. Initially, the Trial Chambers of the Court had relied on the 'actual' and 'proximate' cause of the harm in determining the link between the harm alleged by victims and the crime, the Defendant has been convicted of.⁸⁴ However, the Appeal Chambers has held that determining the causal link between the crime convicted and the harm for the purpose of reparations is subject to specific circumstances of each case and not necessarily subject to any standard rule.⁸⁵ The standard of proof to be met in establishing this causal link is that of a balance of probabilities.⁸⁶

⁷¹ *Lubanga*, para. 32. *Germain Katanga*. (Reparations Order), paras. 37, 162-163. *Al Mahdi* (Reparations Order), para. 38

⁷² Henzelin et al 2006 (n. 64) 327. 'The victim is required to establish a causal link and must provide in the reparation request, pursuant to Rule 94, information relating to the place and time of the incident and the identity of the person or persons the victim believes to be responsible for the harm. At the reparation stage, the claimant must substantiate entitlement. The former is essentially a question of 'eligibility', whereas the latter is one of 'reparability'

⁷³ *Katanga* (Reparations Order), para. 13.

⁷⁴ *Lubanga*, (n. 13) para. 181.

⁷⁵ *Lubanga, ibid. paras.*181-183 The Court held that the duty to define the harm involved in such case cannot be delegated to any other organ of the Court or institution and held that the Trial Chamber erred by delegating the task to the TFV.

⁷⁶ This description was adopted by the Appeals Chambers in the reparations proceedings in *Lubanga's* Reparations.

Lubanga, paras. 10, 31. *Germain* (Reparations Order), para.74

⁷⁷ *Lubanga*, para. 10. *Germain* (Reparations Order), para.74.

⁷⁸ In *Katanga* and *Al Mahdi's* case, the Court identified moral harm. *Katanga* (Reparations Order), para. 189. *Al Mahdi* (Reparations Order), paras. 43, 84, 133.

⁷⁹ *Lubanga*, (n. 13) para. 197-198. The Court held that could not be held responsible for harm emanating from sexual and gender-based violence which, he had not been convicted of.

⁸⁰ *Lubanga*, (Reparations Order). para. 199.

⁸¹ In *Lubanga's* case, the Court categorised the harms experienced by victims with respect to both direct and indirect victims. *Lubanga*, para. 191.

⁸² *Katanga* (Reparations Order), paras. 77-80.

⁸³ *Lubanga*, (n. 13).

⁸⁴ 'Actual cause' is described in terms of the 'but/for' while 'Proximate cause' is a cause that is legally sufficient to result in liability. The Court determines proximate cause in terms of reasonable foresight. The Court will consider among other things, whether it was reasonably foreseeable that the acts and conduct underlying the conviction would cause the resulting harm *Lubanga*, paras 22 and 65. *Al Mahdi* (Reparations Order), para. 44.

⁸⁵ *Lubanga*, para. 80-81.

⁸⁶ *Lubanga*, paras 22 and 65. *Al Mahdi* (Reparations Order), para. 44. Where the victim is unable to establish his allegation of harm on a balance of probabilities, it does not equate the denial of the existence of such harm although the court will

In identifying harm which may qualify victims for reparations, the Court is not limited to the evidence led in respect of harm during the trial proceedings leading to the conviction of the Defendant. The Court may receive fresh evidence relating to the harm against which the victims are claiming reparations. In addition, the Court may identify different forms of harm which may not have been identified in the judgment convicting the Defendant.⁸⁷ The Court may assess the extent of harm inflicted by the perpetrator by itself or through the TFV, for the purpose of determining the nature and size of the reparations award to the victim.⁸⁸ Harm perpetrated against natural persons such as individuals need not be direct but it must be personal to the victim. On the other hand, legal persons such as organisations claiming harm must establish direct harm to their properties.

