



Making Sense of Reparations at the International Criminal Court

Background Paper

Lunch Talk, 20 June 2018, Residence of the Finnish Ambassador, The Hague

I. Introduction

The International Criminal Court's (ICC or the Court) reparations mandate is a critical component of its overall framework for giving victims a voice and allowing them to exercise their rights within the international criminal justice system. The inclusion of reparations provisions in the [Rome Statute](#) (Statute) establishing the ICC and the Court's [Rules of Procedure and Evidence](#) (Rules) as well as the creation of a [Trust Fund for Victims](#) (Trust Fund) are major advancements in international criminal justice and an improvement on the *ad hoc* tribunals which preceded the ICC. While the inclusion of a reparations mandate within the Statute was viewed by many as a victory for victims' rights, the implementation of this mandate faces some challenges. With three cases now in the reparations phase, the Court and the Trust Fund are struggling to make the promise of reparations a tangible reality for victims on the ground.

This first [Victims' Rights Working Group](#) (VRWG) *Lunch Talk* seeks to give focused attention to the important issue of reparations, and to promote a frank and open discussion as to what we—as members of civil society, practitioners, academics and State Party representatives—can do to support the Court and the Trust Fund in their work.

This background paper prepared by [REDRESS](#) provides a succinct overview of reparations at the ICC in order to help frame the discussion during the VRWG *Lunch Talk* as well as to encourage further reflection on the issues. It does not provide an analysis of the reparations process before the ICC.¹ The attached table sets out the key developments in reparations in the cases of [Thomas Lubanga Dyilo](#) (Lubanga) and [Germain Katanga](#) (Katanga) from the situation in the Democratic Republic of Congo (DRC), [Ahmad Al Fagi Al Mahdi](#) from the situation in Mali and [Jean-Pierre Bemba Gombo](#) (Bemba) from the Central African Republic (CAR).

II. The Reparations Process: From Application to Implementation

While Article 75 of the Statute sets out the legal basis for reparations and the modalities are elaborated in Rule 94 of the Rules, the reparations procedure at the ICC is not entirely clear. The case-by-case approach to determining reparations has resulted in inconsistent jurisprudence, divergence in practice and lack of clarity for victims even within the same situation before the Court.

II.1. Application for Reparations

The jurisprudence of the Court has confirmed that in order to be considered for reparations, a victim has to meet the following conditions, namely: (i) he or she must be a natural person or legal entity; (ii) he or she must have suffered harm; (iii) the alleged crime of which he or she is a victim must be within the jurisdiction of the Court; and (iv) there must be a causal link between the harm and a crime for which the convicted person was convicted.

On its face, the application procedure appears to be simple. Victims wishing to engage with the Court may submit a written application to participate in proceedings at any stage and may apply from the outset to receive reparations. They may also choose to apply only for reparations in the reparations phase. Standard

¹ For a detailed analysis of the reparations process before the ICC, see, e.g., WIGJ, [Legal Eye on the ICC: Reparations Proceedings at the ICC \(Part 1 of 3\)](#) (March 2018); FIDH, ["All I Want Is Reparation": Views of Victims of Sexual Violence About Reparations in the Bemba Case before the International Criminal Court](#) (November 2017); REDRESS, [Moving Reparation Forward at the ICC: Recommendations](#) (November 2016).

application forms are prepared pursuant to Regulation 88 of the [Regulations of the Court](#) by the Registry's Victims Participation and Reparations Section (VPRS) and approved by the Presidency. Where it is impossible or impracticable to identify beneficiaries prior to issuing a reparations order, Regulations 60-64 of the [Regulations of the Trust Fund](#) allow the Trust Fund to identify beneficiaries during the implementation of the award. This allows the Court to bypass the judicial application-based process altogether. However, even the application process has created some practical challenges for the Court.

