

## REPARATIONS, ASSISTANCE AND SUPPORT

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### Introduction

This chapter, focuses on the mandates, rules and procedures and practice of international criminal tribunals and the International Criminal Court, in relation to reparations, assistance and support. In keeping with the orientation of this Handbook, these aspects are analysed from the perspective of victims' active engagement with these mandates. Thus, while the various systems of victim participation operating before some of these tribunals and courts do not form the focus of this chapter, these are relevant nonetheless, insofar and to the extent that victims' participation in proceedings and the advocacy carried out by victims' legal representatives may impact on the extent to which victims' may access reparations, assistance and support. At the ECCC, only those victims that are admitted to participate in proceedings as civil parties are entitled to apply for and obtain reparations. In contrast, at the ICC, victim participation and reparations requests are treated distinctly; a victim may apply for and/or obtain reparations without having participated in proceedings. Given that victim participation is treated in other chapters in this volume, this chapter considers only aspects of victim participation that impact, or have the potential to so impact, victims' access to reparations, assistance and support.

The chapter is split into two parts: i) reparations and ii) assistance and support. Each part begins by providing an overview and comparing and contrasting the statutory frameworks, rules and procedures of the various tribunals and courts. An analysis is then provided of how victims and their legal representatives may access their entitlements to reparations and assistance and support, the challenges

that have arisen in the practice, as well as the various steps that legal representatives may take to enhance access, bearing in mind the jurisprudence and other relevant factors.

Reparations, assistance and support are relatively new features in international criminal law, and the practice remains in a state of flux. Victims' legal representatives can play an important role in shaping and further developing the evolving practice for the ultimate benefit of victims. Therefore, this chapter explains both the current state of affairs and where relevant, posits ways in which victims' legal representatives can potentially extend access to victims in these crucial areas.

## **I. Reparations**

### **I.1 Overview and comparisons of the legal frameworks**

As will be described, both the ICC and ECCC include provisions in their legal frameworks relating to reparations for victims. The newly established Extraordinary African Chambers, set up to try Hissène Habré, also provides for reparations to victims. Before these frameworks were adopted, there was little by way of precedent. Neither the Nuremberg<sup>1</sup> or Tokyo<sup>2</sup> tribunals, nor the ad hoc tribunals for Rwanda and the former Yugoslavia, nor the Special Court for Sierra Leone, allowed for victims of the crimes covered by those tribunals to seek reparations before the tribunals. The statutes and rules of the latter three tribunals made clear that the judgments of the tribunals could be used by victims to pursue compensation before domestic courts.<sup>3</sup> Additional provisions outlined that as part of the penalty, the Trial Chambers could order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties,<sup>4</sup> or order the return of any property and proceeds

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<sup>1</sup> See Art 28 of the IMT Statute: 'In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany'. Discussed in Luke Moffett, 'The Role of Victims in the International Criminal Tribunals of the Second World War' (2012) 12 Intl Crim LR 245, 256-7, who indicates that the provision was never applied. The Tokyo tribunal had no such provision.

<sup>2</sup> The *Postdam Declaration* made reference to reparation in Article 11: 'Japan shall be permitted to maintain such industries as will sustain ... allow of the exaction of just reparations.' See, The *Potsdam Declaration*, Proclamation By Heads of Governments, United States, United Kingdom, and China, 26 July 1945. However this was not taken forward in the framework for the Toyko Tribunal. See, *Charter of the International Military Tribunal for the Far East*, Adopted at Tokyo, Japan, 19 January 1946.

<sup>3</sup> See, Rule 106 common to the ICTR and ICTY Rules of Procedure and Evidence, provides that judgments establishing guilt are to be binding as to the criminal responsibility of the convicted person for the purpose of an action for compensation, which might be brought by victims in national courts. See also, Rule 105 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone and Article 25 of the Statute of the STL.