In reality, owing to several factors, the process of meeting the requirement is tasking, time consuming and onerous.⁸⁹ In line with the Court's reasoning, it may be asserted that the RPE already apprehends such difficulty, hence the provision phrased as 'to the extent possible'⁹⁰ and the additional reference to circumstantial evidence and presumptions in favour of the victims.⁹¹ In assessing the harm alleged by the victim, Court takes cognisance of the context of the harm and the value at the time the reparations award was made against the information supplied by the victims and the observations and recommendations from recognised experts.⁹²

The ICC has identified various forms of harm/injury for which victims may receive reparations. The Court has identified physical harm.⁹³ The Court identified material deprivation which causes pecuniary loss or places victims at a disadvantage in gaining economic benefits which will ordinarily accrue to them as economic harm.⁹⁴ The Court described moral or psychological harm in terms of 'emotional distress and harm', 'mental pain and anguish' suffered by a victim.⁹⁵ There is a presumption of psychological harm where the Court makes a finding of physical or material harm.⁹⁶ The Court awarded reparations for physical, economic psychological and moral harm inflicted on the victims. In addition to categorising harm and ordering reparations for specific kinds of harm, it is desirable that victims be afforded some form of general reparations for experiencing the horror of the crimes perpetrated against them.⁹⁷ In situations where the victims established harm with respect to crimes for which the Defendant had not been charged or convicted by the Court, the Court has refrained from awarding reparations but gave exhortatory order to the TFV to provide assistance to victims in such situations in line with the provisions of Rule 98 (5) of the ICC RPE.⁹⁸ The Court holds the view that the reparations must be commensurate with the harm inflicted on each victim.⁹⁹ In reality it may be difficult to actually measure accurately, how commensurate the reparation is to the harm inflicted on victims. In *Katanga's* case, the Court affirmed the categorisation of victims based on the extent of the harm inflicted on them. It is however doubtful whether this is the best approach as it is probable that it may breed discrimination among victims. Although, it would be impractical to deny the fact that the victims were inflicted with harm in varying degrees and it is likely that a victim's injury appears more severe than the other, categorisation is not dissociated from discrimination.

make no findings as to the alleged harm, it may be that the victim may re-pursue such claims through other platforms.

Katanga (Reparations Order), para. 51

⁸⁷ *Lubanga*. (n. 13) para. 185, the Appeals Chamber in amending the earlier decision of the Court emphasized that it is bound by and limited to the facts of the case. The Court further noted that for purposes of reparations, it limited the interpretation of harm to that which was occasioned by the crimes, for which Mr *Lubanga* was convicted directly or indirectly against victims, it does not rule out other potential scenarios where the court may make an order for reparations of a harm based on certain findings of the Court. Where the Court makes findings based on different forms of evidence deducible from specific provisions of the RCT relating to facts or under the RPE relating to harm, which was not part of the main proceedings but was presented at the reparation stage. The circumstances are however without prejudice to the Defendant's rights.

⁸⁸ Rule 97 (2) of the ICC RPE. *Katanga* (Reparations Order), para. 31.

⁸⁹ In *Katanga's* case, the victims' legal representative got extension of time several times in order to make its submissions. *Katanga* (Reparations Order), para. 55.

⁹⁰ Rule 94 (1) (g)

⁹¹ *Katanga* (Reparations Order), para. 62.

⁹² In *Katanga's* case, the Court considered the difficulty of establishing the value of the property at the time of loss and the disparity in value of the destroyed property at that the material time of reparation and the value at the time of loss. Hence, the Court opined that in assessing the monetary value of economic harm, the economic context of the harm must be considered. *Katanga* (Reparations Order), paras. 185, 188, 191.

⁹³ *Lubanga*, (Reparations Order).

⁹⁴ Material deprivation was regarded as economic harm in *Lubanga* (Reparations Order), para. 191; *Al Mahdi's* Judgment, para. 108, 81-83.

⁹⁵ In *Lubanga's* reparations order, the Court identified loss and psychological disorders as forms of psychological harm. In *Al Mahdi ibid*, paras 85, 90. In *Katanga's* case the Court identified transgenerational harm as a form of harm. *Katanga ibid*, para. 133.

⁹⁶ *Katanga* (Reparations Order), paras. 129, 131.

