THE SEARCH FOR JUSTICE: REPARATIONS IN THE INTERNATIONAL CRIMINAL COURT

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Abstract

Reparations in the International Criminal Court (ICC) are both a tool and a process – a tool to usher transitional justice, but also a technical process that guides the ICC in deciding when to award them. This paper argues that the ICC, although a criminal judicial tribunal, plays a crucial in developing a reparations framework within the context of transitional justice. It discusses the theory of reparation in the fields of international law and transitional justice; and examines the ICC and Trust Fund for Victims' ("TFV") practices in awarding reparations, particularly in the Lubanga case. The paper concludes with proposals on how the ICC and the TFV may improve its handling of reparation claims, such as the retention of the TFV's dual mandates; improving victim recognition and engagements; utilizing presumptions and other standards of proof; and addressing the resource gaps of the TFV.

I. Introduction

The word "justice" always connotes some level of consequence both for the aggrieved and aggressor. Whether this sense of justice comes in the form of retributive, restorative, and sometimes, economic and social transformation,[1] it

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[1] Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, 60 J. INT'L AFF. 1, 18 (2006), https://www.jstor.org/stable/24358011.

must always respond to the victims' rights and needs resulting from the violation committed.[2]

Any judicial tribunal, whether domestic or international in nature, must use a variety of tools to "serve the ends of justice," such as accountability measures through a guilty verdict, imprisonment, fines, and reparation.[3] The mandate of the International Criminal Court ("ICC"), as a criminal court, is no different. While the ICC does deliver imprisonment verdicts, its recent foray in the area of reparation through the *Lubanga*[4] case has put into focus the ICC's role in advancing transitional justice.

Reparations in the ICC are aimed at "relieving the suffering and affording justice to victims not only through the conviction of the perpetrator by this Court, but also by attempting to redress the consequences of genocide, crimes against humanity and war crimes…"[5] Here, reparations are both a tool and a process – a tool to usher transitional justice, but also a technical process that guides the ICC in deciding when to award them. This dynamism is precisely what makes reparations such a powerful tool for empowerment, healing, and change for the survivors and victims' families.

This paper argues that the ICC, although it functions as a criminal judicial tribunal, is also crucial institution in developing a reparations framework within the context of transitional justice. It is divided into four parts. The first part focuses on the general theory of reparation and will contextualize it as a tool in international law and transitional justice. The second and third parts will examine the ICC and Trust Fund for Victims' ("TFV") principles and practices in awarding reparations, and as specifically applied in the *Lubanga* case. The paper will

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[2] International Center for Transitional Justice, *Reparation* (n.d.), https://www.ictj.org/our-work/transitional-justice-issues/reparations.

[3] *See* Drazan Dukic, *Transitional justice and the International Criminal Court – in "the interests of justice"?,* 89(867) INT'L REV. RED CROSS (Sept. 2007), https://international-review.icrc.org/sites/default/files/irrc-867-9.pdf.

[4] Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-3129-AnxA, Order for Reparations, amended (Mar. 3, 2015), https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/06-3129-AnxA.

[5] ICC, THE ROLE OF THE TFV AND ITS RELATIONS WITH THE REGISTRY OF THE ICC, ICC Press Kit (2004); *see also* Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, 29 T. JEFFERSON L. REV. 189 (2006-2007), https://www.tjsl.edu/sites/default/files/files/Keller_reparations_ICC_final.pdf.

conclude with proposals on how the ICC and the TFV may further improve its handling of claims relating to victims' reparations.

II. Reparation as a Concept in Law and Transitional Justice

It has been said that the "concept of reparations, the making amends for wrongs, is an ancient, universal and basic institution of justice."[6] In legal terms, reparation is often expressed as a right to restitution, compensation, or damage for loss or injury.[7] It is also sometimes confused with retributive justice, a focal point in modern forms of criminal justice which emphasizes the need to punish individuals who have committed a wrong,[8] and restorative justice, which promotes victim-offender mediation, with the offender taking the necessary steps to repair the harm they have caused.[9]

But reparation or reparative justice differs because it is anchored on key principles that determine "how victims experience the justice process in terms of how far the specific harm they have suffered is repaired."[10] These principles include the substantive outcome of an award aimed at repairing harm suffered by victims, the victims' procedural rights such as rights to access proceedings and rights to protection and support in the judicial process, and the victims' perceptions of the overall justice mechanism such as fairness and the restoration of dignity.[11]

In international law, these principles are often co-mingled, but with a focus on state responsibility,[12] and not just on the victims' sense of justice vis-à-vis individual liability. The history of reparation began as an inter-state affair, with

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[6] Malin Åberg, *The Reparation Regime of the International Criminal Court*, DIGITALA VETENSKAPLIGA ARKIVET, 10 (2015), http://www.diva-portal.org/smash/get/diva2:801293/ FULLTEXT01.pdf.

[7] *Id.* at 11.

[8] *Id.* at 10-11.

[9] *Id.*

[10] *Id.* at 11.

[11] *Id.*

[12] *Id.* at 14 ("Accepted forms of reparation to be made between states include restitution, compensation and satisfaction, either singly or in combination, with cessation and guarantees of non-repetition as appropriate, constituting separate consequences of a breach of an international obligation"); *see also* ILC Articles on Responsibility of States, art. 31. ("The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act").

payments being made by the losing state to another, such as in the Versailles Treaty. The Holocaust experience slightly veered from this mechanism, with a nationally (state) sponsored reparations program made in favor of individuals.[13] Other instances of reparation in the global stage are those paid by Japan to Korean comfort women, by South Africa to victims of apartheid in its own country, and by the United States to Japanese Americans and others confined in internment camps in the United States during World War II.[14]

This trend went on and is embodied in the 2005 United Nations General Assembly Resolution on *the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (*"Basic Principles"*).[15] Largely applied to international human rights law and international humanitarian law, the *Basic Principles* require states to comply with their obligation under international and domestic law to make available adequate, effective, prompt, and appropriate remedies, including reparation, to the victims.[16] States must then provide access to information and develop procedures that allow groups of victims to present claims for and receive reparation.[17] Under the *Basic*

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[13] *Boraine, supra* note 1, at 24; *see also* Annabelle Timsit, *The blueprint the US can follow to finally pay reparations*, QUARTZ (2020), https://qz.com/1915185/how-germany-paid-reparations-for-the-holocaust/. ("In 1951, West German chancellor Konrad Adenauer committed to paying "moral and material indemnity" for the "unspeakable crimes…committed in the name of the German people" during World War II. The following year the government signed a set of reparations agreements with Israel (pdf) and an umbrella group of advocates known as the Conference on Jewish Material Claims Against Germany, or Claims Conference. Over the next 20 years Germany committed to compensating other countries, Jewish and non-Jewish victims of the Holocaust, and former forced laborers. While it's difficult to estimate the exact amount of money, in today's dollars, that was paid in deutsche mark over all this time, Germany says it has distributed over €77.8 billion [$91.9 billion].").

[14] David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1053 (2010), https://openscholarship.wustl.edu/law_lawreview/ vol87/iss5/3/.

[15] G.A. Res. 60/147 (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 (Dec. 16, 2005), https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx.

[16] *Id.* at I(c); *see also* IX.15 ("In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim").

[17] *Id.* at VIII13.

Principles, these reparations may take the form of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[18]

In transitional justice, the theory of reparative justice finds a perfect fit, regardless of state or individual responsibility. Indeed, the focus is not on the offender, but on the victim, as the rise of transitional justice amid a community's search for true justice in the wake of "undemocratic, often oppressive and even violent systems"[19] has brought to focus how victims and their families try to confront their perpetrators in the name of peace and healing.

From the lens of transitional justice, the usual form of trial and punishment system in criminal law may be seen as fraught with challenges. As scholars would put it, "there are clearly limits to law."[20] For one, it may be difficult to prosecute all perpetrators in the case of widespread culpability. This often leads to a subjective selection process in which those with the greatest responsibility for human rights violations are first prosecuted. There are also considerable political restraints that tend to hamper the arrest, evidence gathering, and prosecution of the offenders. An often-overzealous prosecution can also prevent a lasting sustainable peace and stability in a war-torn community.[21]

But instead of treating justice as the antithesis of peace, one should think that justice goes hand-in-hand with healing. Processing the trauma through activities that document the truth helps in restoring the dignity of the survivors and victims' families, as they seek to find justice through formal legal proceedings.

Here, transitional justice and the theory of reparative justice are holistic. Post-conflict situations are both difficult for the state and its citizens, and there is no one-size-fits-all framework that may be recommended because of the unique circumstances of each case and the culture of the community involved.[22] Transitional justice thus combines the twin goals of justice and peace. It strives for accountability in holding perpetrators liable; gives redress for survivors and victims in the form of reparation; provides an avenue for truth seeking and giving a chance for survivors and victims to reconcile with the past; aims for prevention that serves as a deterrence for individual perpetrators to repeat similar injuries;

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[18] *Id.* at IX19-23.

