

Reparative justice

An afterthought in accountability for international crime

Allan Ngari and Steven Kayuni



African states are on the back foot when it comes to redressing victims of international crime. Serious challenges have arisen as to how international institutions and states should address victims' concerns. Reparations for the millions of victims in post-conflict African states have at best been an afterthought in criminal accountability processes; and at worst, a tool used for political mileage, often around elections. This report reflects and analyses different methods for redressing victims of international crime.

Key findings

- ▶ The court-ordered reparation framework of the International Criminal Court (ICC) is hinged on the guilt of the accused.
- ▶ Collective reparations in cases of mass crimes are appropriate as they necessarily deal with a large number of victims, affected directly and indirectly, albeit to varying degrees.
- ▶ The ambit or purview of the harm for victims directly and indirectly connected to crimes has become a key feature in awards for reparations.
- ▶ The process of establishing reparative justice for victims at the ICC has not crystallised into a uniform practice. The experiences of the Rome Statute system following from the 2012 Thomas Lubanga reparation order have however provided key lessons in establishing reparation frameworks for victims of international crime.
- ▶ Beyond the funds required for reparations, considerable reflection is required in the implementation process of reparative justice for victims.
- ▶ The African Union's Transitional Justice Policy Framework sets the benchmark for successful reparative justice. Member states are encouraged to develop comprehensive frameworks that bring both governmental and non-governmental reparation initiatives.
- ▶ National reparation frameworks – as has been seen in post-conflict Kenya, Senegal (relating to Chad), South Africa and Uganda – provide important lessons for national processes aimed at providing reparative justice to victims of international crime.

Recommendations

To the Rome Statute system:

- ▶ Numerous challenges regarding reparative justice at the ICC would be mitigated if the delays in implementing reparations for victims were addressed. With investigations and prosecutions taking centre stage, reparations are almost an afterthought. Consultations among all players to develop court-wide strategies on delivering reparative justice to victims in all affected countries are necessary. These consultations should involve every office in the ICC that has a mandate on any aspect of victims' concerns.

To African states:

- ▶ Reparations should be hinged on policy and legislative frameworks and not executive orders. This gives the best chance for a thorough national process where all stakeholders, including victims, are involved

in developing reparation frameworks that are informed by good practices, are locally owned and are geared towards ensuring rehabilitation, satisfaction, compensation and guarantees for non-repetition of the harm.

To the AU Department of Political Affairs:

- ▶ In raising awareness of the AU Transitional Justice Policy Framework, support and encourage member states to engage in sustainable reparation programming anchored in policy and legislation. Particular attention should be placed on the Central African Republic, The Gambia and South Sudan, which have transitional justice mechanisms in place on accountability and truth seeking. Reparation processes in these countries should not be an afterthought but rather complement existing mechanisms to ensure victims receive reparative justice.

Introduction

Reparation for victims has largely been a white elephant project for the international community. Advances have however been made by various international institutions and states to provide reparation frameworks.

In Africa, the question of reparative justice for victims of international crime remains unaddressed despite there being millions of victims. Serious challenges have arisen as to how international institutions and states should address victims' concerns. How policy and legal frameworks are formulated, interpreted and implemented have heavily impeded reparation strategies. There have been divergent concepts of how to redress victims' needs.

Resources for implementation are also limited. The International Criminal Court (ICC) has had some legal systems developed on reparation including the ICC Trust Fund for Victims guide. Further, varied regional and domestic reparation frameworks, strategies and processes have been put in place for purposes of redress for victims of international crime.

This report on reparation frameworks for states and international institutions attempts to reflect and analyse different methods for redressing victims of international crime.

Reparation framework under the ICC

Principles developed by the Trial Chamber

The ICC Statute framework of reparations includes reparative justice processes. Through adjudication, the Trial Chamber has attempted express and substantive orders for the provision of the right of victims of international crime to reparations.

In the long run these have culminated in principles that have set the pace for the ICC reparative justice framework. The principles have been developed with inclusive interpretative modes that consider United Nations (UN) guidelines, regional bodies' and human rights institutions' practice and national frameworks for reparations. The Thomas Lubanga, Germain Katanga and Ahmad al-Faqi al-Mahdi decisions illustrate these principles.

Thomas Lubanga Dyilo was convicted of war crimes of enlisting and conscripting children under the

age of 15 and using them to participate actively in hostilities as child soldiers.

In its 2012 decision, the court set out the following principles:

- a. Principle of dignity, non-discrimination and non-stigmatisation** – all victims regardless of their participation in the trial proceedings or not will be treated fairly and equally.¹ This principle may have the desired effect of curbing the increasing volumes of applications from victims to participate in proceedings at the court discussed in an earlier section. This is the case where the principles are publicised effectively to victims and affected communities that reparations will take a non-discriminatory application.²
- b. Principles on beneficiaries** – the beneficiaries of reparations are both direct and indirect victims pursuant to Rule 85 RPE. While a direct victim may be clear, an indirect victim status may not be as clear. The Chamber will determine an indirect victim as for example the parents of a child soldier.³ Legal entities may also benefit as victims but priority may be given to certain victims in vulnerable situations such as victims of sexual and gender-based violence.⁴
- c. Principle on accessibility and consultation with victims** – the Chamber endorsed a gender-inclusive approach to all principles with sufficient consultations with victims in situ paying particular attention to their priorities.⁵
- d. Principle on victims of sexual violence** – victims include women and girls, and boys and men alike. Reparation awards for this group of victims require a specialist, integrated and multidisciplinary approach particularly to meet obstacles faced by women and girls when seeking access to justice.⁶
- e. Principle on child victims** – reparation decisions will be guided by the fundamental principle of the 'best interests of the child' enshrined in the United Nations Convention on the Rights of the Child. Where child soldiers are victims, reparation programmes must include their reintegration into society and rehabilitation to promote reconciliation within society.⁷
- f. Principle on the scope of reparations** – the Chamber recognised the uncertainty in the number of victims in the case and despite the volumes of

applications from victims, these numbers are not representative of all the victims. The Chamber endorsed the use of both individual and collective reparations noting that the two are not mutually exclusive and may be awarded concurrently.⁸ When collective reparations are awarded, they should address the harm suffered by victims on an individual and collective basis.⁹

- g. Principle on the modalities of reparations** – a comprehensive approach to reparations was adopted, including restitution, compensation (requires broad application consistent with international human rights law assessments of harm and damage) and rehabilitation. The Chamber reserved a non-exhaustive list of the forms of reparations not excluding those with symbolic, preventive and transformative value.¹⁰
- h. Principle on proportional and adequate reparations** – reparations should support programmes that are self-sustaining and benefits paid in periodic instalments rather than in a lump sum.¹¹
- i. Principle on causation** – the court should not be limited to ‘direct’ harm or the ‘immediate effects’ of the crime, particularly in this case involving child soldiers, but instead the court should apply the standard of ‘proximate cause’. The court must be satisfied that there exists a ‘but/for’ relationship between the crime and the harm.¹²
- j. Principle on the standard and burden of proof** – as the trial stage is concluded when an order of reparations is considered, the appropriate standard of a balance of probabilities is sufficient. Where the reparation award emanates from the Trust Fund for Victims a more flexible approach must be taken.¹³ These kinds of awards are akin to what has become known as the second mandate operations and assistance of the Trust Fund for Victims in situation countries of the court outside of a judicial determination of guilt or innocence of an accused person.

In relation to reparations, Trial Chamber II handed down its decision in the case in December 2017 with two main objectives: (a) to implement the Appeal Chamber’s earlier order, the Order for Reparations of 3 March 2015 (the ‘2015 Order’); and (b) to set an amount for reparations.

