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*Mia Swart**

THE *LUBANGA* REPARATIONS DECISION: A MISSED OPPORTUNITY?

Abstract

In March 2012 the ICC delivered its first and long-awaited judgment in Prosecutor v Lubanga. Trial Chamber I found Thomas Lubanga guilty as co-perpetrator of the war crimes of conscripting and enlisting children into the armed forces. The guilty verdict was followed by a reparations decision on 7 August 2012. This article examines the extent to which the ICC has successfully fulfilled its mandate to formulate reparations principles. The position of reparations within international law generally is discussed. This is followed by an explanation of how the ICC reparation regime functions. The bifurcated reparations mandate of the ICC is also explained. The focus of the article is on a critical assessment of the Lubanga reparations decision. The Court's treatment of the harm requirement and the requirement of causation is examined. It is argued that the Court's failure to clarify the requirements of "harm" and "causation" meant that it did not fulfil its mandate to formulate reparations principles.

INTRODUCTION

> They expect something that will really help them to heal, to help them to recover from the loss of their childhood, their education.[1]

The International Criminal Court (ICC) is the first international criminal court or tribunal with an explicit mandate to provide reparations to victims.[2] The ability to

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[1] Bukeni Waruzi, an expert on child soldiers and the programme manager for Africa and the Middle East at the NGO Witness, cited in *Thorny Issue of Reparations for Lubanga's victims*, The Guardian 12 April 2012.

[2] Art. 75 of the ICC Statute states:

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.

order reparations to victims is one of the most innovative and exciting aspects of the Court's mandate.[3] Whereas other international courts such as the Cambodia Tribunal[4] have the ability to make reparations, the emphasis on reparations in the ICC Statute is unique. This is a cause not only for celebration but for scholarly attention. In March 2012 the ICC delivered its first and long-awaited judgment in *Prosecutor v Lubanga*.[5] Trial Chamber I found Thomas Lubanga, a former Congolese rebel leader, guilty as co-perpetrator of the war crimes of conscripting and enlisting children into the armed forces and actively using the children under age 15 in the hostilities. The judgment breaks new ground: it was the first to be delivered by a permanent international criminal court; and it was the first time an international court focused exclusively on the crimes of conscripting, enlisting and using child soldiers.[6] The guilty verdict was followed by the Court's first sentencing judgement on 10 July 2012[7] and a reparations decision on 7 August 2012.[8] Under the Rome Statute a perpetrator's liability for reparations is based on his criminal responsibility. The guilty verdict in this case is therefore the trigger that allows the ICC to order reparations.[9] But how did the ICC fare in its first reparations decision?

The reparation decision did not make any order of financial or symbolic reparations but outlined some principles to guide the ordering of reparations to victims. The Trial Chamber affirmed that victims of war crimes, crimes against humanity, and genocide have a fundamental right to receive reparations. The Trial Chamber also recommended that a new trial chamber be established and the actual concrete order of reparations was delegated to a Trial Chamber that is yet to be established. The decision to lay down principles of reparations is consistent with the mandate

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79

[3] The emphasis on victims is evident from the preamble of the ICC Statute. It states: "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity." Rome Statute of the International Criminal Court, Preamble, 17 July 1998, 2187 UNTS (hereinafter "Rome Statute").

[4] Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea ("Extraordinary Chambers" or "ECCC").

[5] *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-1/06, 14 March 2012 (hereinafter "*Lubanga* Judgement").

[6] *See however* the jurisprudence of the Special Court for Sierra Leone on child soldiers, *e.g.*, *Prosecutor v Alex Tamba Brima et al*, Case No. SCSL-04-16-T, Trial Chamber Judgment, 20 June 2007; *Prosecutor v Issa Hassan Sesay et al*, Case No. SCSL-04-15-T, Trial Chamber Judgment, 2 March 2009.

[7] *Decision on Sentence Pursuant to Article 76 of the Statute*, ICC-01/04-01/06, 10 July 2012.

[8] *Situation in the Democratic Republic of the Congo, Prosecutor v Thomas Lubanga Dyilo,* Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06, 7 August 2012 (hereinafter "Reparations Decision").

[9] C. McCarthy *Reparations and Victims Support in the International Criminal Court*, Cambridge University Press, Cambridge: 2012, p. 188.

contained in Art. 75 of the ICC Statute and the fact that it was the first reparation decision of the ICC. The decision stated that reparations "go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognizes the need to provide effective remedies for victims."[10] The ICC's reparations decision however did not fulfil its the mandate to formulate principles in a satisfactory way and or live up to the expectations of victims or academic commentators.

This article examines the extent to which the ICC has successfully fulfilled its mandate to formulate reparations principles in its judgement in the *Lubanga* case. The position of reparations within international law generally is discussed. This is followed by an explanation of how the ICC reparation regime functions. The bifurcated reparations mandate of the ICC is also explained. The focus of the article is on a critical assessment of the *Lubanga* reparations decision. In this context, specific attention is paid to the Court's mandate to formulate reparations principles. The Court's treatment of the harm requirement and the requirement of causation is examined. It is argued that the Court's failure to clarify the requirements of "harm" and "causation" meant that it did not fulfil its mandate to formulate reparations principles. The *Lubanga* reparations decision was a moment of great symbolic importance in international criminal law and it seems that the ICC missed an opportunity to lay a firm foundation for future reparations decisions.

The reparations regime of the ICC is treated within the broader context of international law and international criminal law. Because of the fact that the Court itself relies on practices and precedents from international courts and on the work of academic experts in international law, the article occasionally refers to the practice of other international courts such as the *ad hoc* International Criminal Tribunals for Yugoslavia (ICTY)[11] and Rwanda (ICTR).[12]

Koskenniemi has stated that victims do not so much expect punishment as recognition of the fact that what victims were made to suffer was wrong, and to have their moral grandeur sufficiently affirmed.[13] The creation of the ICC's scheme of victim redress offers with it the possibility of symbolic affirmation of the wrong. Crucially, it creates the possibility to provide a measure of justice to a much wider range of victims

[10] Reparations Decision, para. 177.

[11] The full denomination for the ICTY is the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the former Yugoslavia since 1991, established by the Security Council through Resolution 827 (1993) of 25 May 1993 and functioning under a statute originally published as an Annex to the Report of the Secretary General pursuant to para. 2 of Security Council resolution 808 (1993) S/25704, 3 May 1993.

[12] The full name of the ICTR is the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1995.