[19] Boraine, *supra* note 1, at 18.

[20] *Id.* at 19.

[21] *Id.* at 20.

[22] Jane E. Stromseth, *Peacebuilding And Transitional Justice: The Road Ahead*, MANAGING CONFLICT IN A WORLD ADRIFT, 577 (2015).

and finally, gives reconciliation a chance so that the divisions and antagonisms among contending factions are highlighted and overcome.[23]

More importantly, transitional justice views justice from the eyes of the offended. By offering a plethora of initiatives (mechanisms) to an engaged community, transitional justice veers away from the politics and looks to community participation "for catalyzing local support for fair-minded judicial remedies."[24]

But these considerations do not necessarily mean that criminal law and its concept of retributive justice need to be disregarded. Instead, it may be argued that criminal justice complements transitional justice in a way that gives "considerable benefit in the establishment of a just society."[25] And reparations may be seen as the *missing link* between retributive justice and transitional justice, because it is the single most tangible manifestation of a perpetrator's effort to remedy the harms inflicted upon the survivors and victims.[26] Pablo de Greiff said that "a freestanding reparations program, unconnected to other transitional justice processes, is also more likely to fail, despite its direct efforts for victims, [so that] [t]he provision of reparations without the documentation and acknowledgement of truth can be interpreted as insincere, or worse, the payment of blood money."[27] Because "all transitions are characterized by a disparity between needs and resources,"[28] transitional regimes are often confronted with this "justice gap."[29] The most common gap-filling measure deployed are truth commissions and reparations, with the latter "providing recognition and partial redemption for victims while imposing on abusers direct or derivative liability."[30] Reparations, therefore, play an important role in achieving justice.

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[23] *Id.* at 573.
[24] *Id.* at 577.
[25] Boraine, *supra* note 1, at 19.
[26] *Id.* at 24.
[27] *Id.* at 25.
[28] Gray, *supra* note 14, at 1051.
[29] *Id.* at 1052.
[30] *Id.*

III. Reparations in the ICC and the TFV

A. Legal Regime under the ICC

In a 2018 conference conducted by the ICC on the Colombia situation, Deputy Prosecutor to the ICC Mr. James Stewart emphasized the role of the tribunal in transitional justice, underscoring the need for justice and accountability to achieve sustainable peace in post-conflict situations.[31] He explained that the term "transitional justice system" embraces a wide array of measures (i.e., "criminal justice, mechanisms for the establishment of the truth, reparations programs and guarantees of non-recurrence") that deal with post-conflict situations, but with the ICC relating mainly to the criminal justice component.[32] This, however, does not necessarily mean that there is no significant engagement between the ICC's processes on criminal justice and the other measures stated.

Generally, ICC-ordered reparations are often only seen as the extension of retributive justice, inasmuch as only those found guilty and punished may be made liable for reparations. This goes into the notion of "blame and responsibility,"[33] a concept commonly seen in criminal or tort law.[34] However, this mistake – appreciating reparations as a species of tort claim[35] – only undermines the possible benefits of reparations in serving the ends of transitional justice.

The reality is that reparations in the ICC are both a tool and a process – they are a tool to usher transitional justice, but they also involve a technical process that guides the ICC in deciding when to award them.

In its technical sense, reparation is a legal framework and mandate which allow the Court to directly order a convicted person to pay compensation to the victims. Article 75 of the Rome Statute gives this power to the ICC, including a wide latitude of discretion on how reparations may be made. In fact, the Trial Chamber may, either upon request or on its own motion in exceptional

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[31] *See* James Stewart, *The Role of the ICC in the Transitional Justice Process in Colombia*, (2018), ICC, https://www.icc-cpi.int/iccdocs/otp/201805SpeechDP.pdf.

[32] *Id.* at item 42.

[33] Gray, *supra* note 14, at 1048.

[34] *Id.* at 1071.

[35] *Id.* at 1050.

circumstances, determine the scope and extent of any damage, loss, and injury to, or in respect of, victims and state the principles on which it is acting.[36]

In determining whether to award reparations, the ICC must first grapple with the principles of proportionality and causality, in keeping with the *Chorzow Factory* case which said that "reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed."[37]

The principle of proportionality states that reparation must be proportional to the injury caused by the wrongful act, with the injury not necessarily resulting to some form of material damage upon the victim.[38] This definition was further enhanced in the *Lubanga* case by including the element of participation by the convicted person in the commission of the crime for which he or she was found guilty. In *Lubanga,*[39] the proportionality principle may be restated as "[a] convicted person's liability for reparations… [which is] proportionate to the harm caused and, inter alia, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case."[40] Similarly, the principle of causality eliminates other damages that are not the result of the wrongful act, and so requires a "link between the illegal act and the harm suffered."[41]

While these two principles appear generally in international law, one must proceed with caution so as not to confuse international human rights law with international criminal law. The ICC, as a criminal tribunal, is still mandated to "craft principles that respond to the sense of moral wrong, as well as the other,

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[36] Art. 75(1): "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting."

[37] *Case concerning the Factory at Chorzow* (Ger. v. Pol.), Merits, 1928 P.C.I.J. (ser. A) No. 17, at 47.

[38] Octavia Amezcua-Noriega, *Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections*, UNIVERSITY OF ESSEX, 3 (2011), https://www1.essex.ac.uk/tjn/documents/Paper_1_General_Principles_ Large.pdf.

[39] Prosecutor v. Thomas Lubanga Dyilo (Order for Reparations), s*upra* note 4, at 5/20, item 21.

[40] Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 A A 2 A 3, Judgment with Amended Order for Reparations, at 43/97, item 118 (Mar. 3, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_02631.pdf.

[41] Amezcua-Noriega*, supra* note 38, at 3.

more tangible, forms of harm inflicted by criminal conduct."[42] Moreover, the ICC's jurisdiction over individual criminal responsibility instead of states requires the institution to "fashion a range of reparation principles that are appropriate for the distinctive legal context in which it operates."[43]

Reparations in the ICC, however, are *not* punitive. Instead, they are meant to "so far as possible, wipe out all the consequences of the illegal act, and reestablish the situation which would, in all probability, have existed if that act had not been committed."[44] Reparations, therefore, are not meant "to punish the responsible party, but to address the harm or injury caused to the victims."[45]

Victims are legally defined in the Rome Statute. These are "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court,"[46] as well as institutions such as religious, education, and humanitarian organizations which may have sustained *direct* harm in the course of the illegal conduct.[47] The Court may also order reparation *in respect of* victims, which references to those indirectly harmed collectively such as family members or those filing on behalf of deceased victims.[48]

The *damage, loss, or injury suffered* must also emanate as a result of a crime for which the perpetrator is responsible,[49] leading to the conclusion that reparation in the ICC is only concerned with the harm to which a convicted person's criminal responsibility relates to.[50]

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[42] Conor McCarthy, *Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory*, 3 INT'L J. TRANSITIONAL JUST., 251 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1422417.

[43] *Id.* at 255.

[44] *Id.* at 256 (citing Factory at Chorzow, *supra* note 37, at 47.

[45] *Id.* at 257.

[46] ICC, *Victims*, (n.d.), https://www.icc-cpi.int/about/victims.

[47] Aberg, *supra* note 6, at 19; *cf.* Aberg, at 20. ("Could indirect victims, such as family members who are linked to the direct victim, also receive victim status? They may in fact have suffered harm as a result of a crime within the Court's jurisdiction. When drafting Rule 85 no agreement to expressly include family members of direct victims could be reached, but this should not be interpreted as to exclude family member only because of the fact that they are not explicitly mentioned in Rule 85.").

[48] *Id.* at 21.

[49] *Id.* at 19.

[50] *Id.* at 20.

These parameters are set out in the Rome Statute and the ICC's Rules of Procedure and Evidence. In fact, Article 75(1) of the Rome Statute practically gives the Court the leeway to determine the scope and extent of any damage, loss and injury in reparation procedures. Although only three modalities of reparations are mentioned in the Rome Statute (i.e., restitution, compensation, or rehabilitation),[51] satisfaction and guarantees of non-repetition, as listed in the *Basic Principles,* have been recognized by the ICC as permissible forms of reparation.[52]

1. Forms of Reparation

While reparation programs can be a complex topic, it can generally be organized into two groups: material and symbolic, and individual and collective.[53] It may also be categorized according to who contributes to the reparation fund. The paper *No-Excuse Approach to Transitional Justice*[54] uses a similar approach and posits a four-pronged matrix that best describes the form of reparation awarded, categorizing them according to who benefits, who contributes, and what is awarded.