⁹⁷ *Katanga* (Reparations Order), paras. 127-128.

⁹⁸ In *Lubanga's* reparations order, victims of sexual and gender based violence could not claim reparation against Mr. Lubanga because he had neither been charged nor convicted of such crimes. With respect to broader violation of human rights of victims resulting from other actions to which *Al Mahdi* was not convicted; the Court gave an exhortatory order to the TFV to provide general assistance to such victims. *Al Mahdi*, (Reparations Order), para. 108.

⁹⁹ *Katanga* (Reparations Order), para. 305.

As stated earlier, the Court's power in determining the scope and extent of damage, loss or injury is generally wide and discretionary. For the purpose of determining the scope and extent of any damage loss or injury with respect to reparations, the Court may appoint 'appropriate experts' *suo motu* or at the request of victims or their legal representatives, or the convicted person.¹⁰⁰ In addition, the appointed experts could suggest to the Court various options concerning the appropriate types and modalities of reparations. In such situations, the Court is required to receive the observations of the victims or their legal representatives, the convicted person as well as interested persons and interested States on the reports of the experts.¹⁰¹ The observations serve an advisory role to the Court, hence the Court is not bound to adhere to the observations received from the experts or other parties. However, thus far, the Court has often relied on the expert's observation in the process of assessment of the harm. It may appear that the Court adopts a mixed approach to the assessment of the victims' application for reparations. The Court has engaged both individual and collective assessments. For instance, in *Germain Katanga's* case, the Court assessed the applications individually.¹⁰² The Court however noted it was more inclined to adopt the individual assessment method in *Germain Katanga's* case because of the nature of the case with fewer applications and nature of the crime involved. The Court has opted for individual analysis of the application of the victims for two purposes. First, individual assessment assists the Court to assess the extent of the harm inflicted on the victims and determine the size of the reparations award. Second, the Court is able to determine the scope of the liability of the Defendant.¹⁰³ Also, the Court makes recourse to similarity, consistency and discrepancy in assessing the accompanying documents of victims' applications and finding of facts in respect of reparations.¹⁰⁴

In assessing the needs of the victims with respect to the determining appropriate reparations, the Court takes cognisance of factors such as age, gender, special circumstances which may distinctively define the harm experienced by them and their needs owing to such harm. In *Lubanga's* case, the Court considered age-related needs of child-victims, in pursuance of the provision of the Rome Statute and the RPE,¹⁰⁵ in order to assess need of victims. In line with the provisions of the RPE,¹⁰⁶ the Court, in determining appropriate reparations types, may invite States and non-governmental organisations with expert knowledge on the context of the crime involved in the reparations proceedings, to make observations and submissions to it.¹⁰⁷ As expressed by the Court in *Lubanga's* case, symbolic reparations will pave the way for the social acceptance of reparations awards in the affected communities. The general principle is that reparations order is made against a convicted person and the scope of liability of the Defendant for reparations is determined by the 'proportion of harm' he/she is responsible for, owing to the crime perpetrated against the victims and the level of participation in the perpetration of the crimes for which he or she has been declared guilty.¹⁰⁸ A Defendant will not be liable in reparations, to account for harm inflicted independently of his crime.¹⁰⁹ The TFV only discharges such liability to the extent of the order of the Court while the Defendant remains liable to the TFV and must reimburse it.¹¹⁰ In the experience of the Court thus far, the problem has recurrently, been the indigence or insolvency of the Defendant. The indigence of a Defendant does not impact reparations award made by the Court. It may however affect how the reparations order is implemented in terms of funding and promptness of implementation.¹¹¹