For example, in *Lubanga*, the manner in which victims have been permitted to access the reparations process has undergone several changes. Written applications for reparations were collected at different stages of the proceedings by different actors including the VPRS, legal representatives of victims and the Trust Fund, using different methods.² In addition to this application-based process, the [Trial Chamber](#) has also permitted the Trust Fund to identify additional eligible beneficiaries during the implementation phase. In *Katanga*, the [Trial Chamber](#) adopted an application-based approach, with no possibility of further victims coming forward during implementation. In *Al Mahdi*, the [Trial Chamber](#) bypassed the application-based process altogether and is relying on the Trust Fund to identify beneficiaries during implementation. Finally, in *Bemba*, most victims completed a "joint" application form at the outset of proceedings requesting both participation and reparations simultaneously. During the reparations phase, the [panel of experts](#) appointed by the Trial Chamber proposed that no attempt be made to identify additional victims. Had this approach been followed, the completion of a form during the trial phase which was aimed primarily at participation would have constituted the sole means of accessing reparations.³

II.2. The Role of the Trust Fund for Victims

The Trust Fund plays a critical role in implementing reparations at the ICC. It is an independent, non-judicial institution operating within the Rome Statute system. It was established by the Assembly of States Parties for the benefit of victims of crimes within the Court's jurisdiction and their families.

The Trust Fund exercises **two distinct mandates**. Its [assistance mandate](#) is aimed at providing victims with physical and psychological rehabilitation and/or material support. Assistance occurs at the **situation level**, in that it is directed at a situation under investigation in a particular country. Assistance activities may commence once a situation comes under investigation, and after the Trust Fund has complied with the requirements concerning notification to the Court of its intent to undertake such activities. Assistance activities have the potential to reach a wide range of victims as they are not limited to harm stemming from the crimes charged in a particular case. Rather, assistance activities may be directed at *any* victim who suffers harm as a result a crime within the Court's jurisdiction, as well as their families. The Trust Fund's assistance mandate is funded by resources raised through voluntary contributions. To date, the Trust Fund is carrying out assistance programmes in the Democratic Republic of Congo and Northern Uganda, and is planning further programmes in Côte d'Ivoire. The Trust Fund also [announced](#) on 13 June 2018 that, following Bemba's acquittal, it is accelerating the launch of a programme under its assistance mandate in the Central African Republic. It is unclear what criteria the Trust Fund applies to terminate assistance activities.

The Trust Fund's [reparations mandate](#) involves the implementation of awards for reparations ordered by the Court against a convicted person. As such, reparations activities occur at the **case level**, in that they are linked to a conviction of a particular perpetrator. It is the convicted person who is responsible for the cost of implementing reparations awards. As such, the Court may order under Article 79(2) of the Statute that money and other property collected through fines or forfeiture be transferred to the Trust Fund. In reality, however, most convicted persons are indigent. In such circumstances, the Trust Fund may use its other resources—*i.e.* funds made available by voluntary contributions—to "complement" the award under Regulation 56 of the [Regulations of the Trust Fund](#) (subject to repayment by the convicted person). To date, the Trust Fund has been asked to consider advancing the full amount ordered in all three cases to reach the implementation phase.

² See, e.g., REDRESS, [Moving Reparation Forward at the ICC: Recommendations](#) (November 2016), pp.5-8.

³ In light of Bemba's acquittal, the point is now moot.

II.3. Reparations Orders

A reparations order is the formal decision by the Court making an award for the harm victims have suffered. The reparations order is made *directly* against a convicted person (see Article 75(2) of the Statute; Rule 98(1) of the Rules) and it addresses, among other things: victim eligibility; the harm caused; the modalities of reparations; and the convicted person's monetary liability. Rule 97 of the Rules provides that, taking into account the scope and extent of any damage, loss or injury, the Court "may award reparations on an individualized basis, or where it deems appropriate on a collective basis, or both". The legal representatives of victims and the convicted person are permitted to appeal reparations orders under Article 82 of the Statute.

Before making a reparations order, Trial Chambers are permitted by Article 75(3) of the Statute to **invite representations** from the convicted person, victims, other interested persons and States ("parties and participants"). In addition, under Rule 97(3) of the Rules, the Trial Chamber may **appoint experts** to provide assistance. While the number and range of parties and potential participants involved in the reparations process have augmented the wealth of information available to the Chambers prior to making a reparations award, their involvement has also contributed to delays in the process. Parties and participants continue to file detailed—and often multiple—representations, and requests for extensions of time are common. In addition, experts file lengthy individual or joint reports addressing a range of issues under consideration, and various civil society organizations file written observations as *amici curiae*.