<sup>4</sup> Rule 61(d), Rules of Procedure and Evidence of the ICTR and of the ICTY. A similar provision is found in Rule 82(c) of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon.

acquired by criminal conduct, including by means of duress, to their rightful owners.<sup>5</sup> In practice however, these provisions did not result in victims realising reparations.<sup>6</sup>

The initial draft of what became the ICC statute made no provision for reparation either. This draft, prepared by the International Law Commission, proposed that the Court be empowered to order that fines paid be transferred to a trust fund established by the UN Secretary-General for the benefit of victims of crime, foreshadowing in part the ICC's trust fund for victims.<sup>7</sup> There was no independent role for victims to seek reparations before the Court. Similarly, the ECCC statute did not include provisions for reparations.<sup>8</sup> However in their final incarnations, the notion of reparations was incorporated into the mandates of these courts, thanks to strong advocacy, a growing awareness and acceptance of victims' rights in criminal proceedings and armed with some of the hindsight of what were perceived as failings to victims at the ad hoc tribunals.<sup>9</sup> Provisions on reparations were incorporated into the ICC statute agreed in Rome and the Internal Rules eventually adopted by the ECCC.<sup>10</sup> In both of these latter two courts, victims are able to apply for reparations for the harm they suffered as a result of the criminal acts for which a perpetrator has been convicted. At the ICC, the Court may award reparations to or in respect of victims, following a conviction, including restitution, compensation and rehabilitation.<sup>11</sup> This award must be made against a convicted person or where appropriate, it may be made through a separately established Trust Fund for Victims.<sup>12</sup> At the ECCC, the Chambers may award collective and moral reparations to civil parties, to be paid by the convicted person, or by recognition of an externally funded project.<sup>13</sup> The Extraordinary African Chambers, established pursuant to Senegalese law to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990, provides that reparations in the form of restitution, compensation

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<sup>5</sup> Rule 105, Rules of Procedure and Evidence of the ICTR and the ICTY; Rule 104(c), Rules of Procedure and Evidence of the Special Court for Sierra Leone.

<sup>6</sup> S. Malmström, 'Restitution of Property and Compensation to Victims', in R. May (eds), *Essays on ICTY Procedure and Evidence* (Kluwer Law International, 2001) pp. 373–384; CF article; Supranational Criminal Prosecution of Sexual Violence: The ICC and the ... By Anne-Marie de Brouwer, 394–400.

<sup>7</sup> See, International Law Commission, draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its 46th Session, 49 UN GAOR, 49th Sess., Supp. (No. 10), UN Doc. A/49/10 (2 May–22 July 1994), Art. 47(3)(c)).

<sup>8</sup> Law on the Establishment of the Extraordinary Chambers, as amended, 27 October 2004 (NS/RKM/1004/006)

<sup>9</sup> For an analysis of the negotiations leading to the inclusion of these provisions see, in relation to the ICC, C. Muttukumaru, *Reparations to Victims*, in R.S. Lee (Ed.), *The International Criminal Court The Making of the Rome Statute: Issues, Negotiations, Results* 262, at 262–264 (1999); D. Donat-Cattin, *Article 75*, in O. Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' notes, Article by Article* 966 (1999); C. Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations' 15 LJIL (2002) 667. In relation to the ECCC, see, C. Sperfeldt, 'Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia', *International Criminal Law Review* 12 (2012) 457–489; Brianne McGonigle, 'Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles', *Leiden Journal of International Law* 22 (2009) 127–149.

<sup>10</sup> ICC Statute, Art 75; ECCC, Internal Rules, Rule 23.

<sup>11</sup> Article 75 of the ICC Statute.

<sup>12</sup> Article 79 of the ICC Statute.