More often than not, various forms of reparation are combined to maximize resources and cover a large number of victims.[55] Since there are different types of victims with specific needs, having a variety of options means reaching out to more of them.[56]

The most common form of reparation is the material type, which includes the payment of compensation in cash and provision of tangible benefits like

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[51] Rome Statute of the International Criminal Court (last amended 2010), art. 75(1), July 17, 1998, 2187 U.N.T.S. 3: "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting."

[52] Aberg*, supra* note 6, at 23, *citing Prosecutor v. Lubanga*, *supra* note 40.

[53] OUN-HCHR, *infra* note 55, at 9.

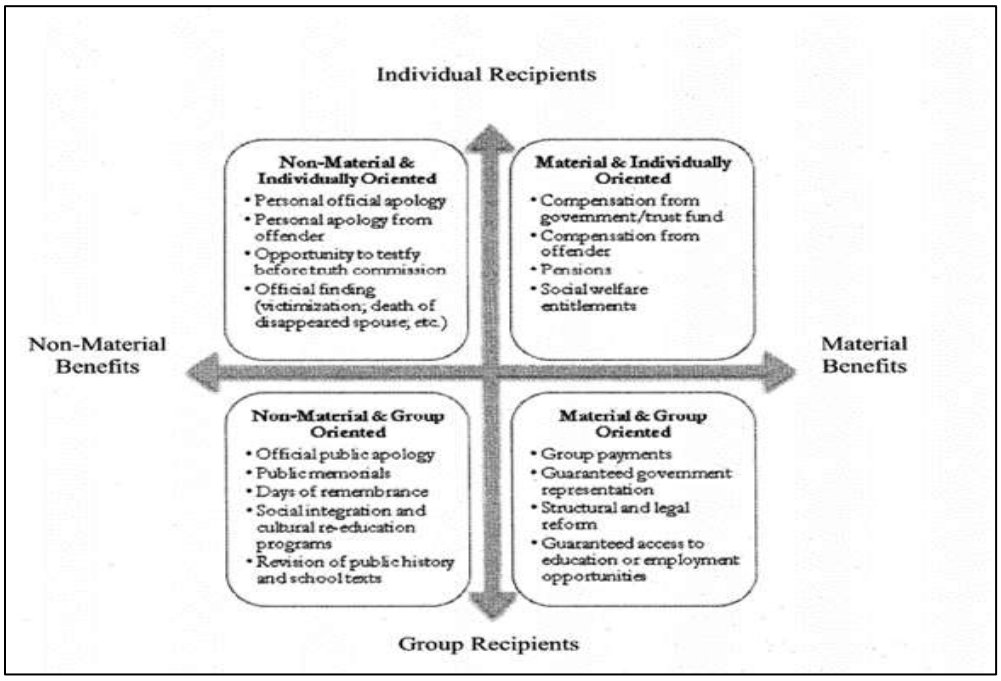
[54] Gray*, supra* note 14, at 1054.

[55] Office of the United Nations High Commissioner for Human Rights (OUN-HCHR), *Rule-Of-Law Tools For Post-Conflict States: Reparations Programme,* 22 (2008), https://www.ohchr.org/ Documents/ Publications/reparationsProgrammes.pdf.

[56] *Id.*

housing, education, and health services.[57] The non-tangible or symbolic ones are "return of property, rehabilitation or symbolic measures such as apologies or memorials."[58] These measures are seen as "carriers of meaning"[59] and therefore help survivors reconcile their painful past with the future that is before them.[60] They also disburden the survivors with the "sense of obligation to keep the memory alive and allow them to move on"[61] and be recognized to be more than victims, but also as citizens and rights holders.[62]

Figure 1. Four-Pronged Matrix[63]



[57] *Id.* at 23-25.

[58] ICC, *Reparations/Compensation stage* (n.d.), https://www.icc-cpi.int/Pages/ReparationCompensation.aspx#:~:text=At%20the%20end%20of%20a,such%20as%20apologies%20or%20memorials.

[59] OUN-HCHR, *supra* note 55, at 23.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 25.

[63] Gray, *supra* note 14, at 1056.

In terms of who contributes to the reparation fund, the four-pronged matrix earlier mentioned may alternatively be viewed as a spectrum, since both states, corporations, and private individuals may contribute to reparations funds to fill in the void.[64] In the case of state-sponsored reparations, there is a blurring of lines between the state as a caretaker of reparation and the state in its previous role as an abuser.[65] It also perpetuates the continued dominance of the state, as the survivors and victims remain dependent upon state support and the subjective judgment of who may be considered as rightful recipients of reparation.[66] Until and unless a state in transition has a genuine desire to move forward from past atrocities, it will not be motivated enough to pursue reparation and instead delay, stop or constrain it altogether.[67]

The award may also be done on an *individual or collective basis*, the decision being made on which is the most appropriate for the victims of a particular case.[68] The strength of individual reparation is the recognition of a specific harm to an individual. This personal approach to reparation empowers an individual, as compared to collective reparation which responds to collective harms and sometimes negatively perceived as a political largesse or mass dole outs.[69] But individual reparations are also susceptible to critique such as line drawing[70] because not all applicants may qualify, given the limited resources.

Meanwhile, collective reparations may establish social cohesion and solidarity while maximizing the limited resources dedicated to reparations.[71] One of the advantages cited by the ICC in setting up a collective reparation is the community appeal that it gives, which allows the members of the community to "rebuild their lives [collectively], such as the building of victim services centres or the taking of symbolic measures."[72] It is also said that collective reparations

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[64] *Id.*

[65] *Id.* at 1064.

[66] *Id.*

[67] *Id.* at 1065.

[68] ICC, *Reparations/Compensation stage*, *supra* note 59.

[69] Naomi Roht-Arriaza and Katharine Orlovsky, *A Complementary Relationship: Reparations and Development,* INT'L CTR. TRANSITIONAL JUST. RES. BRIEF, 3 (2009), https://www.ictj.org/publication/complementary-relationship-reparations-and-development.

[70] Gray, *supra* note 14, at 1066.

[71] Roht-Arriaza & Orlovsky, *supra* note 69, at 3.

[72] ICC, *Reparations/Compensation stage*, *supra* note 59.

promote reconciliation among divided communities[73] by reinforcing activities that yield individual benefits, such as medical or psychological care, vocational training, and other income-generating activities.[74]

While group reparations are also criticized for failing to distinguish between victims and non-victims, such as those belonging to different generations (the issue of privity),[75] in the end, the form of reparations must be contextual and fit to the needs of the beneficiaries.

B. Legal Regime under the TFV

What is fitting to the needs of the beneficiaries is still a vague standard to base reparations on, leading the Court to rely on and employ experts in assessing a pool of evidence.[76] This is where the TFV comes in. Established by the states parties to the Rome Statute, the TFV serves as a lifeline of funds for the victims and their families should the convicted person be unable to compensate them out of his personal funds.[77] Specifically, the TFV has a two-fold mandate: "(i) to implement Court-Ordered reparations and (ii) to provide physical, psychological, and material support to victims and their families."[78] This is also called the *reparations* mandate and the *assistance* mandate, respectively.

While the ICC and the TFV are complementary institutions, they are distinct in terms of mandate, objectives and context of work. The ICC is focused on balancing the rights of the accused and the aim of delivering justice to the victims, while the TFV has an *equal* dual mandate in terms of reparations and assistance.

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[73] The Trust Fund for Victims (TFV), *Reparation Implementation*, (n.d.), https://www.trustfundforvictims.org/index.php/en/what-we-do/reparation-orders.

[74] *Id.*

[75] Gray, *supra* note 14, at 1063. ("Privity also suggests that only those who suffered direct or indirect harm may claim a right to reparation. Group reparations frequently threaten this intuition by failing to distinguish between victims and nonvictims. Privity is particularly relevant in the case of historical claims, such as proposals for slavery reparations in the United States. In this context, critics ask how 'a claimant (or alleged victim) [can] establish privity between himself (or his group) and the perpetrator when the latter belongs to a different era' and judges point out that "there is a fatal disconnect between the [slaves] and the plaintiffs.")

[76] Amezcua-Noriega, *supra* note 38, at 8.

[77] *Id.*

[78] ICC, *Trust Fund for Victims*, (n.d.), https://www.icc-cpi.int/tfv.

The ICC is also in a "legal reality" that is dictated by law and rules created by a political body, whereas the TFV deals with the realities of war on the ground.[79]

The hook of the TFV under its reparations mandate is that while the perpetrator is generally made liable to pay for the costs of reparation, more often than not, their indigency hampers the implementation of a reparation order. The personal nature of the ICC-imposed liability, however, does not detract from states and private donors contributing to reparation programs and freeing up resources, [80] which the TFV manages.