The Lubanga case was the first case at the ICC to reach the reparation stage, but controversy surrounding procedural requirements delayed the determination of Lubanga’s monetary liability by the Chamber. The decision of 15 December 2017 by Trial Chamber II has similar findings as the Katanga and al-Madhi cases on the question of assessment of monetary liability.

This suggests that thus far, ICC Trial Chambers have assessed defendants’ monetary liability for reparations through formal, functional and intermediate approaches. Trial Chamber II reiterated key principles from the 2015 order, including the proportionality between liability and harm, as well as the convicted person’s participation in the commission of the acts for which he or she was convicted.

Direct victims were held to have experienced material, physical or psychological damages while indirect victims had to demonstrate, among others, a personal relationship or connection to the direct victim in addition to establishing harm.

Trial Chamber II assessed liability in relation to 425 victims collectively at US\$3 400 000, together with an additional liability of US\$6 600 000 for victims not yet identified. The total amount for collective reparations was set at US\$10 000 000.

On 7 March 2014, Germain Katanga was found guilty of crimes against humanity and war crimes perpetrated in the village of Bogoro, Democratic Republic of the Congo (DRC), on 24 February 2003. The Chamber found Katanga guilty as an accessory to the crimes of murder as a crime against humanity; murder as a war crime; attack against a civilian population as such or against individual civilians not taking direct part in hostilities, as a war crime; destruction of enemy property as a war crime; and pillaging as a war crime.

Under the Chamber’s order for reparations, individual reparations were awarded to victims in the form of a symbolic award of US\$250. In addition, the Chamber made an award for collective reparations designed to benefit each victim, in the form of support for housing, an income-generating activity, education and psychological support.

The court-ordered reparation framework of the ICC is hinged on the guilt of the accused. The Trial Chamber

acquitted Katanga of sexual violence crimes that constituted war crimes and crimes against humanity. Victims of these crimes who participated in the case would therefore not benefit from the court-ordered reparations in this case.¹⁴

On 27 September 2016, following an admission of guilt, the Chamber convicted Ahmad al-Faqi al-Mahdi of the war crime of attacking protected objects. These included 10 historic monuments and buildings dedicated to religion pursuant to Articles 8(2)(e)(iv) and 25(3)(a) of the ICC Statute in Timbuktu, Mali.

The Lubanga case was the first case at the ICC to reach the reparation stage

The Chamber sentenced al-Mahdi to nine years in prison. It further appointed four experts to help determine the reparations. In its determination the Chamber considered, among others, collective and symbolic reparations for the community of Timbuktu; acknowledged that the destruction of the protected buildings had caused suffering to the people in Mali and the international community; and assessed al-Mahdi's liability for reparations at €2 700 000.

Types of damages

Collective reparations in cases of mass crimes are appropriate as they deal with a large number of victims, directly and indirectly affected, albeit to varying degrees.¹⁵ In another ruling, a Pre-Trial Chamber found it appropriate to use a 'presumption of collective injury' in cases where the applicants for reparations were not able to show a close relationship with the victim.¹⁶ The Chamber found that direct and indirect victims had suffered damages, and it identified specific types of injury or harm giving rise to reparations.¹⁷

With respect to direct victims, the Chamber relied on the earlier Appeals Chamber ruling to identify the following types of damages:

- a. Physical trauma and violations of security of the person.
- b. Psychological trauma and the development of psychological difficulties, notably suicidal tendencies and dissociative behaviours.
- c. Interruption and termination of schooling.

- d. Separation from family.
- e. Exposure to an environment of violence and fear.
- f. Difficulty in maintaining relations with family and community.
- g. Difficulty in controlling aggressive impulses.
- h. Inability to adapt to normal life, placing the individual in a disadvantageous situation, especially with regard to the ability to find work.¹⁸

With respect to indirect victims, the Chamber further noted the following aspects:

- a. Psychological suffering resulting from the sudden loss of a family member.
- b. Material poverty resulting from the loss of revenue associated with a family member.
- c. Losses and damages incurred by a person attempting to ensure that children do not suffer further damages as a result of the alleged crimes.
- d. Psychological suffering and material losses resulting from the aggression of former child soldiers who are reincorporated into their families and communities.¹⁹

The Chamber noted that by reason of their age and vulnerabilities, child soldiers would be 'presumed' to have experienced psychological, physical and material damages.²⁰ This presumption is the result of conditions in the area and in the relevant forces or units such as poor living conditions (including lack of access to potable water, inadequate shelter, lack of medical care, and increased likelihood of injury, rape and other forms of abuse); psychological trauma from having witnessed torture and from proximity to violence, munitions, and weapons, and the devastating consequences of all these factors afterwards, including dissociative states, depression, suicidal tendencies and the effects of alcohol and drug use.²¹

Ambit of the harm

Regarding the assessment of beneficiaries, policymakers need to realise that the ambit of the harm for the victims directly and indirectly connected to crimes has become a key feature in awards for reparations.

The rules haven't set out categories for harm or definition. The court has had to seek guidance from other legal instruments such as the UN Basic Principles

and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

It is victims' right to indicate from the outset that they want reparations

Injury, damage and hurt – material or physical – have been categorised as useful factors when considering reparation awards. Further, harm can be proven through evidence adduced during trial, personal to the victim. The value of the harm and its quantification is a challenge to the ICC reparation framework. However, the Trial Chamber has had guidance from possible cost of repair as opposed to quantifying a total sum of harm suffered.

Analysis of ICC approaches in the Katanga, Lubanga and al-Mahdi cases

The ICC has a set of stipulated conditions for victims to qualify for reparations, or be categorised as being within the ambit of the court. In the cases of Katanga, Lubanga and al-Mahdi, it has laid down the following:

- a. A victim is a natural person or a legal person.
- b. The victim has to demonstrate that there has been harm suffered.
- c. The crime leading to the harm must be within the ICC's jurisdiction.
- d. The victim must establish a link between the cause of the harm and the alleged crime that has led to the conviction of the accused person.

It is suggested that in order for the reparation frameworks for international crimes to advance a victim's cause, these four need to be liberally and progressively interpreted. Policymakers and decision makers must bear in mind transformative approaches to formulation, interpretation and implementation policies and strategies.

Gender sensitivities, child welfare and economic costs over substantive justice and vice versa should have serious considerations. Trust Fund for Victims Regulations 60 to 64 and 88 are instructive to this process. Thus natural and legal persons intending to be heard by the court may write to the court requesting the right to take part in the proceedings. This can be done at any stage.

It is victims' right to indicate from the outset that they want reparations. But victims should decide to participate in reparation proceedings only when such proceedings are before the court. The standard form application prepared by the Registry's Victims Participation and Reparations Section is approved by the court's presidency, which oversees the Registry's administrative work.

In ICC cases where decision makers are struggling to identify beneficiaries before a reparation order, it is the Trust Fund's duty to identify them during



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the time that it is implementing the reparation award. Bypassing the judicial process via the Trust Fund can create selectivity challenges for victims, and could see victims crying foul for exclusion. The process can also lead to over-inclusiveness, which may create a strain on the existing shoestring budget for reparation implementation.

Admission to participate in proceedings

The admission criteria have complicated the reparation framework for the ICC. For example there is no steady direction of jurisprudence. In the Lubanga case, victims had to apply in writing to participate in the reparation process. These applications were collected at varied intervals and collected by different actors – the Victims Participation and Reparations Section, Legal Representatives of Victims and the Trust Fund for Victims.

The Trial Chamber has in addition to application-based processes given the Trust Fund the authority to identify extra beneficiaries who can be termed eligible during the implementation phase.