<sup>13</sup> Rule 23 *quinquies* ECCC Internal Rules (Rev.8), 3 August 2011.

and/or rehabilitation, may be afforded to victims, and may be made by the intermediary of a Trust Fund.<sup>14</sup>

The trajectory of international criminal courts and tribunals in the area of reparations appears to be one of slow recognition of the need to incorporate reparations into the mandates and procedures of these bodies. However, it is not a simple or neat trajectory. The Special Tribunal for Lebanon, which at the time of writing was one of the most recent of the tribunals to be established, provides no possibilities for victims to pursue reparations before the Tribunal, despite the fact that the ability to seek reparations before criminal courts features in Lebanon's domestic criminal law. And, as will be described, in both the ICC and ECCC, the mandate to afford reparations has been applied with restraint, with the reparations afforded failing to approximate even remotely the internationally recognised standards for reparations relating to proportionality, adequacy and effectiveness.<sup>15</sup> While the jurisprudence remains in its early stages, thus far judges have felt constrained by a combination of factors which have all impacted on the procedures they have chosen to adopt and on the jurisprudence. First, the immense scale of the harm has underpinned judges' concerns about the manageability of the process. There is fear that the necessarily vast numbers of persons who will have suffered harm as a result of the crimes within the jurisdiction of these courts could make anything other than a restrained reparations process and its implementation unwieldy. Second, the approaches taken reflect an overriding concern about limited resources. Judges worry that awards should be capable of implementation bearing in mind convicted perpetrators' usual indigence and the limited additional sources to fund reparations. Third, judges are conscious of the limits of their mandates and the need not to overstep these in the reparations phase. There is concern to avoid even the slightest inference of state or other forms of responsibility in courts with mandates limited to determining individual criminal responsibility. This is despite the fact that it will often be collectives or other groupings (e.g., governments, rebel movements, criminal enterprises, companies) that have benefited financially from the commission of crimes carried out by the individual perpetrators.

## **1.2 Key aspects of reparations before international criminal tribunals and courts**

This section focuses mainly on the ECCC and ICC, as the key bodies with an ability to award reparations to victims. Reference will also be made to the Extraordinary African Chambers, though at the time of writing, that body had only just begun to function and thus its reparations mandate has yet to be tested.

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<sup>14</sup> Article 27, Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990.

<sup>15</sup> These standards are set out in a range of texts, including the 16 December 2005 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, A/RES/60/147.

#### **a) Provisional measures: Assets**

Most international criminal tribunals and courts recognise the ability for the courts themselves, or states collaborating with them, to locate, freeze and seize assets of accused persons on a precautionary or provisional basis. In most instances, such procedures are designed to help secure custody over suspects who remain at large. The property and assets may eventually be used to contribute to the costs of defence, property may be returned to the rightful owners and in some instances the assets may be used to fund reparations to victims. Thus far, however, the various courts and tribunals have had only minimal success with the recovery of assets, for a combination of reasons.

A main reason for the failings is that property or assets of accused persons have not been located, either because the persons are impecunious, assets have not been successfully located and/or states have not adequately cooperated with requests for the location and freezing of assets. A second reason is that in those tribunals where victims do not have the ability to participate directly in proceedings, they have been forced to rely on the Prosecution to make requests, and due to the competing work priorities, investigations into the location of assets have invariably not been prioritised. Even where victims can participate directly in proceedings, the Prosecution is tasked with carrying out investigations into assets and it is usually for it to engage the relevant Chamber with a view to encouraging it to issue a request for cooperation. Despite the utility of so doing, legal representatives for victims have rarely had the wherewithal to carry out their own investigations into assets and armed with such data, to press the Prosecution in its own investigation and/or to engage the Court directly to issue orders relating to the location and freezing of assets. A third reason is that not all courts have seen it as their role to engage in efforts to locate and seize assets, or request states to cooperate in such endeavours. A fourth reason is that the provisions on precautionary measures tend to focus on the proceeds and instrumentalities of crime, and thus some courts have recognised that only those assets that constitute proceeds and instrumentalities of crime could be the subject of seizure orders, and/or the procedures put in place by States to cooperate with such requests have narrowly focused on the proceeds and instrumentalities of crime.