5. Concluding Remarks and Recommendations

Expectedly, the reparations system of the ICC is practically unable to provide reparations to every victim in each situation. Apart from the indispensable limitations associated with juridical reparations, the novelty of a reparations system by an international criminal institution comes with its peculiar challenges. Victims may be oblivious of many of these challenges while they are fixated on their expectations from the Court. The situation appears more complicated where victims have exaggerated expectations from the Court's reparations system having endured the relatively arduous trial proceedings and experienced the euphoria of seeing their 'villain' convicted. Clearly the Court emphasizes the need to work with the Legal Representatives for the Victims and the TFV in managing victims' expectations. However, it is difficult to ascertain how far this may go in reality.¹¹² This is particularly exemplified by Bemba's case where thousands of victims who were expectant of reparations had their hopes dashed when the Defendant's conviction was quashed. Similarly, while the Court emphasizes victim-centred and prompt approach to victims' reparations, the situation of victims who approach the ICC is already beset by delay. Usually, the prosecution and eventual conviction of perpetrators of ICC crimes take place many years after the crimes have been committed. At the time of prosecution most victims may have received little to no assistance. This usually renders the victims more vulnerable and beleaguered with raised expectations of 'repair' which may not necessarily materialise.

¹⁰⁰ Rule 97 *ibid.* Henzelin, M. et al. (n. 64) 333.

¹⁰¹ Rule 97 (2) of ICC RPE.

¹⁰² *Katanga* (Reparations Order), para. 43.

¹⁰³ *ibid.*, para. 33.

¹⁰⁴ *Ibid.*, paras. 66-70.

¹⁰⁵ Article 68 and Rule 86 respectively.

¹⁰⁶ Rule 103.

¹⁰⁷ In the *Lubanga* reparation's case, the Court invited submissions from the NGOs and international organisations such as Women's Initiatives for Gender Justice UNICEF, ICTJ, and Child Soldiers International. In *Katanga* reparation's case, paras. 194, 221, refer to the TFV making consultations with NGOs.

¹⁰⁸ The Court reiterated this principle in *Lubanga*, (n. 13) para. 99, 118: where the court stated explicitly the Defendant is liable to remedy the harms he has inflicted on the victims by the crimes he has been convicted of. *Al Mahdi* (Reparations Order), para. 50.

¹⁰⁹ *Lubanga, ibid.* para. 99. *Katanga*, (Reparations Order), para. 147. Notwithstanding the speculations about the alleged harm, the Defendant is only liable to the victims to the extent of his conviction. This however does not amount to a determination of the commission of crimes which may be connected to the alleged harm for which the Defendant has not been found responsible by the Court.

¹¹⁰ *Lubanga* (Reparations Order), para. 5, 115.

¹¹¹ *Lubanga* (Reparations Order), paras. 102-102; *Katanga* (Reparations Order), para. 245.

¹¹² *Ntaganda* (Reparations Order), Paras. 6, 47-48.

The Court's jurisprudence on eligibility of victims may appear strange and difficult for hurting victims. Non-eligible victims may be faced with the harsh reality that harm suffered from the same situation as other victims whom the court deemed eligible would not be repaired at the Court. Owing to applicable legal considerations on the subject matter and scope of the crimes, criminal responsibility of the Defendant, nexus with the harms suffered by victims, many more supposed victims are shut out of reparations for harms arising from the same situation.¹¹³ In the first instance, Statistics from the number of victims who have benefitted from implemented juridical reparations appear rather low in relation to the magnitude of crimes for which reparations were awarded. Secondly, a large number of eligible victims may be unknown and difficult to determine and on the flip side, victims who may otherwise be eligible but are shut out, may only have recourse to assistance measures by the TFV.¹¹⁴ In fulfilling its assistance mandate, the TFV relies on the funds from voluntary contributions from States and various international organisations.¹¹⁵ While the assistance programme may have reparative effects, it is difficult to conceive them as reparations *simpliciter*. The assistant measures are not so guaranteed neither are they conferred as of right. It is commendable though, that the Court established the principle against 'over compensation' to address cases of overlapping victims and harms. Hence, irrespective of joint liability of two or more perpetrators for the harms caused to victims in a situation, the liability of the perpetrator for full reparations does not diminish in each case.¹¹⁶