The admission criteria have complicated the reparation framework for the ICC

At times the Trial Chamber has adopted an inflexible application-based approach. In the Katanga case, it provided for this approach with no possibility for victims to be added to the list during the implementation stage.

That notwithstanding, the varied approaches towards reparations have been apparent in the al-Mahdi case where the Trial Chamber has abandoned the application-based process and relied heavily on the Trust Fund to initiate identification and qualifications of beneficiaries during the implementation phase.

Further, if not for Jean-Pierre Bemba's acquittal by the Appeal Chamber, most victims who participated in the case, had jointly applied at the outset of the proceedings for both participation and reparation. A panel of experts duly appointed by the Trial Chamber advised that during reparation phase there should be no attempts to identify additional beneficiaries. Unfortunately this meant that the only way to access reparations would have been at the outset when victims completed the Victims Participation and Reparations Section-issued forms.

Reparation implementation

Policymakers and decision makers must realise that there are significant challenges in the implementation of reparation frameworks for international crimes beyond the availability of funds. Considerable reflection is required to ensure reparative justice for victims of international crime.

The ICC legal framework provides for implementation through the Trust Fund for Victims pursuant to Article 75(2) and Rule 98. Collective, individual and other reparation awards will need sound implementation strategies in place.

The Trust Fund for Victims frames a Draft Implementation Plan for the approval of the Trial Chamber. This plan will set out a strategy for executing the reparation order and proposed activities, including assistance. The Draft Implementation Plan can be developed only through consulting actors in the Registry, defence, local authorities on the ground, and Legal Representatives of Victims.

The Trial Chamber can reject or endorse such a Draft Implementation Plan. When it has been approved, the Trust Fund will consider an implementing partner on the ground through a transparent procurement process. The Trial Chamber expects a progress report on the implementation of the reparation order from the Trust Fund.

Implementing a reparation order in active or recurring conflict situations, such as currently in the DRC and Mali, while at the same time ensuring that there is proper consideration of all sensitivities, is an uphill task for the Trust Fund and selected implementing partner. Such situations remain volatile, so implementation is likely to be hampered. Innovation will be needed to deliver reparative justice to victims of international crime in these situations.

Analysis of ICC approaches in the Katanga, Lubanga and al-Mahdi cases

Despite the Lubanga, Katanga and al-Mahdi decisions making jurisprudential advancements, each decision has been criticised for different reasons. These include the question of selection of victims, considerations of gender, child victims, psychological harm caused, and cost of repair. This section critically discusses the reparation framework in the Lubanga, Katanga and al-Mahdi decisions.

The Katanga case

Generally the convict's responsibility is expected to be proportional to their contribution to the commission of the crimes for which he or she has been convicted. The convict will repair only according to his or her contribution to the commission of the offences.

The main argument in support of this principle is that it would be unfair to place all the responsibility on an individual who is only partly responsible for the damage suffered by the victims. An accomplice, therefore, won't be sentenced to the payment of reparation in the same manner as the author or co-author of the offence.

In the Katanga case the Chamber noted the complicity of the convicted person and tempered his involvement to arrive at a decision reflecting his real participation in the crime. In light of all the material available for its consideration, the Chamber found Katanga liable for US\$1 000 000 in compensation as an accomplice, out of US\$3 752 620, which is about a third of the total extent of the injury.

It's been noted that the Katanga reparation order contains "important confirmations de lege ferenda"²² in terms of the participant-victim status, the definition of the harm suffered and the standard of proof; however, the individual-focused approach adopted raises perplexities'.²³

While it is appreciated that the court tried to fill the gap left by the symbolic awarding of US\$250 as individual reparations, by means of the collective reparations, it has been asserted that the court 'lost sight of their actual aim, which is, as expressed by the Court itself, to address common needs and "la complexité de la souffrance des différentes victimes"'.²⁴

In essence, while the court tried to award collective reparations as a way of realising victims' shared suffering, it failed to mitigate individual needs. It's also argued that in deciding on the reparation measures, the court stressed the importance of victims' expectations and needs as they were expressed during the consultations,²⁵ but it didn't go further.

Another concern that the Katanga decision raised was:

'The outcomes of the individual analyses are not taken into account in order to provide comprehensive

collective reparations which should also restore the dignity of those victims who were not able to satisfy the onus of proof in the instant case. In that connection, it is submitted that two different standards of proof for personal harm and common harm, although expressly denied by the Appeals Chamber, could allow for a better chance of alleviating the sufferance of those victims and thus promoting reconciliation between the convicted person, the victims of the crimes and the affected communities.'²⁶

Another challenge identified under the reparation framework in the Katanga case is the lack of continuous legal representation for victims.²⁷ It is argued that the Office of Public Counsel for Victims alleged that the Trial Chamber failed to appoint a new counsel for 32 victims immediately following approval of the withdrawal of the former legal representative.²⁸

The office averred that 'there should be "no gaps" in the legal representation of victims as they must remain represented throughout the proceedings'.²⁹

It is further alleged that the Katanga decision didn't recognise the issue as being worth analysis alongside international human rights law. It simply noted that, firstly, the court's rules and regulations sporadically require the appointment of a legal representative to victims 'where the interests of justice so require'. Secondly, it noted that 'the Court's legal texts do not expressly provide that victims must be represented by counsel at all times'.³⁰

The Appeals Chamber dismissed the OPCV's appeal based on the late stage of the reparations proceedings 'without much opportunity to submit new evidence to substantiate specific applications for reparations'.³¹ Thus it is contended that in following this course of action, the Appeals Chamber glossed over two important areas:

'First, it restricted the meaning of "interests of justice" to merely the submission of evidence, in disregard of other aspects of access to justice, such as to ensure the flow of information and to receive legal advice. Second, it neglected the OPCV's reliance on human rights jurisprudence.'³²

In that regard Sean Shun Ming Yau,³³ in a comparative perspective, refers to the European Court of Human Rights which, in *Artico v. Italy*,³⁴ emphasised a positive obligation to ensure an effective fair trial right and, in

Pakelli v. Germany,³⁵ found that legal representation is imperative for one to develop legal arguments, especially given the complexity and voluminous nature of the case.³⁶

The Lubanga case

In the Lubanga case, in light of the circumstances of the case, the Chamber defined his liability in accordance with the principle of proportionality, the guiding principle in reparation proceedings.

The Chamber used a mixed approach – one approach based on the Katanga case law regarding the sample of victims who participated in the case, and a different approach for unidentified victims.

Having noted that the responsibility for reparation varies according to the form of responsibility and the specific elements of that responsibility, considering the seriousness of the crimes committed and the degree of involvement in the commission of the crimes, the Chamber said it didn't, to its knowledge, have any other person convicted of the same crimes.

It is known that there is a monetary responsibility for the convicted person, even if his share of responsibility for the total harm done from his crimes isn't clear. The Chamber applies its own formula to determine the monetary responsibility so as not to have a set amount for all convicted people. Through mathematical calculation, however, it's possible to deduce what the Chamber intended to make understood.

The sum of US\$6 600 000 corresponds to 825 additional victims with 100% responsibility, or 1 650 victims with 50% liability for the harm suffered. This is the maximum that Lubanga can be held responsible for in view of participation, the existence of the harm having been demonstrated even if the exact number of victims is unknown.

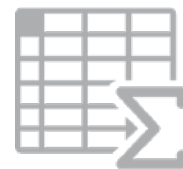
The court doesn't know everything, and is only aware of the evidence brought to it by the parties to the trial and the reparation proceedings, as well as elements found through its research.