II.3.1. Assessment of Harm

The assessment of **the scope of the harm** caused to direct and indirect victims of the crimes (that is, the types or categories of harm suffered) is a key component of reparations awards. To date these assessments have been made by the judges; however, the assessment of the **extent or monetary value of that harm** may be made by the Trust Fund, on the basis of criteria set by the Trial Chamber.

Harm is not specifically defined by the Statute or Rules. The emerging jurisprudence on reparations at the Court has been guided by the definition in the [UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#). In *Lubanga*, the [Appeals Chamber](#) confirmed that for the purposes of reparations, harm denotes "hurt, injury and damage" and may be material, physical or psychological. While the harm does not necessarily need to have been direct, it must have been personal to the victim.

Findings relating to harm may be based on evidence presented during the trial, received during the reparations phase, or contained in any reparations applications. In addition, the reparations order must establish the **convicted person's monetary liability** with respect to the reparations award, in a manner proportionate to the harm caused and his or her participation in the crimes.

The [Katanga Trial Chamber](#) opted to assess the scope and extent of the harm itself, without the assistance of experts. It allocated a fixed amount to particular types of harm, and then applied those amounts to the harms suffered by each identified victim in order to reach a total monetary value of the overall harm. It then set Katanga's monetary liability at a *portion* of the total amount. The [Appeals Chamber](#) was critical of the approach taken by the Trial Chamber in *Katanga*, stating that Trial Chambers should focus on the cost of repair, rather than attempting to determine a "sum-total" value of harm caused. The [Al Mahdi Trial Chamber](#) relied on expert reports to reasonably approximate the value of the harm caused by Al Mahdi's crimes, finding him liable for the *full* amount. The [Lubanga Trial Chamber](#) assigned a value to the "average harm" suffered by identified victims, which it then supplemented in order to cover unidentified victims. As in *Al Mahdi*, the Chamber held Lubanga responsible for the *full* amount.

II.3.2. Individual and collective reparations awards

Under Rules 97 and 98, the Court can make both individual and collective reparation awards. In addition, it may order that an award be made to an intergovernmental, international or national organization (although this has yet to occur). The Court's approach to reparations awards has differed in each case. In *Lubanga*, the

Court ordered collective reparations only, whereas in both *Katanga* and *Al Mahdi*, the Court ordered a combination of individual and collective reparations. To date, individual awards have taken the form of compensation, while collective awards have taken the form of rehabilitative services and symbolic measures.

The Chambers have applied different approaches in deciding whether it is necessary or appropriate to **identify individual beneficiaries** and to verify their eligibility in cases where only *collective* reparations awards are contemplated (and if so, when this must occur). Each of the Chambers have also adopted a different approach with respect to judicial involvement in this process.

Initially, the *Lubanga Trial Chamber* did not examine victims' written applications for reparations in its order, but rather transmitted them to the Trust Fund for consideration. The *Appeals Chamber* endorsed this approach, explaining that where *only collective reparations* are awarded, a Trial Chamber is not required to rule on the merits of individual reparations applications. Nevertheless, in the context of its assessment of the Lubanga's monetary liability, the newly-composed *Trial Chamber* assessed those written applications to determine eligibility for *collective* service-based reparations. Despite this exercise, it noted that the available applications represented only a sample of the entire beneficiary group, and therefore allowed for the possibility that additional beneficiaries might be identified by the Trust Fund during the implementation phase. The *Trust Fund* is now working with VPRS to put in place an administrative screening process, and has recommended administrative (not judicial) review of its assessments.

The *Katanga Trial Chamber* assessed all 341 written applications itself, for the purposes of both collective and individual awards (an approach which was criticized by the *Appeals Chamber* as leading to "unnecessary delays"). In *Al Mahdi*, the *Trial Chamber* considered the number of applicants paled in comparison to the number of victims in fact harmed by the crimes. The Chamber concluded that it was impracticable to identify all potentially eligible beneficiaries itself, opting instead to delegate the role of screening beneficiaries for *individual* reparations to the Trust Fund. No formal screening process was put in place for the implementation of *collective* awards. The *Appeals Chamber* confirmed that it is within a Trial Chamber's discretion to request that the Trust Fund undertake an administrative screening process in this manner in order to enhance the efficiency and effectiveness of the process, provided the Trial Chamber sets out the eligibility criteria. Nevertheless, the Appeals Chamber required that the Trial Chamber maintain control over the screening process, including judicial review of the Trust Fund's assessments.