[13] M. Koskenniemi, *Between Impunity and Show Trials*, 6 Max Planck Yearbook of United Nations Law 11 (2002).

than is possible through prosecution and punishment. In a sense it extends and expands the reach of justice.

1. *LUBANGA*: BACKGROUND AND JUDGMENT

The background to the *Lubanga* case is as follows: The *Union des Patriotes Congolais* ("UPC") was created on 15 September 2000. Thomas Lubanga was one of the UPC's founding members and its first President. The UPC and its military wing, the *Force Patriotique pour la Libération du Congo* (FPLC) took power in Ituri in September 2002.[14] Ituri is a region in the rain forested eastern DRC. The prosecution argued that that Lubanga visited and inspected FPLC military training camps, oversaw the conduct of military affairs and appointed the senior ranks within the FPLC, secured financing for the UPC/FPLC, and negotiated the provision of their weapons and other military equipment. It was the view of the prosecutors that Lubanga personally took part in recruiting child soldiers, had them trained, and used them in armed conflict.

Lubanga was arrested in March 2005 and transferred from the DRC to the ICC in March 2006. The charges against him were confirmed in January 2007. The start of the trial was plagued by delays but it eventually started in June 2008.

The charges in the *Lubanga* case centered on the crimes contained in Art. 8(2) of the Rome Statute: the conscripting, enlisting and use of children under the age of fifteen in armed conflict.[15] But the trial did not proceed smoothly. From very early on, it encountered particularly serious procedural obstacles. This is illustrated by the fact that the trial was "stayed" or suspended twice.[16]

On 14 March 2012 Trial Chamber 1 unanimously convicted Thomas Lubanga. The judges found that Lubanga and his co-perpetrators[17] participated in a common plan to build an army for the purpose of establishing military control of Ituri.[18] This resulted in the conscription and enlistment of children under the age of fifteen and their active use in the hostilities. The accused satisfied the mental element of the crime by

[14] *Prosector v Thomas Lubanga Dyilo,* Public Summary of the Judgment Pursuant to art 74 of the Statute, ICC 01/04-01/06 (hereinafter "Public Summary").

[15] Art. 8(2)(e)(vii) of the Rome Statute prohibits "[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities."

[16] The trial was initially suspended when the prosecutor failed to disclose information to the defense. The trial was suspended for a second time when the prosecutor refused to disclose the identity of an intermediary. The first stay was imposed on 13 June 2008 and lifted on 18 November 2008. The second stay was imposed on 8 July 2010 and lasted until 8 October 2010. *See also* A. Cole, K. Askin, *Thomas Lubanga: War Crimes Conviction at the First Case before the International Criminal Court*, 16(2) Insights, American Society of International Law (2012).

[17] With regard to the mode of liability, the allegations concerned Art. 25(3) of the Rome Statute, which included "co-perpetration" by referring to commission "jointly with each other". Lubanga was charged with committing the crimes through coordination with other leaders within the UPC.

[18] *Lubanga* Judgement, para. 1351.

being aware of the fact that children were recruited, conscripted, and used in military operations.[19]

The Trial Chamber found that "conscription" and "enlistment" are both forms of recruitment in that they refer to "coercive" and "voluntary" incorporation, respectively, into an armed group. The crimes of conscripting, enlisting and using child soldiers were said to constitute three distinct crimes.[20]

The ICC developed the jurisprudence on the use of child soldiers by finding that the crime of enlisting child soldiers is committed as soon as the child joins the armed group "with or without compulsion". As Alison Cole comments, this sets a high threshold by prohibiting any use of children in armed forces.[21] Children are prohibited from participating even when families or the children themselves may appear to support the child's participation due to the coercive circumstances of armed conflict.

The judgment also sets a high threshold for the protection of children who have an "indirect" role in armed conflict, such as children who may be forced to conduct domestic duties or general support activities which may not include taking up arms. The decisive factor in deciding if an "indirect" role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target.[22]

Although the prosecutor had not specifically charged Lubanga with sexual violence and rape,[23] a decision which has been severely criticised,[24] the judges paid particular attention to the experience of girl soldiers who suffered from sexual violence.[25] During the trial, the Court rejected an attempt by the victims participating in the case to amend the charges to include gender crimes. But in the course of presenting evidence, witnesses repeatedly raised the abuse of girls and women as sex slaves.

The Trial Chamber further commented on the controversial issue of the prosecution's use of intermediaries, which had a disruptive effect on the trial. The ICC has defined an intermediary as "someone who comes between one person and another; who facilitates contact and who provides a link between one or more of the organs or units of the Court or Counsel on the one hand and victims, witnesses, beneficiaries

[19] *Ibidem*, para. 1350.

[20] Public Summary, para. 23

[21] A. Cole, *Lubanga Judgment marks milestone in the path to accountability*, The Guardian, 14 March 2012.

[22] Public Summary, para. 24.

[23] *See* in this regard *Prosecutor v Lubanga (Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009,* entitled *'Decision Giving Notice to the Parties and Participants That the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court')* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 OA 15 OA 16, 8 December 2009).

[24] *See* Ch. de Vos, *Someone Who Comes Between One Person and Another: Lubanga, Local Cooperation and the Right to a Fair Trial*, 12(1) Melbourne Journal of International Law 217 (2011).

[25] The evidence also established that children, mainly girls, were used to carry out domestic work (Public Summary, para. 29).

of reparations and/or affected communities on the other."[26] Intermediaries currently assist with functions such as communicating with victims/witnesses in situations where direct contact with the Court could endanger the safety of victims and witnesses.[27] Intermediaries also liase between legal representatives and victims for the purpose of victim reparations.[28]

Whereas the Chamber acknowledged the need to make use of intermediaries, it stated that the prosecution should not have delegated its investigative responsibilities to intermediaries.[29] The Chamber acknowledged a link between the unsupervised use of intermediaries and the unreliable testimony of many of the witnesses.[30] According to the Chamber, the intermediaries "were potentially able to take advantage of the witnesses."[31]

2. REPARATIONS: THE NEW FRONTIER IN INTERNATIONAL CRIMINAL LAW

The emphasis on the interests of victims and the new respect for the obligation to pay reparations in international law can be described as a new frontier in international law and international criminal law. The emphasis on victims fits within the paradigm shift from the state to the individual in the context of international criminal law. The enactment of the Rome Statute indeed marks a shift from an emphasis on prosecution and individual criminal responsibility to a paradigm where there the latter is combined with respect for victims' concerns.[32]

Following the definition in the *Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*,[33] the term "reparations" in this article refers to the range of measures that may be taken in response to an actual or threatened violation of international human rights law and international humanitarian law (embracing both the substance of relief as well as the procedure through which it may be obtained). The Rome Statute itself does not define reparations. Whereas in domestic systems reparations do not usually

[26] *Draft Guidelines Governing the Relations Between the Court and Intermediaries*, April 2012 p. 5 *See* de Vos, *supra* note 24.