Should the ICC order an award for reparations be made through the Trust Fund, the TFV will be compelled to use its resources collected through fines or forfeiture and awards for the satisfaction of the same.[81] But the TFV's Board of Directors is free to determine whether it should complement the resources for awards with "other resources of the Trust Fund."[82] Because of lack of funding, the TFV is sometimes constrained to look for a variety of funding sources, including from the "fines and forfeitures of convicted persons, and through voluntary donations by member states and individual donors."[83] It also partners with national and international partners and, as with any other international organization, is also guided by procurement and bidding rules.[84]

On the other hand, the TFV's assistance mandate (i.e., to provide physical, psychological, and material support to victims and their families) is *outside* the scope of reparations. There is a deliberate decision by the drafters of the TFV Regulation to exclude the term "reparation" within this context, which signifies their intention to conceptually separate reparations within the meaning of Article 75 of the Rome Statute from the use of the TFV's *other resources*, which should be used to *benefit victims*. This enables the TFV to provide assistance to the victims

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[79] Alina Balta, Manon Bax & and Rianne Letschert, *Trial and* (*Potential*) *Error: Conflicting Visions on Reparations Within the ICC System*, 29(3) INT'L CRIM. JUST. REV. 221, 225 (2019), https://journals.sagepub.com/doi/pdf/10.1177/1057567718807542.

[80] Roht-Arriaza & Orlovsky, *supra* note 69, at 4.

[81] Aberg, *supra* note 6, at 31.

[82] ICC Assembly of States Parties, *Regulations of the Trust Fund for Victims ICC-ASP/4/Res.3*, ICC, Section III.56 (Dec. 3, 2005), https://www.icc-cpi.int/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3_English.pdf.

[83] TFV, *Reparation Implementation, supra* note 73.

[84] *Id.*

even prior to a trial and employ various modalities, both individual and collective, to be able to assist the victims.[85]

This assistance mandate also puts into perspective the role of the TFV similar to an international aid organization, especially when it is able to address the needs of the victims that otherwise would not have been addressed by any government agency.[86] Against this backdrop is a perception that the TFV's assistance mandate acts as a "safety net" to its reparation mandate, as the Trial Chambers rely on the former to extend some form of assistance for victims outside the scope of the identified beneficiaries.[87] Scholars have sometimes likened this principle to the "Swiss cheese model in which the assistance mandate is seen as the filling in the gap that the limited reparations process was not able to provide."[88]

What these observations point out is the need for the ICC and the TFV to be able to cohesively work together and choose a mode of reparations and assistance that will best suit the needs of the victims who have suffered both direct and indirect harms, and the post-conflict situation they are in.

IV. Assessment of Court-Ordered Reparations in *Lubanga*

The seminal case of *Lubanga* tried before the ICC lays out the core principles and procedures of reparation to be observed by the tribunal.[89] While the ICC and the TFV has so far dealt with three Court-ordered reparations in the *Lubanga, Katanga* and *Al Mahdi* cases,[90] it is the *Lubanga* case which first "establishes a liability regime for reparations that is grounded in the principle of accountability of the convicted person towards victims."[91] Thus, the so-called "principle of liability to remedy harm" ties in both the punitive aspect of a criminal

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[85] Balta, et. al., *supra* note 79, at 233.

[86] Aberg, *supra* note 6, at 33.

[87] Balta, et. al., *supra* note 79, at 234.

[88] *Id.*

[89] Carsten Stahn, *Reparative Justice after the Lubanga Appeals Judgment on Principles and Procedures of Reparation,* BLOG EUR. J. INT'L L. (Apr. 7, 2015), https://www.ejiltalk.org/reparative-justice-after-the-lubanga-appeals-judgment-on-principles-and-procedures-of-reparation/.

[90] *See* Anne Dutton & Fionnuala Ní Aoláin, *Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims under Its Assistance Mandate*, 19 CHI. J. INT'L L. 490 (2018-2019), https://chicagounbound.uchicago.edu/cjil/vol19/iss2/4/.

[91] Stahn, *supra* note 89.

proceeding,[92] while addressing the harms suffered by the victims.[93] It has even been said that the *Lubanga* decision presented a "warning"[94] to future perpetrators that they will not only face incarceration, but also the consequences of their actions towards the victims of atrocities. The portion below focuses on the *Lubanga* case and its reparation orders.

Thomas Lubanga Dyilo (Lubanga) was a founder and once president of the *Union des patriotes congolais* (Union of Congolese Patriots or UPC), and Commander-in-Chief of the *Forces patriotiques pour la libération du Congo* (Patriotic Forces for the Liberation of the Congo or FPLC).[95] He was found guilty, on Mar. 14, 2012, of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities (child soldiers); he was sentenced, on July 10, 2012, to a total of 14 years of imprisonment.

The ICC issued a Reparations Order setting the amount of Lubanga's liability for collective reparations at USD 10,000,000. The Chamber examined a sample of 473 representative victims' applications and concluded that 425 of them were "most likely direct or indirect victims of the crimes of which Lubanga was convicted."[96] The Chamber, however, acknowledged that there may be thousands more victims of Lubanga, some of whom were not able to or are no longer willing to participate in the reparation proceedings.[97]

Because of Mr. Lubanga's indigence, the Chamber instructed the TFV to determine whether earmarking or raising additional amounts are necessary to implement the collective reparations, as well as to coordinate with the Government of the Democratic Republic of the Congo (DRC) if the latter can contribute to the process.[98]

As far as allowable (due to confidentially conducted proceedings), the TFV has declared that it has implemented or will be implementing the following collective reparations: (a) symbolic reparations such as the construction of

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[92] *Id.*

[93] Serge Makaya, *Critical Considerations Regarding Reparations in the Thomas Lubanga Case at the ICC*, INT'L JUST. MONITOR (Sept. 19, 2016), *at* https://www.ijmonitor.org/ 2016/09/critical-considerations-regarding-reparations-in-the-thomas-lubanga-case-at-the-icc/.

[94] *Id.*

[95] ICC, *Lubanga case: Trial Chamber II issues additional decision on reparations* (Dec. 15, 2017), https://www.icc-cpi.int/Pages/item.aspx?name=pr1351.

[96] *Id.*

[97] *Id.*

[98] *Id.*

symbolic structures and holding of a mobile programme to host interactive symbolic activities and to reduce stigma against former child soldiers; and (b) service-based reparations such as mental and physical health services to address the trauma and bodily harm suffered, vocational training to account for the absence of skills learned during development years, and income-generating activities to enable their life project.[99] So far, the TFV has identified 854 beneficiaries, but is struggling to complete the total amount of reparations needed. The TFV has been able to complement half of the award and is currently seeking contributions for the remaining 4.25 million euros.[100]

A. Elements of a Reparation Order

The *Lubanga* decision noted that a judicially-issued reparation order must contain, at the minimum, five essential elements: "1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence; 4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted."[101]

These requirements illustrate the tie-in approach earlier mentioned, that is, it balances the rights of the convicted person (through the requirement of specificity) which is an element of a criminal proceeding, with the need for victim accountability.[102] It also reinforces that "responsibility for reparations is markedly

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[99] TFV, *The Lubanga Case*, (n.d.), https://www.trustfundforvictims.org/what-we-do/ reparation-orders/lubanga.

[100] *Id.*

[101] *The Prosecutor v. Thomas Lubanga Dyilo* (Judgment with Amended Order for Reparations), *supra* note 40, at 7/97, item 1.

[102] Stahn*, supra* note 89.

different from the determination of individual criminal responsibility,"[103] and in the view of this paper, exemplifies best the role of the ICC in transitional justice.[104]

B. Standard of Proof

Likewise, the standard of proof in the reparation proceeding is more lenient than the criminal trial owing to the "'fundamentally different nature of reparation proceedings' and the potential 'difficulty victims may face in obtaining evidence.'"[105] In *Lubanga,* there need not be a proof beyond reasonable doubt that there is a causality between the crime proven and the harm suffered. Instead, the ICC merely required a "sufficient proof of causal link between the crime and harm suffered, based on the specific circumstances of the case."[106]

C. Criticisms to the Reparation Order

There were also criticisms of the reparations order in *Lubanga*. The first concern is the determination of who may be considered as victims. The Trial Chamber held that direct victims are the child soldiers, and the indirect victims are the parents of the child soldiers. Excluded in the indirect victims' category are persons attacked by a child soldier because this loss, damage, or injury is not linked to the harm inflicted on the child soldier. Victims of sexual- and gender-based violence were also excluded.[107] Against the TFV's initial estimation of 3,000

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[103] *Id.*

[104] *Id.* ("A second major contribution of the judgment is its articulation of the link between criminal conviction and reparation under Article 75. The ICC reparations regime differs from civil claim models due to its nexus to the criminal case, and specifically the focus on conviction. The judgment clarifies that 'reparation orders are intrinsically linked to the individual whose criminal responsibility is established in a conviction and whose culpability for these criminal acts is determined in a sentence' [AC, para. 65])"

[105] *Id.*

[106] *Prosecutor v. Thomas Lubanga Dyilo* (Order for Reparations), *supra* note 4, at 5/20 item 22.