II.4. Implementation of Reparations Orders

Where appropriate, the Court may order that reparations be **implemented through the Trust Fund** under Article 75(2) of the Statute and Rule 98 of the Rules. This will occur in cases of: (i) collective awards; (ii) awards made to an intergovernmental, international or national organization; and (iii) individual awards, where it is impossible or impractical to make awards directly to each victim. The reparations awards that have been made in the *Lubanga*, *Katanga* and *Al Mahdi* cases are to be implemented by the Trust Fund. Once the Court has issued a reparations order, the Trust Fund is required to prepare a **draft implementation plan** setting out proposed activities corresponding with the modalities identified by the Chamber. The plan is based on consultations with the Registry, the legal representatives of victims, the defence, local authorities and experts (as needed). After hearing from the parties, the Trial Chamber may then approve, reject or modify the plan. Once approved, the Trust Fund launches an international competitive bidding process to select implementing partners on the ground. The Trust Fund is required to submit periodic progress reports to the Chamber throughout the implementation phase.

Draft implementation plans are currently before the Trial Chambers in both *Katanga* and *Al Mahdi*. Draft implementation plans for both symbolic and service-based reparations in Lubanga have been approved. While implementation of the symbolic component has commenced in Ituri, the service-based component remains in the procurement phase.

For queries concerning REDRESS' position on reparations before the ICC, or further information concerning the VRWG's Lunch Talks series, please contact Sarah Finin (sarahf@redress.org) or Lorraine Smith van Lin (lorraine@redress.org).

Key Developments in Reparations before the International Criminal Court

| LUBANGA (DRC) (child soldiers in Ituri) | KATANGA (DRC) (attack on Bogoro) | AL MAHDI (MALI) (attack on Timbuktu) | BEMBA (CARI) (murder, rape, pillage) |
|--|---|--|--|
| <p>Trial Judgment of 14 March 2012 and Sentencing Decision of 10 July 2012 sentencing Lubanga to 14 years' imprisonment for enlisting, conscripting, using children to participate actively in hostilities in 2002-2003 (confirmed in the Appeals Judgment of 1 December 2014)</p> | <p>Trial Judgment of 7 March 2014 and Sentencing Decision of 23 May 2014 sentencing Katanga to 12 years' imprisonment for crimes committed during the 24 February 2003 attack on the village of Bogoro (including murder, attacking civilians, destruction of property and pillaging)</p> | <p>Trial Judgment and Sentence of 27 September 2016 sentencing Al Mahdi to 9 years' imprisonment for directing attacks against historic monuments and buildings dedicated to religion (including nine mausoleums and one mosque) in Timbuktu in June and July 2012</p> | <p>Trial Judgment of 21 March 2016 and Sentencing Decision of 21 June 2016 sentencing Bemba to 18 years' imprisonment for murder, rape and pillage committed 2002-2003 in CAR (convictions overturned in the Appeals Judgment of 8 June 2018 and acquittals entered)</p> |
| <p>Application process and identification of beneficiaries:</p> <ul style="list-style-type: none"> - application-based process <i>and</i> Trust Fund identification during implementation - 473 applicants (425 eligible; approx. 3000 unidentified victims) | <p>Application process and identification of beneficiaries:</p> <ul style="list-style-type: none"> - application-based process only - 341 applicants (297 eligible) | <p>Application process and identification of beneficiaries:</p> <ul style="list-style-type: none"> - Trust Fund identification during implementation only - 139 applicants (including 2 legal entities) not assessed by the Chamber | <p>Application process and identification of beneficiaries:</p> <ul style="list-style-type: none"> - application-based process (limited to 5000+ applications received prior to the reparations phase) proposed by panel of experts |
| <p>Experts (none): role of selecting, appointing and overseeing team of multidisciplinary experts delegated to the Trust Fund</p> | <p>Experts (none*): no Court-appointed expert; *one LRV-appointed expert on transgenerational harm (Ms Espérance Kashala Abotnes)</p> | <p>Experts (4): UN Special Rapporteur in the Field of Cultural Rights; Dr Marina Lostal; Panel (names redacted)</p> | <p>Experts (4): Panel (names redacted)</p> |
| <p>Amici curiae: WIGJ; Joint Submission by several NGOs conveying views of affected communities in Ituri; UNICEF; ICTJ</p> | <p>Amici curiae: REDRESS; Joint Submission by Queen's University Belfast and Ulster's TJI; Lique pour la Paix; Joint UN Submission</p> | <p>Amici curiae: UNESCO; Joint Submission by Queen's University Belfast and REDRESS; Joint Submission by FIDH and AMDH</p> | <p>Amici curiae: Joint UN Submission; REDRESS; Queen's University Belfast; IOM</p> |
| <p>Decision Establishing Principles of 7 August 2012 as amended by the Appeals Judgment and Amended Order for Reparations of 3 March 2015; also Decision Setting Lubanga's Liability of 15 December 2017 (<i>on appeal</i>)</p> | <p>Reparations Order of 24 March 2017 confirmed (in large part) by the Appeals Judgment on Reparations of 8 March 2018</p> | <p>Reparations Order of 17 August 2017 confirmed with minor amendments by the Appeals Judgment on Reparations of 8 March 2018</p> | |