The element of monetary responsibility of the convicted person serves in particular to respect Rule 97(3) of the Rules of Procedure and Evidence that '[t]he Court must respect the rights of the victims and of the sentenced person' and allow the convicted person to have an effective remedy to the appeal provided by Article 82(4) of the Statute.

This element is not immutable and doesn't have a single form that would give a percentage of liability in a total loss.

Taking these two factors into account makes it possible for the Chamber to adapt how it determines the convicted person's responsibility according to the circumstances he faces, while allowing him to assert his rights effectively.

In the Lubanga case, the Chamber faced a determined group of victims as well as an unidentified group of victims, but whose existence is proven by various pieces of evidence brought to the Chamber's attention. It therefore had to make two different applications of the



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principle of proportionality to stay within the rights of victims and convicted persons under Rule 97(3) of the Rules of Procedure and Evidence and Article 82(4) of the Statute.

During the proceedings, heated procedural debates emerged and Trial Chamber II and the Trust Fund 'clashed in their understandings of their respective mandates'.³⁷ While the Chamber believed it needed to identify and 'approve' victims entitled to reparations as a prerequisite to determining Lubanga's monetary liability, the Trust Fund believed this was unnecessary, and something it should do during implementation.³⁸

The Trust Fund had estimated that there were 3 000 potentially eligible victims.³⁹ Similarly, while the Trial Chamber believed it needed to determine the extent of the harm caused to victims to establish Lubanga's liability, the Trust Fund thought the extent of the harm was already described adequately in the judgment, sentencing and decisions on victims' participation.⁴⁰

However 'in what appeared to be a change of its original position', the Trial Chamber acknowledged in the course of the proceedings that the victims identified by the Trust Fund were 'a sample, but did not comprise the totality, of victims potentially eligible for reparations, namely those who suffered harm as a result of the crimes for which Lubanga was convicted'.⁴¹ This shift was instrumental in the 15 December 2017 decision by the Trial Chamber.⁴²

As the Lubanga debate continued, Trial Chamber II (with the same composition as the Lubanga case) issued a reparation order in the case against Katanga. Trial Chamber II pursued in the Katanga case what could be termed a 'formal' means of calculating liability, akin to civil claim proceedings.

First the Chamber identified a set of 297 victims (out of 341 applicants) entitled to reparations.⁴⁴ Then, allegedly without consulting experts, it calculated the monetary value of the harm suffered by each of the identified victims, reaching a total monetary value of the overall harm of US\$3 700 000.⁴⁵

But the Chamber found that Katanga was criminally responsible for only US\$1 000 000 – an amount deemed proportionate to both the harm caused and

the specific circumstances of his participation in the commission of the crimes.⁴⁶

Months later, it is observed, Trial Chamber VIII approached monetary liability for reparations differently in its reparation order in the al-Mahdi case, issued shortly after the judgment.⁴⁷ Trial Chamber VIII assessed the value of harm 'suffered by or within the community of Timbuktu'⁴⁸ using what is termed a 'functional' approach.⁴⁹

The Trial Chamber rejected the arguments that harm and associated liability could only be determined on the basis of the 139 individual victim applications before the Chamber,⁵⁰ and that the Chamber needed to identify and approve the victim beneficiaries.⁵¹

Instead the Chamber engaged with expert reports to enable it to 'reasonably approximate' costs that established al-Mahdi's monetary liability of €2 700 000⁵² and delegated the identification of the victims to the Trust Fund,⁵³ moving the process forward.⁵⁴ In both the Katanga and al-Mahdi cases, the Chambers awarded a combination of individual and collective reparations – and both orders were appealed.⁵⁵

The Trial Chamber in the Lubanga case took a different, 'intermediate' approach.⁵⁶ Despite its initial opposition to the requests of the Trust Fund, the Chamber largely endorsed the Trust Fund's position that the Chamber need not identify all victims, nor assess their specific harm, to quantify Lubanga's monetary liability.⁵⁷ The Chamber endorsed aspects of both the Katanga and al-Mahdi reparation orders to conclude that Lubanga was liable for US\$10 000 000.⁵⁸

As in the Katanga case but unlike that of al-Mahdi, the Trial Chamber assessed whether each of the 473 individual victim applications were entitled to reparations. It determined that, on a balance of probabilities, only 425 of the identified victims had suffered harm resulting from the crimes for which Lubanga stood convicted, and were thus entitled to access collective reparations.⁵⁹

However, and unlike in the Katanga case, the Chamber did not assess or quantify the specific harms of these victims.⁶⁰ Instead it determined that all directly and indirectly identified victims had suffered an 'average harm' comprising elements of material, physical and

psychological harm, and estimated the value of this harm to be US\$8 000 *ex aequo et bono*.⁶¹

To arrive at this finding, the Chamber relied on the submissions by the Legal Representatives of the Victims and the Office of Public Counsel for Victims as well as the Chamber's own assessment in the Katanga case.⁶²

The Chamber further found that the 425 victims were only a 'sample' of the overall number of still unidentified victims of the crimes committed by Lubanga;⁶³ determined that unidentified yet eligible victims were in the 'hundreds or thousands';⁶⁴ and entrusted the Trust Fund with further identifying victims.⁶⁵

The Trial Chamber reached this conclusion by relying on the findings of Trial Chamber I in the Lubanga judgment and sentencing decision (which indicated that the crimes were widespread);⁶⁶ estimates provided by the Office of Public Counsel for Victims and one of the two legal representatives that victims numbered 1 000 to 1 500 (the other legal representative estimated 20 000 to 25 000 victims, and Lubanga estimated 200);⁶⁷ and figures provided by the DRC.⁶⁸

Lubanga is indigent and couldn't satisfy the reparation award made against him

Further, the Chamber relied on open source data (mostly from the UN and other international and non-international organisations) which estimated 2 451 to 5 938 direct victims.⁶⁹ However it is considered that underreporting was probably due to the long time elapsed since the crimes, length of the proceedings, geographic dispersion of victims and stigmatisation, among others.⁷⁰

Trial Chamber II didn't seem to find it necessary to specify a definitive number of victims (beyond the estimate of 3 000 initially provided by the Trust Fund) nor the specific harm that such victims may have suffered in a collective reparation case.⁷¹

In this regard, and relying on the principles established earlier in the Katanga case, the court established, *ex aequo et bono*, the average or estimated damages suffered by each victim, as a result of material,

psychological and physical harms, whether the victim was direct or indirect, in the amount of US\$8 000 each, for a total of US\$3 400 000.⁷²

The balance of US\$6 600 000 was established, *ex aequo et bono*, for remaining victims as yet to be identified through the process of implementing the reparations.⁷³ Interestingly, according to Pearl Eliadis,⁷⁴ this amount exceeded the figure requested by lawyers of the victims, who had requested only US\$6 000 000.