Some of these issues have arisen before the ICC and the ECCC. It is important to note that many of the filings and orders issued by the Court remain confidential. As such, it can be difficult to piece together a clear picture of courts' practices in this regard. However, increasingly, there is a practise of de-classifying documents once the need for their confidentiality ceases. Thus, albeit with some delay, the approach to precautionary assets and property orders is slowly becoming more apparent. Before the ICC, Article 57(3)(e) of the ICC Statute provides that the Pre-Trial Chamber may 'seek the cooperation of States pursuant to Article 93, paragraph 1(k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.' Rule 99(1) of the Rules of Procedure and Evidence

specifies that: ‘the Pre-Trial Chamber, pursuant to Article 57, paragraph 3(e), or the Trial Chamber, pursuant to Article 75, paragraph 4, may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so, determine whether measures should be adopted.’ These provisions are of critical importance to the realisation of reparations awards, in those instances where there are assets and they are traceable. However, the wording of Article 93(1)(k) speaks about ‘the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties’. This would at first sight suggest that the precautionary measures focus on proceeds of crime, not simply assets for eventual victims, which differs from post-conviction enforcement.<sup>16</sup>

The interpretation of Article 57(3)(e) arose in the *Kenyatta* case.<sup>17</sup> In that case, in 2011, Pre-Trial Chamber I had ordered the Registrar to prepare and transmit a request for cooperation to the competent authorities of the Republic of Kenya for purposes of identifying, tracing and freezing or seizing the property and assets belonging to or under the control of Mr. Kenyatta. At a much later stage before the Trial Chamber, the Registry brought to the attention of the Chamber the Kenyan Government’s refusal to execute the Pre-Trial Chamber’s request on the basis that Article 93(1)(k) of the Statute only applies at the post-conviction phase and then only to assets that could be considered to be the proceeds or instrumentalities of the crime. The Trial Chamber held that the statutory framework does not require a nexus to be established with the proceeds or instrumentalities of the crime when ordering protective measures under Article 57(3)(e). It held that the term ‘forfeiture’ may carry a broader meaning which encompasses an award for reparations. Referring to a teleological interpretation of Article 57(3)(e) of the Statute, and to ensure that the relevant Trial Chamber will have recourse to such assets for the purpose of an eventual order for reparations, the Trial Chamber held that it is necessary that protective measures are implemented at the earliest opportunity prior to the commencement of trial, after the issuance of a warrant of arrest or a summons to appear. Judge Henderson, in his dissent, took the view that Article 57(3)(e) of the Statute and Rule 99(1) of the Rules do not authorise a Chamber to request a State to take protective measures under Article 93 (1) of the Statute for the purposes of an order for reparations. In his view, protective measures can be taken for the purposes of eventual forfeiture, which in appropriate circumstances can be transferred to the Trust Fund and thereafter used for the benefit of the victims in an award for reparations. Under Judge Henderson’s analysis therefore, the forfeiture requirements (of the assets being linked to the proceeds and instrumentalities of crime) would appear to apply to protective measures. It is unclear how other Trial Chambers will interpret Article 57(3)(e)

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<sup>16</sup> See Article 75(4) of the ICC Statute. See Discussion by D. Donat-Cattin, *Article 75*, in O. Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers’ notes, Article by Article* 966 (1999), 966.

<sup>17</sup> ICC, *Prosecutor v. Uhuru Muigai Kenyatta, Decision on the implementation of the request to freeze assets*, Trial Chamber V(B), ICC-01/09-02/11, 8 July 2014.

or whether the issue will in future be decided more resolutely by the Appeals Chamber. The decision of the majority, if it holds, is a progressive interpretation of the statutory framework which should encourage legal representatives for victims to actively engage with the Prosecution and the relevant Chambers on the issue of asset orders, for the ultimate benefit of victims.