[107] Balta, et. al., *supra* note 79, at 227; *see also* endnote 43. ("Whereas the Trial Chamber I held that the Court "should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence," the Appeals Chamber amended this Decision. See Lubanga Decision establishing Principles and Procedures, supra note 25, para. 207. Under the Assistance Mandate, however, the TFV developed several projects in the DRC to address the needs of victims, survivors of sexual- and gender-based violence. xxx In addition, it made reference to the Lubanga Sentencing Judgment, whereby acts of sexual violence could not be

direct and indirect victims eligible for reparations, the Trial Chamber only sifted through a sample of 473 applications, of which 425 were found to be eligible.[108] Limiting the number of beneficiaries despite the recommendations of the TFV creates a notion that there is a high threshold for victims to overcome before being able to access the ICC. It also reinforces the notion that a harm or suffering is only personal to the victims, and do not have a larger impact on society.[109]

Second, the Trial Chamber based Lubanga's liability (estimated to 8,000 euro per victim) to the harm caused even to nonidentified victims, ergo the nonidentified beneficiaries.[110] While it may appear to be a turnaround from the limitations the Court placed on who may be eligible beneficiaries, the amount is not something that can be realistically met by the convicted person due to his indigency. Therefore, although it is asserted that reparations ensure that the offenders account for their acts, the extent of accountability is at the moment limited to an apology.[111]

Moreover, because of the obvious limitation in resources, reparation may not be immediately implemented.[112] This results in a prolonged state of material and social inequality,[113] making the search for justice elusive and painful to the survivors and victims. An often-cited example by scholars is the "forty acres and a mule" reparation promised by General Sherman to former American slaves, which was not paid, and the lesser grants of land, goods, and money did not give a sense of justice to the former slaves.[114] Other examples cited are the South African and

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attributed to Lubanga, and neither could he be held responsible for the harm ensuing from these crimes. The Chamber referred the victims who did not meet the eligibility criteria to the assistance mandate.")

[108] *Id.* at 229. ("In setting the monetary liability of Lubanga, in addition to the harm caused to the 425 beneficiaries, which was estimated to 8,000 euro per victim, in a first of its kind, the Court also factored in the harm caused to nonidentified victims.")

[109] *See also* Balta, et. al., *supra* note 79, at 230.

[110] *Id.* at 229-230.

[111] *Id.* at 231; *c.f.* Stahn, *supra* note 89. ("The Chamber held expressly that the indigence of the convicted person is not an obstacle to the "imposition of liability for reparations" (AC, para. 104). This reading of Article 75 is a clear victory for victims who sought express judicial acknowledgment of accountability, independently of the perpetrator's indigence. It strengthens the expressivist dimensions of ICC reparations which are of key importance, in light of the limited resources of the Trust Fund.")

[112] Gray, *supra* note 14, at 1049.

[113] *Id.*

[114] *Id.*

Argentinian experiences, where even if the amount of reparation is quite significant, "political realities and abiding guilt among survivors concerned with spending 'cursed money' limit the capacity of reparations to significantly change the lot of victims or recipients."[115]

Third and relatedly, monetary reparations, regardless of the amount, are sometimes seen as an "equivalent" of the harms suffered by the survivors and victims. But how can one measure the monetary value of a harm suffered? As in tort law, material reparations are also criticized as a "'one-time pay-off trap' [that] essentially closes the door on any subsequent justice claims,"[116] with an unspecified or unreachable threshold that needs to be met through evidence.

The quick solution of the ICC and the TFV in the *Lubanga* case was to exclude individual reparations and instead provide for a collective one.[117] This was recommended by the TFV in light of the "limited number of victims participating in the trial and the time- and resources-consuming process of locating other victims was cumbersome for the purpose of individual reparations."[118] The TFV also believed that "collective reparations consisting of community-based programs and rehabilitation are most effective in this situation."[119]

In a way, non-material and symbolic reparations such as apologies and public monuments may not be necessarily enough for a given set of survivors and victims. It is this feeling of inadequacy that the recipients may feel trapped and feel that the system has failed them.[120] The victims in the *Lubanga* case have specifically requested for individual instead of collective reparations and the order of the ICC caused frustration to some, leading to the withdrawal of their participation from the proceedings.[121] There was also a belief that community-based services such as the construction of schools and hospitals would benefit the perpetrators who lived in the same community, so the victims instead sought for compensation, even though it may be limited to a small symbolic amount.[122] Both

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[115] *Id.* at 1050.
[116] *Id.* at 1059.
[117] Balta, et. al., *supra* note 79, at 232.
[118] *Id.*
[119] *Id.*
[120] Gray, *supra* note 14, at 1061.
[121] *Balta, et. al., supra* note 79, at 232.
[122] *Id.* at 233.

the ICC and the TFV recognized that they indeed "missed the mark"[123] by awarding collective reparations despite the clear preference of the victims, resulting in the revision of the reparation order to grant the symbolic amount of 8,000 euro per victim.

Nevertheless, the TFV noted that it remained bound by the criteria of feasibility and declared that collective reparations shall be prioritized over individual ones.[124] This is not an unusual scenario, considering the circumstances that the TFV operates on the ground: a huge gap in resources but with a mandate to provide both reparations and assistance to a large group of victims.[125] The TFV is then constrained to follow a "pragmatic approach… [by helping] more victims, within both mandates, in case it uses collective reparations such as community-based assistance and symbolic projects that pursue reconciliation."[126] In a way, this can be seen as the blurring of the lines between the TVF's reparation and assistance mandates, and it acting as if it were an international aid organization.

Along this line of reasoning, it can be argued that reparation tends to inundate the role of development institutions. Development is generally described as that process by which a community and its members experience prosperity and welfare through various activities spearheaded by various institutions, such as infrastructure building, so that the members have "at least a minimum level of income or livelihood for a life with dignity."[127]

Even from an economic perspective, it is natural to confuse the notions of reparation and development in resource-poor areas. They may be different conceptually but are actually complementary within the context of transitional justice. Because both take place in post-conflict areas where state institutions tend to be weak,[128] reparation can increase the community's awareness of their rights and needs, which development can then support in the short and medium term.

The caveat here is that reparations programs must complement development efforts instead of duplicating them.[129] This could only happen if there is a community-centric plan that focuses on social integration and the needs of

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[123] *Id.*

[124] *Id.*

[125] *Id.* at 234.

[126] *Id.*

[127] Roht-Arriaza & Orlovsky, *supra* note 69, at 1.

[128] *Id.* at 2.

[129] *Id.* at 3.

the members, instead of merely focusing on what activities may be done at the get-go.

Similarly, reparation should never replace long-term development strategies.[130] Reparation is meant to develop the trust and confidence among survivors and the families of the victims – values that are intended to "set the stage for a more positive long-term interaction between the state and [its] citizens."[131] Reparations cannot go on forever, and genuine development must take over at some point.

Fourth and finally, the element of time is always an enemy of a court-ordered reparations program. As the ICC awards the reparation and sets the framework, it is incumbent upon the TFV to draft an implementation plan to be approved by the former. The succeeding back-and-forth of the document and the specificity which is required by the Trial Chamber in the *Lubanga* case (i.e., "the plan should consist of a list of potential beneficiaries, an evaluation of the harm suffered by the victims, proposals for the reparative projects, the expected costs of these projects, and the monetary amount that the TFV could potentially allocate to the reparations"[132]) somehow contributed to the decline in victim participation in the proceedings for fear of revealing their identities or having waited too long to receive reparation.[133]

V. Strengthening Reparations in the ICC as A Form of Transitional Justice

It has been said that the Rome Statute framework is "uniquely receptive to balancing the rights of victims with the rights of the accused in criminal justice processes."[134] As the ICC takes a more proactive role in transitional justice with its groundbreaking decision in *Lubanga,* there is a plethora of principles and practices that both the ICC and TFV can look into to strengthen its reparations regime. These recommendations are premised on the need for the ICC and the

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[130] *Id.*

[131] *Id.*

[132] Balta, et. al., *supra* note 79, at 235.

[133] *Id.* at 236.

[134] Marissa R. Brodney, *Implementing International Criminal Court-Ordered Collective Reparations: Unpacking Present Debates*, 2016(1) J. OXFORD CTR. SOCIO-LEGAL STUD. 1, 35, http://nrs.harvard.edu/urn-3:HUL.InstRepos:34818043.

TFV to actively work together and deliver a reparation regime that is responsive to the needs of the victims.