[27] *Draft Guidelines Governing the Relations Between the Court and Intermediaries*, *supra* note 26, p. 6.

[28] *Ibidem*.

[29] *Ibidem*, p. 17.

[30] *Lubanga* Judgement, paras. 499-502.

[31] *Ibidem*, para. 205.

[32] *See e.g.* V. Spiga, *No Redress without Justice*, 10(5) Journal of International Criminal Justice 1377 (2012).

[33] The Basic Principles and Guidelines state*: Convinced* that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity. Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

flow from a criminal conviction,[34] under the Rome Statute a perpetrator's liability for reparations is directly tied to his criminal responsibility.

Significantly, the duty to make reparations is recognised in many regional human rights instruments. The Inter-American Court of Human Rights (in implementing the American Convention of Human Rights) has been at the forefront of a legal revolution with regard to reparations awards.[35] Art. 13 of the European Convention on Human Rights recognises the right to an "effective" remedy.

The movement to highlight the payment of reparations to victims of serious human rights violations goes hand-in-hand with the international movement to give greater recognition to victims in international law.[36] Reparations have also been acknowledged as a core ingredient of Transitional Justice.[37] Ruti Teitel describes calls for reparations as indicative of post Cold War Transitional Justice attempts to undo history and construct alternative historical narratives after massive catastrophe.[38] As a general rule however, international courts have not been active in ordering financial reparations. The movement to recognize victims' rights in international criminal law has not yet translated into concrete monetary awards to victims.[39] Even courts that have the mandate to award reparations, such as the ECCC[40] are often not mandated to award *financial* reparations. Rule 23 of the Internal Rules of the Cambodia Tribunal provides for the possibility of "moral" or collective reparations, but excludes financial reparations.[41]

In spite of the growing recognition given to reparations in many prominent international conventions, there is however still no universal consensus on the question

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[34] Whereas some jurisdictions allows for compensation claims flowing from criminal conviction, compensation is usually paid in cases involving civil wrongs such as tort or delict. Under Cambodian law, civil parties may claim compensation in criminal cases for damages they suffered from the crimes being tried. In French law, a civil action can be brought jointly with a penal action before a criminal court. According to Art. 2 of the Code of Criminal Procedure, civil action for damages caused by a crime, misdemeanour or offence is open to all who have personally suffered damage as a direct result of the offence. *See* C. Howard, *Compensation in French Criminal Procedure*, 21(4) The Modern Law Review 387 (1958).

[35] *See Velasquez Rodriguez v Honduras*, Int-Am Ct HR (Ser. C) No. 4 1988, 29 July 1988.

[36] E. Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices*, Norton, New York: 2000.

[37] P. de Greiff, *Justice and Reparations*, in: P. De Greiff (ed.), *Handbook of Reparations*, Oxford University Press, Oxford: 2006, p. 454.

[38] R. Teitel, *Transitional Justice*, Oxford University Press, Oxford: 2000, p. 86.

[39] This has been in contrast with the tendency to pay financial reparations in the context of Mass Claims Procedures.

[40] Although the judges of the ECCC have decided that individual financial compensation will not be possible, the judges may award collective and moral reparations such as an order to fund any non-profit activity or service that is intended for the benefit of victims. *See* http://www.eccc.gov.kh/en/faq/willvictims-be-entitled-compensation (last accessed 10 April 2013).

[41] Moral and collective reparations are measures that:

a) acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted and

b) provide benefits to the Civil Parties which address this harm. These benefits shall not take the form of monetary payments to Civil Parties.

whether a general right to reparation exists. Tomuschat takes a hesitant view and writes that establishing an individual right to reparation would be a "progressive development of the law and not [a] codification of existing rules."[42] Kamminga, on the other hand, has argued that such an entitlement already exists under international law.[43] It is indeed difficult not to recognise the increasing support for an individual entitlement to reparations under modern international law.[44] Although these statements are not made in the specific context of criminal convictions, statements made about reparations in international law generally are still relevant for o the work of the ICC. This is evident from the fact that the Court itself relies on the work of academic experts in international law.

Reparations have however been a neglected area of the field of international criminal law.[45] The Statutes of the *ad hoc* ICTY or ICTR and the Special Court for Sierra Leone ("SCSL") did not cater for victims in the form of victim participation[46] and did not make provisions for reparations.[47] Interestingly, ICTY President Patrick Robinson recognised this omission in the design of the ICTY when he called for the creation of a Trust Fund for Victims at the ICTY in 2011.[48] In contrast, the ECCC has catered for victims and victim participation. Victim participation at the ECCC seems to be a

[42] Ch. Tomuschat, *Reparations for Victims of Grave Human Rights* Violations, 10 Tulane Journal of International and Comparative Law 157 (2002).

[43] M. Kamminga, *Legal Consequences of an Internationally Wrongful Act of a State against an Individual*, in: B. Barkhuizen et al. (eds.), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order,* Martinus Nijhoff, The Hague: 1999. *See also* M. Kamminga, *Towards a Permanent International Claims Commission for Victims of International Humanitarian Law*, 25 Windsor Yearbook of Access to Justice 23 (2007).

[44] *See* F. Rosenfeld, *Collective Reparation for Victims of Armed Conflict*, 92 (879) International Review of the Red Cross 731 (2010); R. P. Mazzeschi, *Reparation claims by individuals for state breaches of humanitarian law and human rights: an overview*, 1 Journal of International Criminal Justice 339 (2003), p. 343; A. Randelzhofer, *The legal position of the individual under present international law*, in: A. Randelzhofer, Ch. Tomuschat (eds.), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*, Martinus Nijhoff, The Hague: 1999, p. 231; M. Sassolli, *State responsibility for violations of international humanitarian law*, 84(846) International Review of the Red Cross 401 (2002), p. 419; L. Zegveld, *Remedies for victims of violations of international humanitarian law*, 85(851) International Review of the Red Cross 497 (2003).