| LUBANGA (DRC) (child soldiers in Ituri) | KATANGA (DRC) (attack on Bogoro) | AL MAHDI (MALI) (attack on Timbuktu) | BEMBA (CARI) (murder, rape, pillage) |
|--|--|---|--|
| <p>Harm identified:</p> <ul style="list-style-type: none"> - for direct victims: physical, psychological trauma; developmental difficulties - for indirect victims: loss of a family member; loss, injury or damage from intervening; psychological or material harm flowing from re-integration of former child soldiers - note: harm resulting from SGBV excluded | <p>Harm identified:</p> <ul style="list-style-type: none"> - material harm flowing from destruction of property and pillaging - physical harm - psychological harm caused by relatives' deaths and attack - note: no sui generis harm (loss of opportunity, forced departure etc), harm related to SGBV or child soldiers, or transgenerational harm | <p>Harm identified:</p> <ul style="list-style-type: none"> - damage to protected buildings - economic harm both to those whose livelihoods exclusively depended on the protected buildings, and to the broader community - moral harm, in particular to those whose ancestors' burial sites were damaged | |
| <p>Amount necessary to remedy the harm: US\$3.4 million for identified victims, US\$6.6 million for unidentified victims (totalling US\$10 million)</p> | <p>Amount necessary to remedy the harm: US\$3,752,620</p> | <p>Amount necessary to remedy the harm: €2.7 million</p> | |
| <p>Lubanga's monetary liability: full US\$10 million (found to be indigent)</p> | <p>Katanga's monetary liability: US\$1 million (found to be indigent)</p> | <p>Al Mahdi's monetary liability: full €2.7 million (found to be indigent)</p> | |
| <p>Through the Trust Fund: Yes, with a €1 million complement (decision on further funding pending)</p> | <p>Through the Trust Fund: Yes, with a US\$1 million complement</p> | <p>Through the Trust Fund: Yes (Trust Fund currently raising funds to ensure a full complement)</p> | |
| <p>Types and modalities:</p> <ul style="list-style-type: none"> - <u>symbolic collective reparations</u> in the form of construction of community centres and a mobile programme to reduce stigma and discrimination against former child soldiers - <u>service-based collective reparations</u> in the form of physical/psychological rehabilitation, vocational training and income-generating activities | <p>Types and modalities:</p> <ul style="list-style-type: none"> - <u>symbolic individual reparations</u> in the form of an award of US\$250 - <u>collective reparations</u> designed to benefit identified victims only in the form of housing assistance, education assistance, income-generating activities and psychological rehabilitation | <p>Types and modalities:</p> <ul style="list-style-type: none"> - <u>individual reparations</u> in the form of compensation for those with a close connection to the destroyed mausoleums - <u>collective reparations</u> in the form of protection and maintenance of protected buildings, compensation, rehabilitation and symbolic measures | |
| <p>Submissions and Draft Implementation Plan of 3 Nov 2015 (amended plans approved)</p> | <p>Draft Implementation Plan of 25 July 2017 (yet to be approved by the Trial Chamber)</p> | <p>Draft Implementation Plan of 18 May 2018 (yet to be approved by the Trial Chamber)</p> | |