A. Assistance Mandate

In a research study conducted by scholars Anne Dutton and Fionnuala Ní Aoláin in the work of the TFV under its *assistance* mandate in Northern Uganda, certain indicators of success were identified "in hopes of illuminating best practices on repair, at both a conceptual and operational level [by] using the assistance mandate as a lever to explore broader themes and practicalities."[135] The study was driven by the request of the ICC during the conclusion of the *Lubanga* criminal trial to states, organizations and other stakeholders to provide the Court with "information to inform its judicial decision-making on past and current reparations projects for former child soldiers and on collective reparations."[136]

The result was a comprehensive list of indicators, drawn upon from numerous interviews with the victims and their families, communities and staff of the TFV, implementing partners and the government. Some of these indicators include the following: (a) indicators of success in individuals, including establishing connection with others, participation in economic activity, self-accept and of past experiences, feeling a restored sense of hope, increased use of healthy coping mechanisms, experiencing fewer/lesser symptoms of mental illness, and improvement in physical health; (b) indicators of success in families, including decreased stigma within families, improved family relationships, reconciliation of spouses, and increase in economic power; (c) indicators of success in communities, including culture of togetherness and supportive communities; (d) indicators of success in implementing partners, including implementing partners seen as trusted leaders and increased professionalization among the ranks; and (e) indicators of success in government, including government empowerment and accountability, and long-term programmatic success.[137]

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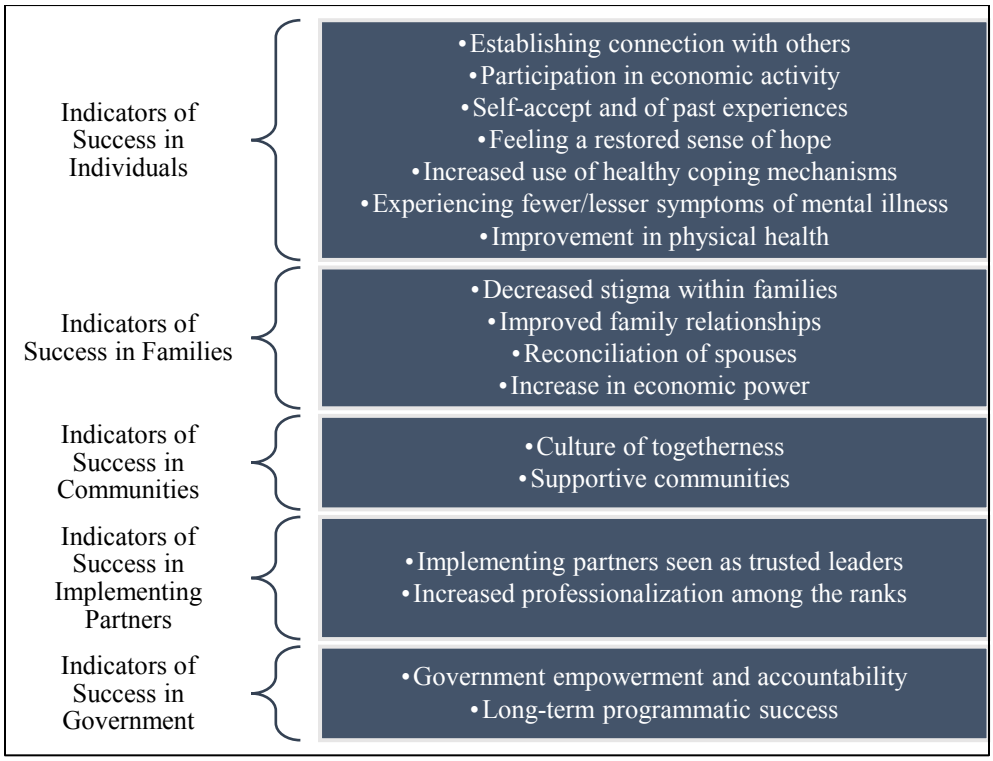
[135] Dutton & Aoláin, *supra* note 90, at 9.

[136] *Id.*

[137] *See* Dutton & Aoláin, *supra* note 90.

Figure 2. List of Indicators of Success



Taking off from these indicators, it appears that the *assistance* mandate of the TFV, when done correctly, posits a great deal of benefits in accomplishing a sense of justice familiar to the victims. While an argument can be made (and has certainly been posited by several scholars in the past) that the assistance mandate has no place in the ICC's framework as a criminal tribunal and because it competes with the reparations mandate on the allocation of the Fund's limited resources,[138] there is considerable value for the TFV to provide this form of general assistance.

[138] *See* Regina E. Rauxloh, *Good intentions and bad consequences: The general assistance mandate of the Trust Fund for Victims of the ICC*, 34(1) LEIDEN J. INT'L L. 203 (2021), https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/abs/good-intentions-and-bad-consequences-the-general-assistance-mandate-of-the-trust-fund-for-victims-of-the-icc/F4831BF9DBB0C617AB1FD8DE70B5D7DB. ("Indeed, the victim is understood to be at the heart of ICL. But this argument overlooks the fact that there must be a clear distinction between victims as protagonists of a trial and victims in the sense of beneficiaries of the Trust Fund's general assistance mandate. This article does not advocate limiting rights of the former, nor does it deny

One, the TFV is seen as the human face of the ICC[139] and helps build credibility for the court. As most victims may not have the capacity to understand the legal hermeneutics in a reparation order, the assistance mandate may be the institution's best response in engaging not just the victims, but also the state and other interested parties. This also ties in with the role of the TFV during a reparation proceeding in which it is asked to evaluate circumstances on the ground and propose an implementation plan. Without such significant engagement, the implementation plan cannot be crafted realistically.

Second, because the assistance programs can precede the reparation proceedings, they can serve as a cushion to victims who might be burdened over the technical thresholds required by the ICC or who may not have the capacity to wait for so long before an implementation plan may be approved. This also complements the view that "the earlier the intervention which engages directly with trauma and the direct physical and psychological legacies of violence for victims will be more likely to ensure that victims can move forward positively with their lives."[140]

Finally, as the ICC itself in the *Lubanga* case acknowledged that there can be more (thousands even) victims[141] than what it was able to examine, limiting the award of reparation to those who were only able to file a claim and able to keep up with the process (i.e., those identified under the reparation mandate) may run counter to the principles of justice that the ICC espouses.

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that the survivors of mass atrocities are in dire need of concrete support. What is argued here is that any support coming from the Court needs to be limited to those victims who have been identified by the Court as victims of the specific case. The general assistance mandate on the other hand extends the concept of victim to all those who have severely suffered in the atrocities. xxxx The ICC is only one part in the range of international and national responses to gross human rights violations. Due to its financial and jurisdictional limitations it will only ever be a symbolic court that can only deal with a small part of atrocities. But this symbolic value depends on the legitimacy of the Court and its procedures. The general assistance mandate is not only a drain on scarce resources but more importantly, severely impacts on the legitimacy the Court. Needs-based assistance for victims and the justice mandate of the ICC are incompatible and therefore need to be institutionally separated.")

[139] Katharina Peschke, *The Role and Mandates of the ICC Trust Fund for Victims*, *in* THORSTEN BONACKER, VICTIMS OF INTERNATIONAL CRIMES: AN INTERDISCIPLINARY DISCOURSE 13 (Jan. 2013), https://www.researchgate.net/publication/291242359_The_Role_and_Mandates_of_the_ICC_Trust_Fund_for_Victims.

[140] Dutton & Aoláin, *supra* note 90, at 59.

[141] ICC, *Lubanga case: Trial Chamber II issues additional decision on reparations*, *supra* note 95.

B. Reparation Mandate

In terms of the thresholds imposed by the ICC on the application for reparation and the TFV's reparations mandate, there is a need to re-examine these principles and take cue from some practices outside the scope of the ICC.

1. Definition of "Victim" and "Harm"

One of the limitations of an ICC-ordered reparation is the need to comply with the essential elements earlier noted,[142] specifically that the order must identify the direct and indirect victims of the crimes for which the perpetrator was convicted from. This involves a link among the identified victims, the harm they suffered, and the crime established, and necessarily requires that the crime be first established before the victims may be able to prove their standing in court.

In contrast, the Extraordinary Chambers in the Courts of Cambodia ("ECCC") took on a different approach by allowing the victims to choose between the reparation ordered or those that may be achieved through third parties. In the *latter* case, the ECCC amended its rules so that victims were "afforded the status of civil parties as long as they proved that the harm visited on them was directly related to the factual circumstances set out in the Introductory and Supplementary Submissions."[143] This means that the crimes alleged were determined at a later time, resulting in a lower threshold (i.e., the link between the crime proved and the harm to the victims) than that imposed by the ICC.[144] It also frees up a tribunal from deciding on the admissibility of victims as civil parties, enabling as many victims as possible to participate in the proceeding.[145] Those who choose reparation through third parties are then endorsed to the ECCC Victims Support Section to participate in the drafting of an implementation plan.[146] This is similar to the TFV's present practice of also seeking funding from donors to implement both its assistance and reparation mandate.