[45] Reparations have also been neglected in the field of Transitional Justice. *See* R. Mani, *Remedies As a Component of Transitional Justice: Pursuing Reparative Justice in the Aftermath of Violent Conflict*, in: K. de Feyter et al. (eds.), *Out of the Ashes. Reparation for Victims of Gross Human Rights Violations*, Intersentia, Antwerp, Oxford: 2005.

[46] Neither the ICTY nor the ICTR allows victims to participate in their own right (*cf.*, M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6(2) Human Rights Law Review 203 (2006)).

[47] Anne Marie de Brouwer has however recognized that the ICTR has made progress in providing medical assistance, including anti-retroviral treatment, to victims who have appeared as witnesses. *See* A.M. de Brouwer, *Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and the Trust Fund for Victims and Their Families*, 20(1) Leiden Journal of International Law 207 (2007).

[48] Robinson made this suggestion at the ICTY Legacy Conference in The Hague in November 2011. In light of the fact that the ICTY will soon be wrapping up its work, the creation of such fund seems unlikely.

tremendous success, with large numbers of victims participating and large numbers of the public attending the trials.[49]

3. THE ICC REPARATIONS REGIME: A BRIEF SUMMARY

For many, the ICC is the focus of future hopes and aspirations for international criminal justice. The work of the ICC can have a substantial impact on the lives of tens of thousands of victims. In spite of this, little is currently known about how the ICC reparations regime will operate in practice. This is due in part to the fact that the documents governing the ICC establish the scheme in very general terms, and in part to the fact that the scheme is sui generis.

The issue of reparations at the ICC is governed by Art. 75 of the Rome Statute. The Statute caters for victims in two principal ways. Firstly, Art. 68(3) allows victims to participate in proceedings.[50] Participation before the Court may occur at various stages of the proceedings and may take different forms. The judges have the discretion to give directions as to the timing and manner of participation.[51]

The second way in which the Rome Statute caters for victims is to provide for the possibility of the payment of reparations. The Court can make an order against a convicted person stating the appropriate reparation for the victims or their beneficiaries.[52] This reparation may take the form of restitution, indemnification or rehabilitation. The Court may order reparations to be paid through the Trust Fund for Victims (TFV), which was created by the Assembly of States Parties.

The ICC has the important mandate to establish principles relating to reparations. The reference in Art. 75(2) to the establishment of "principles relating to reparations"

[49] Victims who have suffered physical, psychological and material harm as a result of a crime investigated by the ECCC may apply to become civil parties. Civil parties have the right to choose a lawyer. If needed, the ECCC helps them organise common legal representation. Civil parties can also organise their civil party action by becoming members of an association of victims. *See* Ch. Turnbull, *The Victims of Victims Participation in International Criminal Proceedings*, 29 Michigan Journal of International Law 777 (2007-2008).

[50] Art. 68(3) states: As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

[51] This means that victims may file submissions before the Pre-Trial Chamber when the Prosecutor requests its authorisation to investigate. They may also file submissions on all matters relating to the competence of the Court or the admissibility of cases. More generally, victims are entitled to file submissions before the Chambers of the Court at the pre-trial stage, at trial, and during the appeals process. Participation in the Court's proceedings will in most cases take place through a legal representative and will be conducted "in a manner which is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial."

[52] Art. 75 (2) of the Rome Statute.

was intended to be an indirect reference to the UN Basic Principles of Justice for Victims of Crime and Abuse of Power and the then-draft UN Basic Principles on the Right to Reparation for Victims.[53]

In terms of Art. 75(2), the ICC can make an order directly against a convicted person specifying appropriate reparations with respect to victims. To trigger the ICC's jurisdiction to award reparations it is necessary that a person must be convicted of a crime within the jurisdiction of this court. The fact that the Rome Statute ties the payment of reparations to the guilt or innocence of an accused raises a larger concern. It can be asked whether sympathy for the needs of the victims could not potentially put pressure on the court to convict the accused.[54] This concern should however not be exaggerated, since victims can be assisted by the Trust Fund in the absence of a guilty verdict.

As explained earlier, the Court can only order reparations once a guilty verdict has been reached. The Trust Fund for Victims however has a more flexible mandate. It is mandated to make reparations to victims whose injury cannot be causally linked to the responsibility of the convicted persons (assuming one can always make such a clear distinction) and it can do so at any time – before or after the verdict.[55] Under the non-court ordered general assistance mandate the TFV has already assisted thousands of victims in concrete and meaningful ways. [56]

In terms of the implementation of the TFV's reparations mandate, the ICC may order money and other property collected through fines or forfeiture from a convicted person to be transferred to the TFV to be used for the implementation of the reparations reward.[57] The TFV has the mandate to complement such resources through voluntary contributions from donors.[58]

The reparation mandate of the TFV is a part of its bifurcated mandate. In addition to its role in assisting the Court after a reparations order has been made, the TFV also has the mandate to provide general assistance to victims and their families. Such general assistance can consist of providing physical rehabilitation, material support, and psychological rehabilitation.[59]

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[53] UN Basic Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, UN. Doc. A/Res/40/34. *See* Ch. Evans, *Reparations for Victims in International Criminal Law*, in: J. Grimheden, D. Karlsson, R. Ring (eds.), *On-line Festschrift in honour of Katarina Tomasevski*, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund: 2011, p. 10.

[54] M. Swart, *Was the ICC's Lubanga judgment a fair one?*, Business Day 19 March 2012.

[55] Redress Trust, *Comments to the Trust Fund for Victims on the Progressive Realisation of its Mandate*, 22 March 2010, pp. 5 and 13 (available at http://www.redress.org/downloads/publications/REDRESS_Paper_for_TFV_Board_22March2010.pdf (last accessed 20 March 2013).

[56] For more information on the various projects of the Trust Fund for Victims in Africa *see* http://www.trustfundforvictims.org/.

[57] *Ibidem*.

[58] For more on the politics surrounding donors *see* S. Kendal, *Donor's Justice*, (2011) 24 Leiden Journal of International Law 585 (2011).

[59] *Learning from the TFV's Second Mandate: From Implementing Rehabilitation Assistance to Reparations*, available at http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Fall%202010.pdf (last accessed on 20 March 2013).

The work of the TFV has been under-publicised.[60] It is a little known fact that the TFV is currently involved in 13 active projects and has assisted more than 80,000 victims so far, mostly in the DRC and Northern Uganda.[61] The TFV has assisted in arranging reconstructive surgery for victims and has assisted thousands of victims of sexual violence. The establishment of the Trust, in combination with the reparations function of the TFV, has been hailed as unprecedented in international law.[62]

4. REPARATIONS IN *LUBANGA*

The *Lubanga* judgment was widely celebrated.[63] Apprehensions remained however about how the ICC would approach the post-judgment phase of reparations.