Before the ECCC, counsel for civil parties had sought the Chamber's assistance with the investigation of the location, tracing and implementing measures for the preservation, of accused persons' assets. However, the Appeals Chamber adopted a restrictive analysis of the ECCC's mandate.<sup>18</sup> It determined that there was no provision under applicable law or interest of a Civil Party or any other party that permits the Co-Investigating Judges to undertake investigative action for a matter that is not within the scope of the investigation as delimited by the Co-Prosecutors. In other words, the investigation was not focused on the assets of suspects, it was focused on the commission of crime. Given that the matter was not within the ongoing investigation, the civil parties could not, under the law of the ECCC, request that an investigation into the assets of suspects be undertaken. Notwithstanding the Appeals Chambers' understanding that such provisions for provisional measures exist before other international courts and tribunals, and despite the fact that the ECCC judges are the authors of their own limited provisions<sup>19</sup> (and thus could have presumably amended the internal rules should they have seen fit), the Appeals Chamber held:

Contrary to the assertions of the Appellants, Internal Rule 113 does not give the Civil Parties the right to initiate enforcement of reparations at the pre-trial stage of a criminal proceeding. Internal Rule 23 *quinquies* specifies that reparations can only be awarded against a convicted person. As reparations can only be awarded against a convicted person, reparations cannot be *enforced* against an unindicted, untried and unconvicted person. It is outside the jurisdiction of this Chamber to take measures to enforce a potential award of reparations prior to such time as the competent chamber has determined guilt following a trial upon indicted charges, recorded a conviction and determined an award of reparations, if any. While, as described below, the Civil Parties have an interest in the assets of the charged persons, neither the interest itself nor any right in respect of such interest has crystallised. Pursuant to the framework of this Court, the fact that no interest or right has crystallised is dispositive. Granting the requested relief would place the Pre-Trial Chamber and the Co-Investigating Judges in the position of acting beyond our collective jurisdiction.<sup>20</sup>

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<sup>18</sup> ECCC, Case 002, *Decision on Appeal of Co-Lawyers for Civil Parties against Order on Civil Parties' Request for Investigative Actions Concerning all Properties Owned by the Charged Persons*, Pre Trial Chamber, 002/19-09-2007-ECCC/OCIJ (PTC 57), 4 August 2010.

<sup>19</sup> Ibid, paras 25, 32.

<sup>20</sup> Id, para 23.

## **b) The scope of beneficiaries of reparations - who and what can be repaired**

### **The relationship between the Prosecution case and victims' eligibility for reparations**

Given the nature of crimes within the jurisdiction of international criminal courts and tribunals, there is potentially a very wide scope of beneficiaries who may be eligible to receive reparations. But resource constraints will necessitate that prosecutors and investigative judges be selective in their approach to international prosecutions. The mandate for courts to award reparations stems from their jurisdiction to consider and decide charges brought before them; there is no independent possibility for courts to determine reparations without a prior finding of guilt in respect of a particular accused person. It is therefore clear that not all victims of crimes within the jurisdiction of the relevant courts and tribunals will fall within the potential class of beneficiaries for reparations awards, for the simple reason that no charges have been brought and/or proven which relate to their victimisation.

The approach to the issue of 'scope' therefore has a profound impact on the realisation of reparations and in this respect is highly sensitive to and critical for, victims. Some of the determinations on the size and scale of the beneficiary class will be influenced by the approach taken by prosecutors or investigating judges in deciding what conduct to investigate and the charges to be brought. Victims, civil parties or their legal representatives as the case may be, in practice do not have much ability to influence which cases are selected for prosecution.

If a perpetrator is not apprehended, reparation can be years away, if it is received at all, such as the situation in Uganda or Sudan before the ICC. If, as happened with Case 002 at the ECCC, there is a decision to sever a case into sub-cases with different charges to be heard in consecutive trials, the civil parties whose victimisation relates to the second sub-case may be forced to have a lengthy wait before their reparations claims can be determined.<sup>21</sup> Similarly, if there is an acquittal on all or some of the charges, and the Prosecutor decides not to appeal, as was the case in the *Katanga case* before the ICC,<sup>22</sup> the victims of those crimes will lose their opportunity for court-ordered reparations. The limited eligibility of victims can create further problems between victims who receive reparations and those who do not, thus creating a 'reparation gap' and risking further victimisation or discontent by recognising only certain victims and not others.

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<sup>21</sup> Anne Heindel, 'Impact of Severance on Individual Civil Parties' Legal Status and Right to Reparations' Cambodia Tribunal Monitor, 22 February 2013.