Following the order of the Court, the TFV is saddled with the responsibility of designing a draft implementation plan which will incorporate all the terms of the Court's order.¹¹⁷ To fully execute implementation of reparation awards, the TFV has relied on its own fund. In reality, the TFV has consistently sought for complementary funds from voluntary contributions.¹¹⁸ The TFV works collaboratively with partners, which may be international organisations or non-governmental organisation to implement the award alone.¹¹⁹ Funding has been as recurrent challenge, while TFV is able to supply half of the reparations amount in the cases so far, implementation has been decelerated by the search for complementary funds. The TFV is expected to carry out the plan as drafted and provide regular updates to the Court on the implementation. The Court shall entertain any matter of contention in the process of implementation. Summarily, the whole process appears long and tedious, especially given the fact that all implementation for all reparations cases thus far, are still ongoing. The State parties have a huge role in facilitating the enforcement and implementation of reparations order. It is difficult to execute reparations awards, especially some forms of symbolic awards without the cooperation of the concerned domestic State authorities¹²⁰ The State may do this by furnishing the TFV with all the necessary information that is required to successfully implement the reparations award and also partner with the TFV to reach all concerned victims. State parties' co-operation is also needed for funding of the TFV and over the two decades of the Court's operation, there has been progressive support from State parties and non-state parties to the Rome Statute.¹²¹

Reparations at the ICC does not absolve respective State parties' responsibility to provide reparations award to victims pursuant to their needs as provided under other treaties or national law. Hence, domestic reparations to victims by State parties must be emphasized. It is obvious that the reparations regime of the ICC is not designed to repair the harms suffered by every possible victim especially, given the outcome of the cases thus far decided. A complementary approach from respective States is inevitable and must be explored. Such complementary approach must make reparations available to verified victims. Practically, States like the DRC and Mali over which reparations cases have been decided, must take steps towards establishing domestic reparations. Domestic reparations should preferably be administrative in nature and designed to cater for victims who have not been captured by the ICC reparations system. In designing such administrative reparations, States may draw on the TFV's experience. Overall, State parties to the ICC must begin to consider establishing domestic reparations system in respect of ICC crime, as an implicit mandate of the Rome Statute and an inevitable resort.

¹¹³ In *Ntaganda's* case, the Court has expressed its awareness that the number of eligible victims may well be higher than the number of victims that could be ascertained at the time of the order or ever be ascertained in afterwards. *Ntaganda*, (Order of Reparations), para. 8.

¹¹⁴ *Lubanga*, (Order of Reparations), para. 55, *Katanga* (Reparations Order), para. 145.

¹¹⁵ Regulation 21 of the TFV Regulations. In addition, the TFV may also be funded from funds recovered through fines and forfeiture orders made by the Court, funds from reparation award under Rule 98 of the RPE and resources allocated to it by the ASP.

¹¹⁶ *Ntaganda's* reparation case provides a classic example where both *Ntaganda* and *Lubanga* have shared victims resulting from harms they both perpetrated against them, The Court upheld the full liability of both perpetrators for such harm while having regard for the principle against over compensation.

¹¹⁷ The draft implementation plan will include 'the objectives, outcomes and necessary activities that comprehensively respond to all of the reparations modalities that can realistically be implemented.' *Al Mahdi* Reparation, para 136. Regulations 54 and 47 of the Regulations of the TFV.

¹¹⁸ In *Lubanga's* case, the TFV has called for voluntary donations to make up for half of the funds needed to execute collective reparations, which runs to 4.25 million Euros. In similar fashion as to the case of *Lubanga*, the Court has also called for voluntary contributions valued at 1.35 million Euros to complement the implementation of collective reparation to the victim community in Mali in the reparation case of *Al Mahdi*. *Al Mahdi*.

¹¹⁹ While in *Lubanga* and *Al Mahdi's* case, the TFV has had to work with local and international organisations who are partners with it. In *Katanga's* case, the TFV implemented awards, solely.

¹²⁰ For instance, in *Al Mahdi's* case, the TFV has had to reach out to the national authorities of Mali in order to successfully implement symbolic reparations.

¹²¹ However, in the recent times the Court has been threatened with withdrawal of some States parties and funding by the US which is one of the largest donors to the ICC.