Unlike in the Katanga case, the Chamber seemed to find Lubanga monetarily responsible for all the harm suffered by at least the 425 identified victims (425 x US\$8 000 amounting to US\$3 400 000) regardless of the recognition by the Chamber that several people are potentially responsible for the crimes tried before the court.⁷⁵

Although the Chamber noted that no one else had been 'found guilty' of crimes causing the victims' harm in this case, its decision was confined to Lubanga's liability.⁷⁶

Marissa Brodney and Meritxell Regué assert that it is unclear whether the Chamber may have considered Lubanga's 'essential' contribution as co-perpetrator under Article 25(3)(a), in light of the specific circumstances of the case, 'so fundamental as to support monetary responsibility for the totality of the harm caused to the identified victims – as compared to Katanga's contribution as an accessory under Article 25(3)(d)'.⁷⁷

Brodney and Regué further assert that it is unclear whether the Chamber held Lubanga monetarily responsible for all the harm suffered by non-identified potential victims as the Chamber did not estimate their individual harm.⁷⁸

Lubanga is indigent and couldn't satisfy the reparation award made against him.⁷⁹ However, like the Trial Chambers in the Katanga and al-Mahdi cases, the Trial Chamber in Lubanga's case held the defendant's indigence irrelevant to his overall liability for reparations.⁸⁰ The Trust Fund had to indicate whether it could cover the bill, but this was presumably difficult, given an indication from the fund that it had only €5 500 000.⁸¹

The Registry would therefore monitor Lubanga's financial situation in the unlikely event that he obtained funds to repay the Trust Fund.⁸² Further, the Trust Fund continues

with the implementation of the reparation order, for instance searching for a partner to implement service-based collective reparation programmes.⁸³

The Lubanga case is important from a reparation perspective for the size of the order – 10 times higher than in the case of Katanga,⁸⁴ and almost three times higher than the cultural reparation ordered in the al-Mahdi matter.⁸⁵

The case is important for the further development of principles used in reparation cases to identify eligible victims, for the specific standards and relevance of evidence needed to establish eligible victims who had been child soldiers, and for the principles to be used in assessing collective reparations.⁸⁶

Further, the analysis illustrates that the ICC is developing a reparation system that incorporates divergent methods of calculating the monetary liability of a convicted person.⁸⁷

The Lubanga case is important from a reparation perspective for the size of the order

To some extent, different approaches appear to depend on case-specific particularities such as the nature of the crimes and ensuing harm; the geographical and temporal scope of the crimes; the number of victims; and, possibly, the legal background and pragmatism of each bench.⁸⁸

The al-Mahdi case

Apparently in certain cases the Chamber and the various parties to the proceedings don't have the necessary information to make an informed decision on the value of the damages. Trial Chamber VIII faced these circumstances as it analysed destruction of cultural property in the al-Mahdi case.

It requested expertise on the harm resulting from crimes and covered, among others, (a) the importance of international cultural heritage in general and the damage that its destruction causes to the international community; and (b) the extent, including in terms of monetary value, of the damage to the 10 mausoleums and mosques concerned in this case with a view 'to facilitate the fair and expeditious conduct of the phase of the repairs'.

Further, it encouraged the submission of observations by amicus curiae pursuant to Rule 103 of the Rules of Procedure and Evidence. The UN Educational, Scientific and Cultural Organization, as amicus curiae, was able to share its experience in the field, provided figures on the value of the repairs that may already have been carried out and offered its support at the time of the implementation of the repairs.

Trial Chamber VIII in al-Mahdi's case didn't rule on the value of each of the alleged damages, but only on al-Mahdi's liability for the damage caused. It said it wasn't a question of whether the figures set out in the order constituted the total amount of the damage suffered in the attack on the protected buildings. Its findings related specifically to al-Mahdi and what the Chamber considered to be a fair assessment of the financial responsibility of the latter, to the exclusion of any other person.

The Chamber, therefore, limited itself to relying on expert assessments to determine al-Mahdi's responsibility, without attempting to define the total harm resulting from the crimes for which he was convicted.

In light of reparation frameworks, Ming Yau observes that in the al-Mahdi case, the Legal Representative of Victims contended that the Trial Chamber erred in granting a 'power of adjudication' to the Trust Fund, a non-judicial entity, thus making delegation of administrative screening permissible.⁸⁹

On this issue, Trial Chamber VIII had earlier relied on the 'impracticability of identifying all those meeting its individual reparations parameters' as justifying an eligibility screening during the implementation phase.⁹⁰

Ming Yau observes further that the Appeals Chamber first noted that the ICC legal text didn't directly 'regulate the content of a chamber's final decision on reparations', referring to the discretion of Trial Chambers in Article 75(1) when making reparation orders and Rule 98(2) which allows chambers to order that a reparation award 'be deposited with the Trust Fund where [...] impossible or impracticable to make individual awards directly to each victim'.⁹¹

In a more extreme tone, the Appeals Chamber held that 'it is within a Trial Chamber's discretion to grant, or not to grant, individual reparations and that, therefore, victims do not have a right to an individual award as such'.⁹²

It's further asserted that in the al-Mahdi case, for the first time, the Appeals Chamber dispersed the speculation of whether the Trial Chamber shall have the final say in the Trust Fund's eligibility screening:⁹³

'68. The Appeals Chamber notes that the entire procedure for implementation of the Impugned Decision, including the screening process by the [Trust Fund for Victims], will remain under the supervision of the Trial Chamber. [...]

69. The Appeals Chamber finds that the oversight of the Trial Chamber exercising judicial control over the screening process shall include that the Trial Chamber finally endorse the results of the screening, with the possibility of amending the conclusions of the [Trust Fund for Victims] on the eligibility of applicants for individual reparations, upon request of those applicants, or *proprio motu* by the Trial Chamber.'

This oversight requirement has been hailed as appearing to be in line with the robust approach in international human rights law.⁹⁴ Ming Yau further asserts that the Appeals Chamber in the al-Mahdi case correctly noted that, in any event, the non-judicial nature of the Trust Fund would be remedied by the final determination of Trial Chambers.⁹⁵

Under Article 14(1) of the International Covenant on Civil and Political Rights, which provides for the right of access to a tribunal, the UN Human Rights Committee stated that the determination of civil rights (in this case the right to reparation) 'must be done at least at one stage of the proceedings by a tribunal'.⁹⁶

Similarly, Ming Yau observes that the European Court of Human Rights consistently found that under Article 6(1) of the European Convention on Human Rights, an administrative procedure may precede the determination of civil rights by tribunals as long as a judicial body has subsequent control.⁹⁷

Ming Yau asserts that in the al-Mahdi case, the Appeals Chamber 'finally delineated part of the blurred line on the [Trust Fund's] functions vis-à-vis the trial chambers'.⁹⁸ In that regard, Ming Yau suggests that in ongoing cases, for instance the Bemba case which deals with 5 000 individual applications for reparations, the Trial Chamber could expedite the process by charging the Trust Fund with permissible tasks.⁹⁹

Ming Yau further asserts that functional delegation is not a strange phenomenon in the ICC chambers, considering 'the delegation by Single Judge Fernández in the Gbagbo pre-trial decision and by two Kenya chambers (Ruto and Sang and Muthaura and Kenyatta) during [the] trial concerning the participation of victims'.¹⁰⁰

In the context of reparation proceedings, the al-Mahdi judgment appears to illustrate that Trial Chambers are to maintain 'a high level of control over the activities of the [Trust Fund]' which gives effect to victims' right to access a tribunal.¹⁰¹

The Katanga appeals judgment is cited as an example that provides some guidance, albeit not comprehensively, on when a Trial Chamber should take active steps to ensure legal representation for victims during the reparation stage.¹⁰²

The extent of harm inflicted on certain individuals called for prioritising individual reparations

However Ming Yau observes that there 'seems to be a worrying trend for the Court, where faced with human rights issues, to develop an instrumental argument that because the ICC legal text does not expressly govern or provide for certain rights, they are not directly transposed into the unique system of the Court'.¹⁰³

In particular, Ming Yau asserts that the Katanga judgment refers to the absence of an absolute right for continuous legal representation.¹⁰⁴ Further, the al-Mahdi judgment relies substantially on the discretions conferred on Trial Chambers under Article 75 of the Statute, based on which it held that 'it is within a Trial Chamber's discretion to grant, or not to grant, individual reparations'.¹⁰⁵

It is therefore worrisome that '[w]hile this may be satisfactory in a strictly legalistic approach, such micro-analysis is not sustainable and puts at risk the rights of the parties in the entirety of the proceedings'.¹⁰⁶