<sup>22</sup> ICC, Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on Germain Katanga's Notice of Discontinuance of his Appeal against his Judgment of Conviction, 25 June 2014.



Whilst victims and others have the possibility to inform prosecutors and investigators about the commission of crimes and tender evidence, they have no automatic standing to oblige that certain leads or lines of inquiry are pursued, nor an ability to appeal a decision not to pursue certain lines of enquiry, though they can have the right to be informed of such developments and to submit views and concerns.

In accordance with the ICC Statute, victims may be able to present their 'views and concerns' should the Prosecutor decide not to initiate an investigation or not to prosecute.<sup>23</sup> However those with the main interest in ensuring that the Prosecutor undertakes full investigations that correspond with the nature, scale and gravity of the crimes are not able to invoke the Article; they have no standing to address the Court if the circumstances of their victimisation lie outside of the charges already before the Court.<sup>24</sup> Furthermore, if the Prosecutor decides to suspend an investigation or prosecution as opposed to ending it, it may not be sufficient to trigger a hearing before the relevant Chamber, as it is always open to the Prosecution to revive the charges.<sup>25</sup> In certain circumstances, there may be scope for counsel to argue that a suspension constituted a *de facto* end to proceedings, however to date the ICC has not seen fit to limit or appear to limit the Prosecution's discretion in this way.

At the ECCC, civil parties have a greater role in contributing evidence to the Investigating Judges. In accordance with Rule 55(10), civil parties can request that the investigating judges make an order or carry out a particular investigation. If the latter reject the request, civil parties may appeal. Civil parties can also appeal the Closing Order issued by the investigating judges at the conclusion of the investigation, setting out an indictment or dismissing the case, so long as the Prosecutors have also appealed.<sup>26</sup>

### **The characterisation of the nexus between the crimes for which an accused has been convicted and eligibility for reparations**

As part of any reparations award, judges must determine how closely connected the beneficiary class must be to the crimes for which perpetrators have ultimately been convicted.

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<sup>23</sup> Article 53(1)(c) and (2)(c) and 3(b) of the ICC Statute; Rules 93, 107 of the Rules of Procedure and Evidence.

<sup>24</sup> See, C Ferstman, 'Limited Charges And Limited Judgments By The International Criminal Court – Who Bears The Greatest Responsibility?' International Journal of Human Rights (2012) vol 12(5)

<sup>25</sup> ICC, Prosecutor v. Thomas Lubanga, *Decision on the Requests of the Legal Representative for Victims VPRS 1 to VPRS 6 regarding "Prosecutor's Information on further Investigation*, Pre-Trial Chamber I, ICC-01/04-399 26 September 2007

<sup>26</sup> Internal Rules, Rule 67(5); 74(4)(f).

Before the ICC, there was opportunity to consider this issue in the *Lubanga* case. In the Trial Chamber's decision establishing the principles and procedures to be applied to reparations,<sup>27</sup> the Trial Chamber did not provide a clear answer, holding more generally that 'a wholly flexible approach to determining factual matters is appropriate, taking into account the extensive and systematic nature of the crimes and the number of victims involved.'<sup>28</sup> On appeal, the Appeals Chamber determined that in the decision on reparations it was incumbent on the Court to go beyond the articulation of mere principles. It must go one step further and derive from these principles specific determinations and findings based on those principles which would form part of the order on reparations in the case.<sup>29</sup> The Appeals Chamber also made clear that an order for reparations, whether for individual or collective forms of reparation or both, and irrespective of whether the award is to be made through the Trust Fund for Victims, must necessarily be made against the convicted perpetrator.<sup>30</sup>