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[142] *Prosecutor v. Thomas Lubanga Dyilo* (Judgment with Amended Order for Reparations), *supra* note 101.

[143] Balta, et. al., *supra* note 79, at 231.

[144] *Id.*

[145] *Id.*

[146] *Id.*

If this mechanism is adopted by the ICC, claimants will be given the two viable options: "[r]eparations ordered against indigent accused, which must abide by strict procedural rules to safeguard the rights of the accused, or through donations by third parties, [which] might be more worthwhile in terms of delivering meaningful justice to victims."[147] Either way, casting a wide net on who may be considered as victims does away with the criticism that the ICC only provides selective justice.

2. Standard of Proof

Perhaps aware of the limitations of the ICC in hearing all the claims, as well as due regard to the difficulties faced by the victims, the Court had rightly veered away from the usual standard of proof used in criminal proceedings (i.e., proof beyond reasonable doubt), and used the rather flexible "sufficient proof of causal link"[148] from the crime committed and the harm suffered.

There are, however, suggestions on numerous scholarships that the ICC can further relax this standard by using certain *presumptions* in favor of the victims.[149] After all, a reparation proceeding is distinct from the trial relating to criminal liability.

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[147] *Id.* at 233; *c.f.* Brodney, *supra* note 134, at 12. ("However, reparations claimants at the ECCC are civil parties to proceedings, unlike prospective reparation beneficiaries at the ICC who may qualify for reparations but may not have applied for reparations or participated in the context of proceedings that precede authorization of an award.")

[148] *Prosecutor v. Thomas Lubanga Dyilo* (Order for Reparations), *supra* note 4, at 5/20, item 22.

[149] Even the Prosecution in Lubanga attempted to use the presumption method, but the Trial Chamber proceeded to assess the evidence instead. *See Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06 A 5, Judgment, 163/193, item 454 (Dec. 1, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_09844.PDF. ("Mr Lubanga's latter arguments are analysed elsewhere in this judgment. With respect to the first argument, the Prosecutor contends that, even applying the standard of a "virtually certain consequence", the Trial Chamber would have found that conscription, enlistment and use of children under the age of fifteen years to actively participate in hostilities was a virtually certain or almost inevitable consequence of the implementation of the common plan. xxxx Accordingly, the Appeals Chamber finds that the Trial Chamber, contrary to Mr Lubanga's allegation, sufficiently addressed the underlying evidence and finds that the Trial Chamber's conclusion was not unreasonable.")

In *Suarez Rosero v. Ecuador,*[150] the Inter-American Court of Human Rights ("IACHR") did not require any proof of suffering from the victim, his wife, and daughter to be awarded damages, holding that "it is human nature to suffer in the circumstances he had been through,"[151] given the totality of circumstances in the case. Mr. Suarez Rosero here was arrested without warrant in Ecuador for illegal drug trafficking, but was not, at any given stage, summoned to appear before a judicial authority or informed of the charges against him.[152] In the *Plan de Sanchez Massacre*,[153] the IACHR stated that "taking into account, inter alia, the circumstances of the case… there are sufficient grounds for presuming the existence of damage,"[154] and proceeded to award damages to the identified members of the community. In 1982 and during Guatemala's civil war, several people of Achi Maya descent were abused and murdered by the members of the armed forces in the town of Plan de Sanchez.[155] Similarly, the truth telling commission in Chile, *the National Commission on Illegal Detention and Torture*, indicated that "victims who were able to prove detention in certain detention facilities in Chile at a certain time were presumed to have been tortured due to evidence of systematic torture being used in those facilities at that time."[156]

Another principle that may be used is the *cy-pres* doctrine ("as near as possible")[157] to endow certain groups when the original intended beneficiaries can no longer be found or has ceased to exist. There is a generational component in the doctrine, in that reparations could be extended to the children of the victims

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[150] Suarez Rosero v. Ecuador, Merits, Judgment, Inter-Am. Ct. H.R. (Nov. 12, 1997), https://www.corteidh.or.cr/corteidh/docs/casos/articulos/seriec_35_ing.pdf.

[151] Dinah Shelton & Thordis Ingadottir, *The International Criminal Court Reparations to Victims of Crimes* (*Article 75 of the Rome Statute*) *and the Trust Fund* (*Article 79*)*: Recommendations for the Court Rules of Procedure and Evidence*, Center on International Cooperation, at 8 (1999), *available at* http://www.vrwg.org/downloads/reparations.pdf.

[152] Suarez Rosero v. Ecuador, *supra* note 150.

[153] Plan de Sanchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (Nov. 19, 2004), https://www.corteidh.or.cr/docs/casos/articulos/seriec_116_ing.pdf.

[154] *Id.* at 74.

[155] *Id.* at 24.

[156] REDRESS, Justice for Victims: The ICC's Reparations Mandate, 66 (2011), https://redress. org/wp-content/uploads/2018/01/REDRESS_ICC_Reparations_May2011.pdf.

[157] *Id.* ("Footnote 301: The cy-près doctrine is a legal doctrine that first arose in courts of equity in relation to the execution of trusts. The term is translated 'as near as possible' or 'as near as may be.' The doctrine has been applied in the context of class action settlements in the United States as well as international mass claims processes in the post conflict context.")

in post-conflict situation. The doctrine was also used in the United States where a trust fund was established for the abolition of slavery; but once the purpose was achieved, the funds were instead appropriated for individuals of African descent needing assistance.[158] So, the doctrine could be appropriate where "collective awards or fixed lump sums are foreseen for a large number of victims, and where the extent of individual harm and suffering within a given category is immaterial."[159]

3. Engagement of Victims and Stakeholders

The criticisms with the ICC somehow tie up to how well the court and the TFV prioritizes *victim participation* in the reparation proceedings, vis-à-vis the protection of the rights of the accused. Apart from that balancing act, it can be seen in the *Lubanga* case that victim participation can be resource intensive for both the victims and the ICC, to the point that critics have remarked that the claimants have been "relegated to mere third parties."[160] Moreover, because of the volume of claims, victim participation also affects the ICC's procedural efficiency, which in turn disappoints the victims and limits their "legal agency to exercise their rights" at the court.[161]

While there are both substantive and procedural challenges to victim participation in a reparation proceeding, justice from the lens of the victims cannot be simply disregarded. The ICC should, in its broad powers under Article 75(1), consider formalizing a participation regime where the victims can air their concerns for the consideration of the court, as well as "encourage victim-oriented complementarity through domestic mechanism that enable victim participation (which in itself would improve the public transparency of investigations and trials)."[162]

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[158] *Id.* at 67.

[159] *Id.*

[160] Juan-Pablo Perez-Leon-Acevedo, *Victims and appeals at the International Criminal Court (ICC): evaluation under international human rights standards*, INT'L J. HUM. RTS. (2021), *available at* https://www.tandfonline.com/doi/full/10.1080/13642987.2020.1859483.

[161] *Id.*

[162] Luke Moffett, *Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court*, 26(2) CRIM. L. F. 255, 24 (2015), https://pureadmin.qub.ac.uk/ws/portalfiles/portal/15375987/Journal_article_Meaningful_and_effective_Considering_victims_interests_through_participation_at_the_International_Criminal_Court.pdf.

The matter of complementarity can also be an important tool in ensuring "sustainability and effectiveness" of a reparation program[163] amid the backdrop of stakeholder engagement. The reality is that there is a need for the TFV to form broad political coalitions, as well as exercise creative judgment that combines legal, political, social and economic approaches[164] to be able to ensure that reparations are able to serve their purpose. An example of this is the *Truth Commission in Guatemala* in which a National Reparations Committee was created by legislation. The Guatemalan government representatives publicly affirmed the commitment of the state to recognize responsibility for human rights violations committed during the armed conflict, which led to a snowball of government efforts in facilitating reparation applications.[165]

4. Modality of Reparations

A point to consider by the ICC and the TFV is that the form of reparation, whether in the assistance or reparations mandate, depends on a variety of factors, including "cultural attitudes towards money or the lost goods, and social structures of gender, class, urbanizations, age, education, and access to capital."[166]

The ICC and TFV can take cue from several best practices which exist in other transitional justice mechanisms. For instance, the reparation program in Nepal's Internal Armed Conflict is one that "acknowledges the importance of reparations to women victims."[167] Thus, the wives of the disappeared individuals or *desaparacidos* were not repeatedly required to prove their status, but instead prioritized in programs relating to access to education, scholarships, land distributes, and asset ownership.[168] The point of the reparation program is that a

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[163] REDRESS, *No Time To Wait: Realising Reparations for Victims Before the International Criminal Cour*t, 14, 65 (2019), https://redress.org/wp-content/uploads/2019/02/ 20190221-Reparations-Report-English.pdf.