Ming Yau thus suggests that more could have been done by classifying the action or failure of Trial Chambers as lawful or unlawful; and that this is particularly needed when the part of the mandate of the ICC on reparations was highly debated in Rome.¹⁰⁷

Another problem noted in the reparation framework is that, '[B]y over-relying on discretionary clauses, the Court may be blurring the standard of review in its non-interventionist practice and without high-quality internal scrutiny.'¹⁰⁸

Ming Yau asserts that in the particular context of reparations, the ICC is still 'testing the water' and that there is an extra amount of responsibility in the appellate decisions to progressively fill in the gaps, rather than letting the 'constructive ambiguities' in the textual silence of the Statute create varied practices of the lower chambers.¹⁰⁹

In view of these challenges, Ming Yau suggests that as a way forward, serious consideration must go to the way in which victims' rights are being handled; and that tempted by the expeditiousness of proceedings, one must be careful not to use procedural discretions as a shield to compromise respect for the rights of all parties.¹¹⁰

Symbolic measures of satisfaction may include an apology from the perpetrator

The al-Mahdi decision is notable for marking 'the first time the ICC has awarded reparations for victims of crimes against cultural heritage'.¹¹¹ The decision is also notable in its intended scope as the court aimed to address all types of harm suffered by the victims through its awards of individual, collective and symbolic reparations.¹¹²

The order assessed the economic and moral harm suffered by the victims and acknowledged the mental pain and anguish that the victimised communities experienced.¹¹³ The decision therefore demonstrates respect for the culture of the victims, and by providing reparations, the court created a precedent for protecting the spiritual and religious connection between the victimised communities and protected buildings.¹¹⁴

Interestingly the al-Mahdi decision is the first time the court urged the Trust Fund to prioritise individual reparations over collective ones in implementing the award.¹¹⁵ While the court recognised the Trust Fund's general position to prioritise collective reparations, it expressed its strong view that the extent of harm

inflicted on certain individuals called for prioritising individual reparations instead.¹¹⁶

Through this approach, the order aims to acknowledge the individual victimisation of people singled out for individual reparations.¹¹⁷ Despite this, it has been reiterated that 'collective reparations are equally important in this case' as such reparations acknowledge the communal harm, bring the victims together, and set out to reconstruct the community's sense of wholeness.¹¹⁸

In the al-Mahdi judgment, the court found that the perpetrator destroyed the cultural heritage of the people of Timbuktu, Mali, and to an extent, the world,¹¹⁹ with the intent to 'break the soul' of the people of Timbuktu by attacking their religious and historical identity.¹²⁰ Alina Balta and Nadia Banteka assert that taking into account the nature of victimisation, both modalities of reparations should have carried the same urgency of implementation.¹²¹

Further, the al-Mahdi decision is the first order on reparations that includes guarantees of non-repetition.¹²² The open-ended letter of Article 75(2) of the Statute offers the judge's discretion in putting forward different reparation measures.¹²³ The ICC has thus given the article a wide margin of interpretation on measures that may form part of reparations.¹²⁴

For example symbolic measures of satisfaction may include an apology from the perpetrator, offered by Lubanga and Katanga in the cases against them, and of course in that of al-Mahdi.¹²⁵ It is therefore asserted that the guarantees of non-repetition in the al-Mahdi order represent 'a novel exercise of this discretion'.¹²⁶

Guarantees of non-repetition traditionally aim to prevent the reoccurrence of crimes by addressing the institutional roots and structural causes of the violations involved.¹²⁷ For this reason the measure is often encountered in cases concerning human rights violations and crimes committed by states that require systemic changes to ensure the atrocities are not repeated.¹²⁸

Often they result in institutional or legislative reforms, vetting and training of public sector personnel, educational plans that address past struggles constructively, and development programmes.¹²⁹ The measure itself forms part of the UN Basic Principles

on Reparations, as well as the UN Principles to Combat Impunity. If implemented strategically, it can have a far-reaching effect given the capacity and willingness of the state to implement it.¹³⁰

The al-Mahdi case presents an intriguing application of guarantees of non-repetition as it concerns the non-repetition of war crimes against cultural heritage.¹³¹ It would be further interesting to note how the Trust Fund responds to the challenge of framing specific reparation measures that can materialise in non-repetition guarantees as in this case.¹³²

Although in largely different contexts, the Inter-American Court of Human Rights has used guarantees of non-repetition extensively as part of its reparation judgments and may offer some useful paradigms for implementation.¹³³ However as the reparation order provides, the measures are to be taken to the extent possible and following consultations with Mali's government authorities.¹³⁴

This could include putting in place mechanisms or protection measures facilitated by the government of Mali to guarantee the non-recurrence of similar threats against cultural heritage.¹³⁵ The United Nations Educational, Scientific and Cultural Organization already undertook emergency action in Mali by providing cultural heritage protection training to UN personnel and the country's armed forces.¹³⁶

Balta and Banteka therefore suggest that an increase in strategic implementation of similar measures can contribute to the goals of instilling a sense of safety to the already traumatised victims and achieving sustainable justice.

In another aspect, the court returned to the concept of 'deterrence' employed in the Lubanga order, even though it had chosen to depart from this language entirely in the Katanga decision.¹³⁷ The court in Lubanga's case suggested that the 'wide publication of the decision may also serve to ... help deter crimes of this kind'.¹³⁸ However the court in the al-Mahdi case made a conceptual alteration by referring to 'reparations being designed', to the extent achievable, to 'deter future violations'.¹³⁹

While the wide publication of a conviction decision, as in Lubanga, may reasonably be expected to achieve some level of general deterrence, Balta and Banteka 'find it more difficult to understand the logic behind reparations having a deterrent effect'.¹⁴⁰ They observe that the underlying idea of reparations is that they respond, to the extent possible, to the suffering caused by the crimes, by alleviating the harm and doing justice for the victims.¹⁴¹

Reparations have been loosely connected in the past, for instance in the context of the Holocaust, with the goal of deterring future leaders from similar criminal policies by pledging to repudiate the past and rebuild the constitutional order.¹⁴² However in the al-Mahdi case it is difficult to envision how the reparations order would achieve a deterrent effect 'in and of itself given the nature of the offenders and crimes involved'.¹⁴³



THE AL-MAHDI DECISION
IS THE FIRST ORDER
ON REPARATIONS THAT
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Balta and Banteka provide the following caution:

‘But perhaps more pressingly, seeing reparations as a means to deter future violations runs the risk of assuming an economic perspective on reparations for crimes within the ICC jurisdiction. In international criminal justice, reparations are largely understood as having a proportional relationship with the victims’ harm: the means to repair the harm determines the nature of the reparations.