Reparations 'must reflect the context from which they arise, which, at the Court, is a legal system of establishing *individual* criminal liability for crimes under the Statute. In the view of the Appeals Chamber, this context strongly suggests that reparation orders are intrinsically linked to the *individual* whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence.'<sup>31</sup> The Appeals Chamber in the *Lubanga* case stuck firmly to this principle. It made clear that because they were not included in the sentence, sexual and gender-based violence cannot be defined as a *harm* resulting from the crimes for which Mr Lubanga was convicted.<sup>32</sup> This underscores the importance for victims' legal representatives to take all possible steps to encourage the Prosecutor to bring charges relating to the full scale of victimisation; as held by the Appeals Chamber, the failure of the Prosecutor to do so cannot be remedied at the reparations stage:

the Appeals Chamber considers that the Trial Chamber's finding that the acts of sexual violence could not be attributed to Mr Lubanga amounts to concluding that the Trial Chamber did not establish that harm from sexual and gender-based violence resulted from

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<sup>27</sup> ICC, Prosecutor v. Thomas Lubanga, *Decision establishing the principles and procedures to be applied to reparations*, ICC-01/04-01/06, 7 August 2012.

<sup>28</sup> *Ibid*, para 254.

<sup>29</sup> ICC, Prosecutor v. Thomas Lubanga *Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2*, ICC-01/04-01/06-3129, 3 March 2015, para. 55.

<sup>30</sup> *Ibid*, paras. 69-76, 115.

<sup>31</sup> *Id*, para. 65. See also, para. 99.

<sup>32</sup> *Id*, para. 196.

the crimes for which Mr Lubanga was convicted, within the meaning of rule 85 (a) of the Rules of Procedure and Evidence. The Appeals Chamber is of the view that, having made the above-mentioned finding in the Sentencing Decision, the Trial Chamber was required to explain in the Impugned Decision how it nonetheless considered that Mr Lubanga should be liable for reparations in respect of the harm of sexual and gender-based violence. It did not do so. The Appeals Chamber therefore considers that Mr Lubanga cannot be held liable for reparations in respect of such harm and accordingly amends the Impugned Decision in this respect.<sup>33</sup>

The Lubanga Trial Chamber noted that in its view, it would be inappropriate to limit reparations to the relatively small group of victims that participated in the trial and those who applied for reparations. It noted that in accordance with Rule 85 of the Rules of Procedure and Evidence which defines the term ‘victims’, reparations *may* be granted to direct victims, who suffered harm resulting from the crimes of enlisting, conscripting and using children under the age of 15 in Ituri in the Democratic Republic of Congo (DRC), from 1 September 2002 to 13 August 2003; indirect victims, including family members of direct victims, along with individuals who intervened to help the victims or to prevent the commission of these crimes. Indirect victims need to demonstrate a close personal relationship between them and a direct victim, for instance as exists between a child soldier and his or her parents; and legal entities, such as NGOs or hospitals. This aspect of the Trial Chamber’s decision was affirmed on appeal.

Before the ECCC, this issue was canvassed in the Case 001 reparations decision and the appellate decision. The approach to the nexus question has been much more narrowly construed by the ECCC, where only civil parties (who must demonstrate that they suffered physical, material or psychological injury as a direct consequence of at least one of the crimes alleged against the Charged Person)<sup>34</sup>, are entitled to apply for and obtain reparations. The Trial Chamber held that the injury suffered by a civil party must result directly from the criminal conduct of the Accused. There must be a direct link between the crime and injury suffered, as opposed to the target of the criminal act, and as such immediate family members, and in exceptional circumstances members of a victim’s extended family, who also suffered harm as a result of the crimes may be eligible for reparations.<sup>35</sup> On Appeal, the requirement of a direct link between the crime and injury suffered was upheld, however the Court noted that ‘absent any limiting provision, the category of indirect victims is not restricted to any specific class of persons such as family members. It may encompass common law spouses, distant relatives, friends, *de facto* adopters

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<sup>33</sup> Id, para. 198.

<sup>34</sup> Rule 23 *bis*.