Historically, no victim redress regime was created within the statutory framework of the Nuremberg Tribunal or of the ICTY or ICTR.[64] In a departure from this conventional approach in international law, the interests of victims formed an integral part of the *Lubanga* trial. This was particularly evident from the degree of victim participation in the case. Although it is important that the Rome Statute makes provision for victim participation in Art. 68, this article focuses on reparations and not participation and the issue of participation will therefore not be fully elaborated on here.[65] It is worth mentioning however that 129 victims participated in the *Lubanga* case.[66] Victims applied to participate for the purposes of introducing evidence, questioning witnesses, and advancing oral and written submissions.[67] To facilitate the process of victim participation, the Victims Participation and Reparations Section (VPRS) was established in the Registry of the ICC to assist victims and facilitate their access to the

[60] Frederic Megrét writes that the TFV has been shrouded in mystery. Its existence is anticipated by a single article in the Rome Statute, it has been quite discreet about its activities and its regulations took a long time to be adopted. *See* F. Megrét, *Justifying Compensation by the International Criminal Court's Victims Trust Fund: Lessons from Domestic Compensation Schemes*, 36 Brooklyn Journal of International Law 123 (2010).

[61] Press Release 23 March: *ICC Trust Fund For Victims Assists Over 80 000 Victims, Raises Reparations Reserve*, http://reliefweb.int/report/democratic-republic-congo/icc-trust-fund-victims-assists-over-80000-victims-raises (last accessed on 1 April 2013).

[62] P. de Greiff & M. Wierda, *The Trust Fund for Victims of the International Criminal Court*, in: K. de Feyter (ed.), *supra* note 45, p. 25.

[63] J. Stewart, *Lubanga Decision Roundtable, Lubanga in Context*, Opinio Juris blog 18 March 2012, available at http://opiniojuris.org/2012/03/18/lubanga-decision-roundtable-lubanga-in-context (last accessed 12 August 2012). *See also* the more measured tone of T. Lieflander, *The Lubanga Judgment of the ICC: More than just the first step?* 1(1) Cambridge Journal of International and Comparative Law 191 (2012).

[64] McCarthy, *supra* note 9, p. 46.

[65] For more on victim participation, *see* Spiga *supra* note 32, and E. Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, 90(870) International Review of the Red Cross 409 (2008).

[66] *Lubanga* Judgement, para. 16.

[67] This number includes 34 female victims and 95 male victims. *See* Summary of the Judgment, *Situation in the Democratic Republic of the Congo*, *Prosecutor v Thomas Lubanga Dyilo*, 14 March 2012, 5. ICC-01/04-1/06.

ICC.[68] When participating, victims pursue their own interest independently from the parties to the case.[69] It is expected that many more victims will participate in the next trial to be heard by the ICC, the *Katanga* trial.[70] Germain Katanga is the next accused, after Thomas Lubanga, to face charges before the ICC with respect to the situation in the Ituri district of the DRC.

The interests of victims were also injected directly into the trial in the form of the participation of Paolina Massada, Principal Counsel of the Office of Public Counsel for Victims (OPCV),[71] who represented victims during the closing arguments in the *Lubanga* trial.

Massada stressed the proactive contribution of victims throughout the trial.[72] She also highlighted the indirect harm suffered by the parents due to the moral and psychological suffering they experienced by the abduction and enlistment of their children.

To assist the Court in formulating its reparations order and to honour its undertaking to include victims in the process, the verdict in the *Lubanga* case was followed by a consultation process in The Hague. In late March 2012, subsequent to the Trial Chamber judgment, the ICC asked various "interested" parties to make submissions on whether they would prefer individual or collective reparations etc. The parties to the case and victims were asked to make submissions on reparations soon thereafter. Massada explained the reason for the consultation procedure as follows:

> It is possible then for the court to start reparations proceedings, but there is no clear established procedure – which is the reason why the judges are asking participants [in the case] to provide observations, among other things, on whether reparations should be awarded collectively or on an individual basis, to whom, and how harm could be assessed.[73]

The *Lubanga* Trial Chamber's observation on reparations (issued in advance of the reparations decision) deals extensively with children.[74] The Trial Chamber makes the point that the Court should ensure access to reparations for the most vulnerable

[68] F. McKay, *Victim Participation in Proceedings before the International Criminal Court*, p. 2 (available at www.wcl.american.edu/hrbrief/).

[69] *Ibidem*.

[70] *The Prosecutor v. Germain Katanga and Mathieu Ngudjol,* ICC-01/04-01/07.

[71] The OPCV was established in order to effectively assist victims in exercising their rights, or to represent them before the Chambers, as provided for in the Regulations of the Court. *See* http://www.icc-cpi.int/NetApp/App/MCMSTemplates/Content.aspx?NRMODE=Published&NRNODEGUID={007C8D7C-8B11-4E11-8D92-57E1326E40C1}&NRORIGINALURL=/Menus/ICC/Structure+of+the+Court/Victims/Office+of+Public+Counsel+for+Victims/Frequently+Asked+Questions.htm&NRCACHEHINT=Guest#Q_4 (last accessed 10 April 2013).

[72] Massada mentioned the fact that in May 2009 victims sought to modify the legal characterisation of the facts supporting the charges brought against the accused so as to include additional charges of sexual slavery and cruel and inhuman treatment. N. Bounakhla, *Closing statements in the Lubanga case, what the victims had to say*, 21 September 2011 (available at http://www.vrwg.org/home/home/post/26-closing-statements-in-the-lubanga-case-what-the-victims-had-to-say/, accessed on 12 August 2012).

[73] *DRC: Thorny Issue of Reparations for Lubanga's victims*, The Guardian, 12 April 2012.