‘A cost-benefit analysis of reparations would shift the focus – instead, we would ask what level of punishment through reparations would be sufficient to deter future wrongdoers. This level may be completely unrelated to the victims’ harm suffered. We do not contend that this is what the Court intended to do in this reparations order. Rather, our goal is to draw attention to the potential risks that the malleable concept of reparations in these proceedings carries.’¹⁴⁴

While admitting that reparation measures in the form of guarantees of non-repetition may incorporate an element of deterrence based on past conduct, for instance in *Myrna Mack Chang v. Guatemala*,¹⁴⁵ Balta and Banteka contend that this connection was not made clear in the reparation order in the al-Mahdi case.¹⁴⁶

They stress that although the court assessed al-Mahdi’s individual liability for reparations to €2 700 000, the measure had only symbolic and moral value.¹⁴⁷ While the financial circumstances of the convicted person should not have any impact on the reparation award or its enforcement,¹⁴⁸ al-Mahdi’s indigent status meant that the burden of financing potential reparation measures would fall on the already strained budget of the Trust Fund, which was tasked with drafting an implementation plan.¹⁴⁹

In the implementation process, it was essential for the Trust Fund to first consult with affected communities to take into account all local conditions in proposing concrete implementation measures, and that the task would be challenging as the security situation in Mali remained worrying and uncertain despite progress.¹⁵⁰

The reparation order in the al-Mahdi case was commended as ‘a step forward for international justice through reparations’.¹⁵¹ The court confirmed some of the foundational elements of reparations first laid out in the Lubanga and Katanga cases and proceeded to set an important precedent for crimes against cultural heritage.¹⁵²

The Trust Fund for Victims is a significant opportunity to address the gap in reparative justice

It is hoped that in the next reparation orders the court would consider more instructive language regarding deterrence through reparations, and further consider both collective and individual harm in determining the circumstances where reparation modalities should be prioritised.¹⁵³

Trust Fund for Victims reparation programmes: strengths and failures

The Trust Fund for Victims represents a significant opportunity to address the gap that exists in reparative justice. Even the ICC orders themselves now and again refer to or have recourse to the Trust Fund arrangements and screening processes. Despite the Trust Fund being described as a collective and transformative reparation system, such a system needs to seriously consider reparation beyond those who suffer crimes by a convicted person, as well as tackling the causes of the crimes.

Reparations should also always include victim satisfaction in international law, guarantees for an effective remedy, restorative justice, respect and protection of human rights, and gender justice. The ICC reparative system within the Trust Fund has limitations such as available funds, continued uncertainty, approaches and strategies that produce vague approaches to implementation.

It is also suggested that victims can benefit from the rapidity of reparations, as the Chamber can decide on their case without the need to wait for the implementation of a reparation process. If this isn’t possible, the Chamber can rely on a sample of known victims that can be completed using various pieces of

evidence at the Chamber's disposal, as in the Lubanga case, or with the help of expert reports, as was done in the al-Mahdi case.

However this method may require finding the victims at the time that the reparations are to be implemented, lengthening the time they have to wait to receive them. It can nevertheless be noted that the files of those who have already submitted their forms should be prioritised. This further opens debate on the opportunity for the Chamber to allow an administrative body to decide on the status of victims and to designate them as beneficiaries.

Reparation frameworks under other organisations

Extraordinary Chambers in the Courts of Cambodia

The Extraordinary Chambers in the Courts of Cambodia's (ECCC) reparation process has internal rules that allow victims to process reparations when they appear formally through a civil party action. The internal rules limit all reparations to only moral and collective reparations. There are also administrative and court-awarded reparations.

The internal rules for the ECCC allow for liberal and flexible rules that aid in decision making regarding specific victims entitled to reparations. The law in Rule 23*bis* (1) of the rules requires that a direct causal link is needed for the victim's harm and the crimes the accused is convicted of.

This specific direct causal link requirement is absent in the ICC framework. The question would be whether collective and moral reparations before the ECCC are more suitable for international crimes.

The African Union's Transitional Justice Policy

It is generally accepted in international law that reparations must be proportionate to the harm suffered by the victim. In this regard, the UN provides for a principle of proportionality, within the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, as follows: 'Reparation should be proportional to the gravity of the violations and the harm suffered.'¹⁵⁴

The reparative justice model for the African Union (AU) as articulated in the AU Transitional Justice Policy comprises effective and adequate financial as well as non-financial redress or restitution for violations or losses suffered.

There are various forms that reparation could take. *Material reparation* could include the restitution of access and/or title to property taken or lost, rebuilding of property destroyed by violence, and provision of a job, a pension and monetary compensation.

Healing complements and completes truth and reconciliation and constitutes one of the objectives of truth and reconciliation. It is the process by which affected individuals and communities mend the physical and psychological wounds they have suffered and recover from the emotional and moral effects of violence.



THERE ARE VARIOUS
FORMS THAT REPARATION
COULD TAKE

Rehabilitation is the provision of basic services, including victim-specific support such as medical and psychosocial services, as well as services specific to women and children.

Collective reparation may include the restitution of communal lands; rebuilding health, education, security, judicial and other public service infrastructure as well as the livelihood systems of affected communities, with due regard to the interests of children and youth; and compensation in the form of money or services to the community.

Moral reparation involves non-material forms including disclosure of facts about the actors and circumstances of a victim's mistreatment or death, public acknowledgement and apology, the identification and exhumation of the bodies of loved ones and provision of support for burial ceremonies and memorialisation.

In theory the AU has set the benchmark and developed good standards for successful reparative justice. Member states are expected to develop comprehensive and holistic policy frameworks that not only provide for public reparation programmes, but also encourage non-governmental reparation initiatives along with transparent and administratively fair procedures to access reparation, and institutions to administer them effectively.

Reparation programmes are expected to be transformative and promote equality, non-discrimination and participation of victims and other stakeholders. They should build solidarity across victim communities, restore dignity, be fair and just and tailored in their form to the needs of different categories of victims, particularly children and youth.

Member states should adopt holistic approaches to reparations for harm inflicted by sexual and gender-based violence that address the societal structures and conditions that permit such violations. Reparation should be prompt, adequate and effective in addressing the harm suffered by the victim.

According to the AU Transitional Justice Policy, the reparation programme should have a clear strategy for being able to mobilise resources – this could include a reparation fund. Where it is expected that there will be a significant time lapse before a full reparation programme is implemented, there should be provision for interim reparations.

Guidelines for coordination between the different actors involved in reparation programmes must be developed to ensure the approach is comprehensive and the widest range of groups affected by the conflict is reached.

There should be proper oversight of reparation programmes which may include submission of regular reports to the appropriate designated body regulated by national law.¹⁵⁵ It is yet to be seen how far the Transitional Justice Policy will be implemented or adopted by member states.

The Extraordinary African Chambers in the Courts of Senegal

The Trial Chamber of the Extraordinary African Chambers (EAC) in the Courts of Senegal, upon pronouncing its guilty verdict, ordered reparations to be paid to the victims of Hissène Habré.¹⁵⁶ On appeal, the Appeals Chamber confirmed the conviction. It further awarded 82 billion CFA francs (almost US\$154 million) to 7 396 listed or named victims.

In addition, 3 489 victims would be eligible to process their reparation requests before the Trust Fund for Victims of Habré's crimes and get assessed as to their eligibility. The latter group of victims had failed to produce sufficient proof of their identity before the Trial Chamber.

Following the AU's adoption of the Trust Fund Statute for victims of Habré's crimes, victims will now have to wait for the collection and disbursement of reparations. The Trust Fund is entrusted with fundraising, assessment of eligibility and implementation of the reparations order.

Despite the fund not being in operation to date, it's clear that the late consideration of reparations at the EAC as opposed to initial consideration became the EAC'S main weakness. Reparation frameworks should have been in place at the start of the EAC. The late consideration has made implementation difficult.

There are serious challenges regarding accountability and fundraising for the award of reparations ordered. Eligibility processes if not handled properly will also complicate matters for the Trust Fund. There is also likely to be huge challenges regarding cross-border cooperation from other states.¹⁵⁷

The African Court on Human and Peoples' Rights (ACHPR)

The ACHPR has had orders for reparations in the cases of Norbert Zongo, Lohé Issa Konaté and Christopher Mtikila. Amounts claimed and ordered for reparations are specific to what the applicants bring before the ACHPR. Further, there is no laid-down assessment of eligibility and no proper follow-up on any Trust Fund or implementation strategy.