[164] Boraine*, supra* note 1, at 25.

[165] E. Christine Evans, *The Right to Reparations in International Law for Victims of Armed Conflict: Convergence of Law and Practice?* LSE THESES ONLINE, 150 (2010), http://etheses.lse.ac.uk/2215/

[166] *Roht-Arriaza & Orlovsky, supra* note 69, at 3.

[167] Amrita Kapur, *Overlooked and invisible: the women of enforced disappearances*, OPENDEMOCRACY (Apr. 14, 2015), https://www.opendemocracy.net/en/opensecurity/ overlooked-and-invisible-women-of-enforced-disappearances/; *see also* International Center for Transitional Justice, *Reparations*, (n.d.), https://www.ictj.org/our-work/transitional-justice-issues/reparations.

[168] *Id.*

gender-responsive reparation program should also address pre-existing gender discrimination.[169]

This is in stark contrast to the experience in *Sri Lanka* where reparations for internally displaced resettlement did not reach women beneficiaries because "customary practices of holding property in men's names meant that women had few legal protections to buttress their reparations claims;"[170] in *Rwanda* where war widows are not awarded reparations because local laws do not include women with inheritance rights;[171] or in the *Philippines* during the martial law reparations proceedings when the calculation of damages was based on the loss of earnings that are pegged at the women-victims' salary, which is considerably lower compared to male workers.[172]

Meanwhile, the Truth Commission in East Timor resorted to a grassroots approach in which a high percentage of its staff were hired locally, thus "enhanc[ing] its legitimacy and sense of national ownership."[173] The Commission worked closely with the community and went as far as proposing that 50% of the reparations should go to women in an effort to balance their underrepresentation during the proceedings.[174]

A word of caution: while it has been said that reparations can sometimes infringe on the role of developmental aid, this can only happen if there is a lack of a community-centric plan that does not consider existing development efforts and proceeds to duplicate instead of complementing them. Stakeholder engagement is key to avoiding this pitfall.

5. Resources

The limited resources of the TFV, can and remains to be a bane to its potential. Experts have pointed out that for all its reparation programs to be considered as sustainable, the TFV must raise a total of €40 million in voluntary

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[169] *Id.*

[170] Vasuki Nesiah, *Truth Commissions and Gender: Principles, Policies, and Procedures, Gender Justice Series, International Center for Transitional Justice*, ICTJ, 35 (2006), https://www.ictj.org/sites/default/files/ICTJ-Global-Commissions-Gender-2006-English_0.pdf.

[171] *Id.*

[172] *Id.* at 36.

[173] E. Christine Evans, *supra* note 165, at 188.

[174] Nesiah, *supra* note 170, at 36.

contributions and private donations by 2021.[175] This is a tall order that the TFV does not seem to meet year in, year out.

A good financial management plan is necessary for the TFV to be able to address its resource needs. For example, to be able to expand its fundraising capacity, the TFV must enhance its present communication plan and raise awareness to its objectives.[176] The TFV can emphasize to its stakeholders that they have a buy-in in supporting the peace and healing of communities in post-conflict situations and point out the long-term effects of reparation to future generations.

The TFV must also improve its capability in tracing, freezing and seizing of the perpetrator's assets.[177] The ICC must be able to closely cooperate with states parties and develop effective mechanisms that will ensure the capture of the perpetrator's assets for reparation purpose.[178] The 2018 Resolution on Strengthening the International Criminal Court and the Assembly of States Parties ("Omnibus Resolution") articulates this position and must be immediately adhered to.[179]

6. Precautions

Outside the ICC are also precautionary examples. One of this is the *Special Court and Truth Commission in Sierra Leone*.[180] Here, the Truth Commission provided a Final Report "with in-depth analysis of human rights violations, their consequences for victims, elements of state responsibility and clear proposals for the establishment of a reparations programme."[181] But the Special Court did not take advantage of these information and recommendations, and the "lack of coordination between the two transitional justice institutions was a missed opportunity to leave a stronger legacy in favour of [the] victims."[182] As for the ICC,

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[175] REDRESS, *No Time To Wait*, *supra* note 163, at 12, 34.
[176] *Id.* at 34.
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] Christine Evans, *Case Study, Reparations in Sierra Leone*, *in* CHRISTINE EVANS, THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT 164 (2012).
[181] *Id.* at 184.
[182] *Id.* at 164.

the TFV must remain a key player in providing recommendations to the court on the appropriate reparations program for a given context.

Similarly, the *Colombian* experience provides a stronger case for the ICC to separate its reparations program from the criminal proceeding and provide the TFV with enough leeway to navigate its mandate freely without the burden of dealing with the said proceeding. The Colombian precedent here involved "de-linking" reparations from the prosecution stage because of the collusion between state agents and armed groups.[183]

VI. Conclusion

It has been said that the ICC "occupies a unique space as a forum to discuss [and advance] both criminal and transitional justice, and the Court's different institutional players give voice to concerns of each field in legal debates about transitional justice measures in a criminal justice context."[184] While the court to this day grapples with legitimate balancing concerns between the rights of the accused and the needs of the victims, its pronouncements in *Lubanga* is a step in the right direction, by setting a different standard for the reparations regime from those of the criminal proceedings.

Nevertheless, there is always room for improvement. The broad discretion given to the ICC under Article 75(1) of the Rome Statute should enable it to craft policies and processes that will enhance its coordinative relationship with the TFV and empower victims to not only to be able to participate, but also fully take advantage of reparations awarded to them. A summary of these recommendations is outlined below.

a. To strengthen the role of the ICC in propagating a viable reparations regime as a tool of transitional justice, it must first reconcile the seemingly competing mandates of the TFV. Both the ICC and the TFV should strongly advocate for the retention of the TFV's assistance mandate, as it provides a great deal of benefits in accomplishing a sense of justice familiar to the victims. It does not compete, but instead complements, the reparations mandate of the TFV.

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[183] E. Christine Evans, *supra* note 165, at 207.

[184] Brodney, *supra* note 134, at 35.

The assistance mandate is the ICC's best response in engaging not just the survivors and victims, but also the state and other interested parties, and provides the TFV an opportunity to craft a realistic implementation plan based on these interactions. Also, because the assistance programs can precede the reparations proceedings, they can serve as a cushion to victims who might be burdened over the technical thresholds or long waiting time for a reparation proceeding to conclude.

b. As regards the ICC's reparations mandate, the ICC should consider widening its net in recognizing victim-claimants. The Court can take cue from the ECCC which offers the option of a court-ordered reparation against the accused (and uses the standards of a criminal proceedings) or one offered by third parties (and provides an efficient means of delivering justice).

c. The ICC can also consider utilizing presumptions and lower standards of proof (e.g., the *cy-pres* doctrine) in the interest of delivering justice that is no more burdensome than the difficulties already experienced by the victims in filing a claim and gathering evidence. It has, in *Lubanga,* already rightly adopted a more flexible approach in the standard of proof required from victims to make a causal link between the crime proven and the harm suffered, and the proposition to use presumptions and lower standards of proof are very much aligned to this flexible approach.

d. The ICC should improve its engagement with the victims and other stakeholders by formalizing a participation regime where the victims can air their concerns for the consideration of the court, as well as encourage victim-oriented complementarity through domestic mechanisms.

e. The ICC should be creative and consider various forms of reparation that is responsive to the needs of the victims. For instance, it can adopt a reparation program that is not only gender-sensitive, but also addresses gender discrimination. But to be able to do this, a grassroots or community-centric approach is necessary to be able to understand such cultural context, avoid duplication of existing developmental efforts, and enhance the legitimacy and sense of national ownership of the reparation program implementors.

f. To address the resource gaps, the TFV should devise a sustainable financial management plan that expands its fundraising capacity through a series of communication programs. The TFV should also improve its capability in tracing, freezing and seizing of the perpetrator's assets to be able to meets its funding goals.

g. Finally, there is also a plethora of precautions outside the ICC which should put the institution into notice on how to best coordinate with the TFV. One of these examples is the *Sierra Leone* experience in which the Special Court disregarded the findings of the Truth Commission. Translated into the work of the ICC, it should give due regard to the recommendations of the TFV, as the latter is expected to do the groundwork to ensure that the implementation plan is both viable and responsive to the needs of the victims.

It was earlier argued that reparation is the *missing link* between retributive justice and transitional justice, giving the ICC not just the *human* face, but also a tangible way, to deal with the sufferings of the victims amid a protracted criminal trial. With the *Lubanga* milestone at the forefront of this reparation regime and perhaps, a willingness by the ICC to consider emerging reparation trends outside its scope, the Court's potential as a cog in transitional justice may soon be realized.