[74] Observation on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04-1/06, paras. 35-39 (available at http://www.icc-cpi.int/iccdocs/doc/doc1404406.pdf).

victims.[75] Vulnerable victims include women and girls, rural and slum inhabitants, the disabled, mutilated persons, orphans, the elderly, and the illiterate.[76] The Trial Chamber stated that it might order affirmative measures to address inequalities.[77] This approach by the Court is in accordance with advice by non-governmental organisations such as REDRESS,[78] which has emphasised that the Court should expressly recognize that there is no one-size-fits-all approach to reparations. Rather, the individual circumstances of each case must be considered.[79]

5. THE *LUBANGA* REPARATIONS DECISION

In the reparations decision of 7 August 2012 Trial Chamber 1 set out the following five purposes of reparations: (i) relieving the suffering caused by Lubanga's crimes (ii) afford justice to the victims by alleviating the consequences of crimes; (iii) deter future violations; (iv) contribute to the effective reintegration of child soldiers and (v) promoting reconciliation between the convicted person, the victims of the crimes, and the affected communities.[80]

The Trial Chamber emphasised the following important points regarding reparations:

i) Reparations should be of a collective nature, addressing the harm victims have suffered on an individual and collective basis.[81]
ii) Victims as well as the families of victims and their communities should all play a role in the reparations process.[82]
iii) The needs of vulnerable victims including children and women should be addressed as a priority.
iv) Reparations should promote reconciliation as far as possible.[83]
v) The explicit recognition of the need for child and gender-sensitive measures to ensure equal access to justice.[84]
vi) Both direct and indirect victims should benefit from reparations. Indirect victims may include the family of direct victims (child soldiers) and those who intervened to try to help the victims.[85]

[75] *Ibidem*, para. 23.
[76] *Ibidem*, para. 28.
[77] *Ibidem*, para. 29.
[78] REDRESS is a non-governmental organisation based in London that works for obtaining justice for torture survivors.
[79] *Case-Based Reparations at the International Criminal Court.* This report formed part of a series of reports by the War Crimes Research Office at the American University Washington College of Law, available at http://www.wcl.american.edu/warcrimes/icc/documents/report12.pdf (last accessed 12 August 2012).
[80] Coalition for the International Criminal Court, Informal Q & A, available at www.iccnow.org).
[81] Trust Fund for Victims, *Programme Progress Report*, Winter 2012, p. 37.
[82] Reparations Decision, paras. 32, 36, 161.
[83] *Ibidem*, para. 21.
[84] *Ibidem*, paras. 25, 61, 62,111, 143, 159.
[85] *Ibidem*, para. 195.

vii) The following procedure was set out: a community based and participative approach for assessing harm and identifying appropriate reparations was recommended. The process was to be carried out in the affected localities in Ituri under the guidance of the Trust Fund for Victims.[86]

viii) The outcome of the consultative process described in (vii) is to be presented to a newly constituted Trial Chamber for approval. The newly constituted Trial Chamber will assist in the implementation.[87] Reparations will then be implemented through the resources of the Trust Fund. The judges did not quantify the amount of reparations the Trust Fund should use for funding reparations in this case.

ix) Awards of reparation should be aimed at reconciling the victims and their families.[88] At the same time the reparations should not intrude on the dignity and privacy of the victims.

The principles and approach taken by the Trial Chamber apply only to the *Lubanga* trial.[89] The Court is free to establish other principles, which may be established in other trials. One may ask whether it would not have promoted consistency and coherence in the law if the ICC formulated principles to be applied to all cases before the court.

In terms of implementation, the Chamber will rely on the TFV. Both Parties to the Rome Statute and non-states parties will be required to cooperate to give effect to the reparations awards. The Court stated that it declined to issue specific orders to the TFV on the implementation of reparations. This of course means that the Court did not state any specific amount to be paid to victims. This leaves the TFV with a great deal of responsibility, and it can be asked whether it is good for the court to defer the specificities regarding a matter as important as financial reparations to a non-judicial body. It is unclear whether the Court did so because it felt the TFV had greater expertise in this regard, or whether the Court lacks the confidence and expertise to specify reparation awards.

The jurisdiction of the ICC over crimes such as genocide, war crimes and crimes against humanity implies the existence of vast numbers of victims. This triggers the obvious question: how will the reparations payments be funded? The responsibility to pay for reparations firstly lies with the accused. Since Lubanga has been found to be indigent,[90] the Trial Chamber did not order Lubanga himself to pay reparations.

[86] *Ibidem*, para. 161.

[87] *Ibidem*, para. 286.

[88] In the Introductory section of the decision the Court recognised that it should also address the "philosophical questions" related to the right of victims of international crimes to reparations. One such question is the relationship between reparations and reconciliation (*ibidem*, para. 21).

[89] http://www.iccnow.org/documents/Informal_CICC_Q_and_A_on_Reparations_Principles_-_Lubanga_case_15_August_2012.pdf (last accessed 10 April 2013).

[90] Elizabeth Rehn, Chair of the TFV Board of Directors, has emphasised the importance of the "perpetrator pays" principle as well as the fact that states should make intensified efforts to identify and freeze assets of persons accused before the ICC.

The Trial Chamber stated that the Trust Fund will need to receive sufficient voluntary contributions in order to be able to implement the reparations programme in a meaningful and efficient way.

The Trust Fund has launched a funding appeal to donors and State parties and international actors to raise money.[91] The TFV currently has just over 3.2 million euros in its account – a modest figure given the potential number and needs of the victims. The Trust Fund set aside 1.2 million euros for the first two cases before the ICC (*Lubanga* and *Katanga*[92])

6. ASSESSMENT OF THE REPARATIONS DECISION

The Chamber stated that special attention should be paid to victims of sexual and gender-based violence,[93] and those former child soldiers who need to be rehabilitated into their communities. This is in accordance with the statement by the Trial Chamber in the *Lubanga* judgment that the needs of vulnerable victims – including women and girls, rural and slum inhabitants, the disabled, mutilated persons, orphans, the elderly and the illiterate – should be prioritised in the reparations order.[94]

The Court stated that it considered it necessary to set out competing points of view on the issue of reparations before it turned to its conclusions.[95] The Chamber then proceeded to spend the bulk of the decision summarising the views of various interested groups.[96] The Court has thus shown its sensitivity to issues such as victim involvement by undertaking an extensive consultation process.

It has been said many times that it can be dangerous to award reparations in a manner that fails to consider all the parties involved. Such an approach can do more harm than good. Paying reparations without sensitivity to the concerns of victims and of the particular context can lead to fresh resentments, further litigation, and even history repeating itself.[97] It can however be argued that the most marginalised victims are typically neglected by the consultative processes because these victims lack the means of communicating to groups such as NGO's.

The reparations decision gives every indication that it is very unlikely that cash payouts will be made. The Chamber stated that "there are very limited financial resources

[91] Thirty countries have contributed to the TFV since 2004. *See Mobilising Resources and Supporting the Most Vulnerable through Earmarked Funding* in: The Trust Fund for Victims, *supra* note 81.

[92] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC- 01/04-01/07.

[93] Reparations Decision, para. 207.