ACHPR reparation awards are simple for policymakers to adopt

The reparations ordered against the alleged violating country can be easily implemented if that state follows through with the reparation payment order. It is yet to be seen what sanctions the ACHPR would mete out to a state that clearly and contemptuously disobeys such a reparation order.

Targeted reparation orders by the ACHPR to the state make it easier to effect a reparation award as opposed to a Trust Fund establishment that would have to raise funds for such payment. Further, ACHPR reparation awards are simplistic and straightforward for policymakers to adopt and replicate for reparation frameworks and mechanisms.

National reparation frameworks

South Africa: Truth and Reconciliation Commission

During post-apartheid South Africa, the Truth and Reconciliation Commission (TRC) made reparation recommendations. Although reparations were discussed at multi-party negotiations at the end of apartheid, the new democratic constitution that came out of those negotiations did not provide for reparations.

The legislation that created the TRC, however, established the Committee on Reparation and Rehabilitation, or CRR, to formally examine the reparation issue and make policy recommendations to the president. The CRR made its recommendations – widely considered to be one of the most ambitious and comprehensive reparation policies in the world – the Truth and Reconciliation Commission of South Africa Report.¹⁵⁸

Despite this, the South African government didn't respond to these recommendations, arguing that since the work of other committees within the TRC was not yet finished, it could not consider the CRR's proposed policy.

Victim groups and civil society disagreed, and conflict ensued over the perceived slow pace of government action on reparations. Victims also pursued lawsuits for reparations against multinational corporations that conducted business with the apartheid government.

In 2003, the government finally enacted a reduced version of the CRR's original reparation policy. Despite such an enactment, criticisms have been levelled against the CRR's reparation policy including challenges regarding implementation.¹⁵⁹

It had not been easy for the implementation of reparation strategies such as individual grants, symbolic gestures, legal and administrative measures like proper burials and memorials, community rehabilitation programmes such as psychological aid, housing and institutional reforms that could prevent recurrence of the human rights abuses.

The criteria to be considered for reparations, the proportionality of violations and the time taken for reparation processes to roll out were also problematic. Despite this, the evaluation of the South African TRC must be viewed in its own terms albeit as a process designed to prioritise the needs and interests of victims of past gross human rights violations.

Uganda: Transitional Justice Policy

The 1987-2006 conflict waged between government forces under President Yoweri Museveni and rebel forces seriously affected people living in the Greater North region of Uganda. Both sides committed mass atrocities. Most victims continue to live with the effects of the war with no clear victim aid programme in effect to date.

The Transitional Justice Policy for Uganda¹⁶⁰ was established to look into possible reparation programmes for victims of the conflict. It aims to address the gaps in the formal justice system for post-conflict situations and to formalise the use of traditional justice mechanisms in post-conflict situations. It also aims to address the gaps in the current amnesty process by facilitating reparation processes and programmes, and to facilitate reconciliation and nation building.

Despite this progress, there remain challenges as to how far the promotion of justice and accountability for the past human rights violations and war crimes can be addressed. The question would be whether such reparation processes can help victims in attaining justice in Uganda; what kind of benefits reparation programmes should distribute; the levels and modalities of reparations; how such reparations can be financed; and how such reparations can be linked to other justice measures.

Can reparation processes help victims in attaining justice in Uganda?

Special attention to the situation of women and children as victims of war needs to be considered. Justice and reconciliation processes that have regard to reparations will remain a huge challenge for the justice system in Uganda.

Kenya: Recommendations of the Truth, Justice and Reconciliation Commission of Kenya on reparation

Recommendations on reparations by the Truth, Justice and Reconciliation Commission (TJRC) of Kenya have been considered an integral part of the processes that will help society's recovery from its armed conflict, repressive regime and culture of human rights abuses and impunity.

For reparations to have the maximum possible effect in the post-conflict reconstruction of society in Kenya, the perspectives of victims and their advocates need to be incorporated into the design, implementation and monitoring of reparations. The TJRC presupposes a normative framework of reparations as the appropriate remedy available under international and national laws for victims of gross violations of human rights.

Reparation principles enshrined in the TJRC have been noted as expensive to the victim and state. Thus reparation processes have been criticised as not properly tied to the existing legal framework and provision for access to justice for the victim being lacking. There is also no complementary connection to the administrative programmes and other international processes.

Christopher Ndungú says the TJRC report provides findings on several important issues:

- a. It identifies various constitutional, legislative and institutional reforms, such as police or judicial reforms, that have been under way since the commission was established.
- b. It makes bold recommendations on the release of government-held information related to massacres and killings.
- c. This gives non-state actors an opportunity to act on such recommendations if the government fails to provide such information as required under Article 35 of the constitution, which deals with the right of access to information.
- d. It proposes a robust reparation framework and makes follow-up on reparations for victims a possibility. It specifically recommends apologies from the state as a first step towards the acknowledgement of victims' suffering.¹⁶¹

However, Ndungú identifies the following as key weaknesses in the report:

- a. Recommendations occasionally appear piecemeal and at times don't seem to flow from the findings. There sometimes appears to be insufficient data to sustain a number of findings.
- b. Some violations are more comprehensively investigated than others, with no apparent explanation for discrepancies in detail.
- c. The TJRC was unable to identify victims in many cases, especially those who suffered gross human rights violations, which is neither surprising nor easy to remedy. The fact that many expected individualisation of victims reveals perhaps unrealistic expectations.
- d. Other parts of the report fail to link its recommendations to ongoing reform processes or clarify linkages, like implementation of the constitution, thereby making it harder for policymakers to take up the recommendations or identify priorities or synergies.¹⁶²

There is a need, therefore, for a proper analysis of the TJRC reparation framework.

Conclusion

It isn't enough to provide for the investigation and prosecution of international crimes within national criminal justice systems. The practice by states in this regard has been to domesticate the Rome Statute of the ICC, or enact laws that allow for the national prosecution of international crime.

In Africa, few states have enabling legislation for this form of retributive justice. Victims of international crime are therefore left with little or no recourse for justice.

The situation is worse for reparative justice for victims of international crime. International law obliges states to provide reparation to victims of gross human rights violations and serious crime. There are few national frameworks in African countries' legislation that ensure reparative justice.

Even where domestication of the ICC Statute has occurred, the aspects of that treaty relating to the right to reparation is not well expressed in national legislation. Resolving the problems of a lack of resources or mobilising these resources just scratches the surface of establishing reparative justice for victims of international crime. The setting up of processes to ensure effective and adequate reparation deserves deeper reflection.

Notes

- 1 Decision establishing the principles and procedures to be applied to reparations in the case of the Prosecutor v. Thomas Lubanga Dyilo, 7 August 2012, ICC-01/04-01/6 [hereinafter Lubanga Reparations Order], para 187.
- 2 Ibid, paras 258 and 259 where the Chamber pronounced that the responsibility of the publicity of the principles lies with the Registry and that its outreach activities with national authorities and local communities is encouraged.
- 3 Lubanga Reparation Order, supra note 1, paras 194-195.
- 4 Lubanga Reparation Order, supra note 1, paras 197-200.
- 5 Lubanga Reparation Order, supra note 1, paras 202-206.
- 6 Lubanga Reparation Order, supra note 1, paras 207-209.
- 7 Lubanga Reparation Order, supra note 1, paras 210-216.
- 8 Lubanga Reparation Order, supra note 1, paras 217-220. See also Appeals Chamber Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 36.
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About the authors

Allan Ngari is a senior researcher at the Institute for Security Studies working on international criminal justice. He is an advocate of the High Court of Kenya.

Steven Kayuni, a law consultant at Ethan & Bill Consultants, has worked on international criminal justice for over 13 years and has published in the same area. He is an advocate of the High Court and Supreme Court of Appeal of Malawi.

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