[94] *Lubanga* Judgement, paras. 605 and 617.

[95] Reparations Decision, para. 20.

[96] Ranging from the UNICEF to Women's Initiatives, as well as the International Centre for Transitional Justice.

[97] E. Kristjansdottir, *International Mass Claims Processes*, in: C. Ferstman, M. Goetz (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity*, Martinus Nijhoff, The Hague: 2009.

available in this case."[98] This is not surprising. Prior to the reparations decision experts warned that it is unlikely that the ICC would order cash payouts. Bukeni Waruzi, an expert on child soldiers, expressed the concern that this will be disappointing to the former child soldiers, who are largely uneducated and untrained.[99] Many suffer from drug addiction or diseases, including HIV. Others have been victims of sexual violence.[100] Whereas symbolic reparations and reparations such as education and rehabilitation may be meaningful to victims, financial reparations are a particularly potent form of reparation.

7. SYMBOLIC REPARATIONS

Although some have feared that the ICC would not order symbolic reparations,[101] the Trial Chamber stated that symbolic and transformative reparations are appropriate forms of reparations.[102] The Chamber suggested the following forms of symbolic reparations: campaigns, issuing certificates of acknowledgement that victims suffered harm, outreach and promotional activities, and education programs aimed at reducing stigmatisation, marginalisation and discrimination against the victims.[103] The Chamber stated that the wide publication of the decision may also serve to increase awareness of the crime of enlisting child soldiers, and that this may have a deterrent effect.[104] The Trial Chamber also stated that it is to be hoped that Lubanga will voluntarily offer an apology to the victims, either on a public or confidential basis.[105] Although the court states that victims should not be stigmatized, it does not state which measures will be taken to avoid such stigmatisation. It is not clear for example whether the ICC will take measures to ensure witness protection and confidentiality. Elisabeth Rehn, Chair of the Board of Directors of the Trust Fund for Victims, has commented that especially children and victims of sexual crimes are in need of support to help them deal with possible stigma.[106]

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[98] Reparations Decision, para. 288.

[99] Bukeni Waruzi is the programme manager for Africa and the Middle East at the NGO Witness (The Guardian, *supra* note 73).

[100] *Ibidem*.

[101] *See* F. Megrét, *The International Criminal Court and the Failure to Mention Symbolic Reparations*, 16(2) International Review of Victimology 127 (2009).

[102] Reparations Decision, para. 222.

[103] *Ibidem*, para. 239.

[104] *Ibidem*, para. 238.

[105] *See* in this regard M. Swart, *Sorry seems to be the Hardest Word: Apology as Form of Symbolic Reparations*, 1 South African Journal on Human Rights 50 (2008).

[106] *Keynote speech*, *Elisabeth Rehn, Ten Years of International Criminal Court: A Focus on Victims*, Trust Fund for Victims p. 10 September 2012, available at http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/Speech_ER_Tallinn_Sept_2012.pdf (last accessed 10 April 2013).

8. THE "HARM" REQUIREMENT

The ICC should give more concrete content to the term "harm". The problem with existing interpretations of "harm" is that they are overly inclusive and broad. In this early stage of the ICC's work, the very open and abstract "harm" requirement creates difficulties for the ICC reparation regime. Since the concept of harm plays a crucial role in various aspects of the decision-making process relating to reparations, delineating and defining the harm requirement could clarify much of the current uncertainty surrounding the question of reparations. The term "victim" under the Rome Statute is also defined by reference to the concept of harm, thus without a clear definition of "harm" it is also not possible to define the term "victim".[107] In light of the extent and the diversity of the harm to which crimes such as genocide and crimes against humanity and war crimes give rise, the Court's task is particularly complex. McCarthy argues that the ICC needs to establish an analytical framework for the concept of harm under the Rome Statute.[108] In his view the concept of harm should be treated as an autonomous concept within the framework of the Court.[109] This means that the ICC should not give too much deference to the reparations decisions of domestic courts. Whereas it is desirable that the ICC's approach to the concept of harm should be consistent with the approach of other international tribunals, it is not crucial that the ICC's definition of harm should correspond with the meaning of harm in domestic jurisdictions.

Questions relating to harm that need clarification include the distinction between "pecuniary" and "non-pecuniary" harm. In the *Lubanga* reparations decision the Court merely distinguished between three different kinds of harm namely physical harm, moral damage, and material damage.[110] It has been suggested that the Court should clearly state that for the purpose of reparations it would take the same broad approach to the concept of "harm" as it has taken to the concept of participation.[111] This would mean that harm will include "physical, material and psychological" harm[112] and that it can attach to both "direct" and "indirect" victims.[113] This approach will be consistent with both the UN Basic Principles on Reparations

[107] Rule 85(a) stipulates that "victims" means "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."

[108] McCarthy, *supra* note 9, p. 95.

[109] *Ibidem*, p. 99.

[110] Reparations Decision, para. 230.

[111] *The Case-Based Reparations Scheme at the International Criminal Court*, War Crimes Research Office, Washington College of Law, June 2010, p. 36.

[112] *The Prosecutor v Thomas Lubanga Dyilo*, Judgment on the Appeals of The Prosecutor and The Defense against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06, para. 32 (Appeals Chamber, 11 July 2008).

[113] The Lubanga Trial Chamber clarified that "indirect victims" are persons who have "suffer[ed] harm as a result of the harm suffered by direct victims." Lubanga, Redacted Version of Decision on "Indirect Victims" (Trial Chamber, 8 April 2009).

and the approach of the Inter American Court of Human Rights.[114] The UN Basic Principles expressly recognize that "victims" include those who have suffered physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.[115]

The Chamber simply stated that the concept of harm denotes "hurt, injury and damage."[116] It did not provide a sufficiently comprehensive definition and discussion of the "harm" requirement.

9. CAUSATION

The element of causation is not defined in the Rome Statute. Causation is dealt with very briefly in the Rules of Procedure and Evidence. Rule 85(a) requires only that an individual suffered harm "as a result of" crimes "within the jurisdiction of the Court."[117] But because the Trial and Appeals Chambers may only award reparations against persons convicted by the Court, it is clear that the "damage, loss and injury" forming the basis of a claim of reparations must have been caused by the crime or crimes for which the perpetrator was convicted.

The Rome Statute's silence on the question of causation is unsurprising in light of the fact that there is currently no settled view in international law on the appropriate standard for causation.[118] The drafters of the Rome Statute might have also preferred to defer to the ICC judges on the question of principles such as reparations.

Tests for causation that can successfully be applied in domestic contexts do not always work in the context of international criminal law. In terms of factual causation, the "but for" test which is commonly applied presents difficulties in the context of co-perpetration (when a crime is committed "jointly with another"). This is but one example where the "but for" case does not provide a workable or appropriate means of determining whether harm was factually caused by an accused's conduct.[119] Given the frequency with which other international tribunals (most notably the ICTY) have employed doctrines of co-perpetration, it might happen fairly regularly that the "but

[114] *See* Inter American Court of Human Rights, *Las Dos Erres Massacre v Guatemala*, Judgment of 24 November 2009, para. 226.

[115] Principle 8, United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law, Principle 8, Commission on Human Rights, Res. 2005/35 of 19 April 2005.

[116] Reparations Decision, para. 228.

[117] International Criminal Court, Rules of Procedure and Evidence, U.N Doc. PCNICC/2000/1/Add.1, R. 85 (2000) Rule 85(a).

[118] M. Henzelin, V. Heiskanen, G. Mettraux, *Reparation to Victims before the International Criminal Court: Lessons from International Mass Claims Processes*, 17(3-4) Criminal Law Forum 317 (2006), p. 325.

[119] McCarthy, *supra* note 9, p. 139. The "but for" test has also been said to be inappropriate where the harm caused by the crime has multiple sufficient causes.

for" test will not be the appropriate test. As an alternative to the "but for" test, McCarthy suggests that the Court take into account a range of factors which assist in assessing the extent of an individual's contribution to the harm caused by the crime.[120]

Most legal systems do not merely require factual causation but consider legal causation a necessary further enquiry. On the question of legal causation it has been suggested by scholars such as Dinah Shelton that the proximate cause standard is the most appropriate standard to use in this context.[121] Proximate cause is "generally considered to be a relative term meaning 'near' or 'not remote' and to include concepts of foreseeability and 'temporal proximity'."[122]

Rule 85(b) states that "victims may include organizations that have sustained direct harm …". Although the standard of "direct harm" has often been applied by international courts and tribunals,[123] McCarthy points out that the concept of directness has been controversial in international law.[124] He is of the view that international courts and tribunals have not been consistent in determining whether a form of harm is "direct" (and therefore recoverable) or "indirect" (and not recoverable).[125]

The *Lubanga* reparations decision can be criticised on the basis that the Court spent only four paragraphs on the centrally important question of causation.[126] Whereas the Court briefly mentions the 'but for' and the 'proximate cause' tests of causation, it fails to support one of these tests. The Court mentions that there is no settled view in international law on the meaning of causation,[127] but does not contribute substantially to formulating a definition or test there for.

CONCLUSION

According to Ferstman, the inclusion of reparations for victims in the ICC system is revolutionary in international criminal law.[128] The latest developments in the *Lubanga*

[120] *Ibidem*, p. 155.

[121] D. Shelton, *Remedies in International Human Rights Law*, Oxford University Press, Oxford: 2001, p. 231.

[122] A. Rovine, G. Hanessian, *Towards a Foreseeability Approach to Causation Questions at the United Nations Compensation Commission*, in: R.B. Lilich (ed.), *The United Nations Compensation Commission (Thirteenth Sokol Colloquium)*, Transnational, New York: 1995, p. 243. *See also The Case Based Reparations Scheme at the International Criminal Court,* War Crimes Research Office, International Criminal Court Legal Analysis and Education Project, June 2010.

[123] *See Trail Smelter Arbitration* (*United States v Canada*) 3 RIAA 1905 1931. The European Court of Human Rights has also referred to "direct causal connection" in determining the extent of the harm attributable to a responsible state. *See Cakici v Turkey*, Merits, Grand Chambers, 8 July 1999, 31 EHRR 133 para. 127.

[124] McCarthy, *supra* note 9, p. 154.

[125] *Ibidem*.

[126] Reparations Decision, paras. 247-250.

[127] *Ibidem*, para. 248.

[128] C. Ferstman, *The Reparation Regime of the International Criminal Court: Practical Considerations*, 15(3) Leiden Journal of International Law 667 (2002).

judgment suggest that the reparations phase of a judgment can potentially be just as significant and important for the development of international criminal law as the judgment itself. It was stated in the *Lubanga* reparations decision that "the reparations phase is an integral part of the trial proceedings".[129] With respect to the future reparations practices at the ICC, fairness and consistency will be essential in creating and maintaining the legitimacy of the Court.

The ICC should embrace its mandate to formulate principles of reparations. One of the reasons for the existing uncertainty surrounding the ICC's reparations mandate is the lack of clear principles with regard to reparations. The Rome Statute merely provides a framework for reparations and contains many *lacunae*. It is the task of the judges to formulate principles that will suit the distinct legal context of the ICC. The lack of clarity with regard to reparations is illustrated by the fact that the Court has still not provided a clear definition of the harm requirement and the element of causation. The concept of harm is particularly important since it forms a cornerstone of the Rome Statute reparations process, and without that cornerstone the house cannot stand. Although the inclusive and consultative nature of the *Lubanga* decision is praiseworthy, the decision leaves many burning questions unanswered and defers many important questions to the TFV. The ICC missed an opportunity to lay a firm foundation for future reparations decisions. Although the ability to formulate principles has been interpreted as limiting a court to the formulation of principles for a specific case before it, it is submitted that the formulation of general principles that would apply to all cases before the court would promote legal certainty, consistency and coherence.

Scholars such as de Greiff and Wierda have argued that it is important to "temper" expectations on what the TFV can do for victims.[130] The ICC faces the challenge of designing and implementing a comprehensive reparations policy that will not only be satisfactory to victims, but also realistic and acceptable to states and governments. The policy formulated by the Court in the *Lubanga* reparations decision cannot, however, be yet described as comprehensive and leaves much ground uncovered and questions unanswered. A comprehensive reparations policy will be attractive both to victims as well as to potential donor countries that will be approached to contribute funds to the TFV. State parties may also feel more comfortable contributing money to the Trust Fund if they knew that there is a comprehensive and principled reparations policy in place.

The importance of reparations is heightened in the *Lubanga* case because of the fact that most of the victims are children. The Trial Chamber in *Lubanga* could have been bolder in formulating reparations principles for the ICC. Whereas the loss of a childhood can never be repaired, the failure to place the child victims on the road to recovery would be unconscionable.

[129] Reparations Decision, para. 267.
[130] Greiff, Wierda, *supra* note 62, p. 226.