<sup>35</sup> ECCC, Case 001, Judgment, 001/18-07-2007/ECCC/TC, 26 July 2010, paras 642-3.

and adoptees, or other beneficiaries, provided that the injury on their part can be demonstrated. On the other hand, persons who did not suffer injury will not be considered indirect victims even if they were immediate family members of the direct victim.’<sup>36</sup>

### **c) The relationship between victim participation in the criminal procedure and reparations**

Victim participation affects reparation in a number of ways. The right to truth, as a form of reparation,<sup>37</sup> is one way in which reparation can be assured; it is a form of reparation, and victim participation is integral to the arrival of the truth. In addition, victim participation can elicit information on harms caused by the accused, which can positively impact victims’ claims for reparation. Victim participants or civil parties have been accorded certain rights throughout the trial proceedings such as the right to review evidence, adduce new evidence, call witnesses, put questions to witnesses, and to raise more generalised views and concerns. These can be an opportunity to contribute actively to the trial process which can itself enhance victims’ sense of agency and can also help substantiate their eventual claims for reparations. Even though there may be a formal hearing on reparations at the end of a trial, reparations proceedings should not be understood as isolated from the trial proceedings.

At the ICC, Regulation 56 of the Regulations of the Court stipulates that ‘[t]he Trial Chamber may hear the witnesses and examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial’. Whether it will do so will depend on whether ‘it is in the interests of individual witnesses or victims, or if it will assist with the efficient disposal of issues that may arise for determination.’<sup>38</sup> While the participation of a victim at the trial is not a prerequisite for claiming reparations, the finding that reparations issues may possibly be considered during the trial underscores the need for victims’ interests to be protected during this phase.<sup>39</sup> At the ECCC, civil parties’ ability to engage in the trial process is more extensive, even taking into account the limitations introduced with the revisions to the Internal Rules in 2008, according to which civil parties’ interests are represented by the Civil Party Lead Co-Lawyers.

### **d) Victim Applications for Reparations and the Determination of the Award**

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<sup>36</sup> ECCC, Case 001, Appeals Judgment, 001/18-07-2007-ECCC/SC, 3 February 2012, Para 418.

<sup>37</sup> 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, A/RES/60/147, 16 December 2005, para 22(b)

<sup>38</sup> Discussed in ICC, Prosecutor v. Thomas Lubanga, Trial Chamber, *Decision on Victims’ Participation*, 18 January 2008, ICC-01/04–01/06, para. 122.

<sup>39</sup> Discussed in C Ferstman and M Goetz, ‘Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact for Reparation Proceedings’ in C Ferstman, M Goetz and A Stephens, (eds.) *Reparations for Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making*, Martinus Nijhoff, The Netherlands (2009), 336-8.

Both the ECCC Internal Rules and the ICC Statute and Rules of Procedure and Evidence set out ways in which victims may apply for reparations.

At the ECCC, this is one of the rights within the civil party system. Victims may apply to become civil parties and once they gain this status, they are entitled to submit claims for reparations in accordance with Rule 23. As such there is no further need to demonstrate the harm suffered by the individual and its nexus to the crimes, as this will have already been proven as part of the civil party application process. The ECCC have interpreted its mandate narrowly, and the judges have only incorporated into their Internal Rules the possibility to award collective and moral reparations; no individual awards and no monetary payments are allowed under the rules. These restrictions are at the heart of the ECCC's arguably underrated understanding of its role. The Supreme Court Chamber has said that 'On the policy level, it should be emphasised that ECCC criminal proceedings ought to be considered as a contribution to the process of national reconciliation, possibly a starting point for the reparation scheme, and not the ultimate remedy for nation-wide consequences of the tragedies during the DK. As such, the ECCC cannot be overloaded with utopian expectations that would ultimately exceed the attainable goals of transitional justice.'<sup>40</sup> These limitations have influenced the application process, as has the desire for efficiency and strong prospects for implementation.

The procedure for applications has evolved from Case 001 to Case 002. In Case 001, to be granted, reparations awards needed to qualify as collective and moral reparations and be sufficiently certain or ascertainable to give rise to an enforceable order against the Accused.<sup>41</sup> The Chamber made it clear that it did not see it as its role, nor did it believe it had the mandate, to determine itself, or indeed to award, adequate and effective reparations awards. Instead, it could only assess and approve, as appropriate, the necessarily constrained proposals made by civil parties.

The Chamber is, additionally, unable to issue orders where the object of the claim is uncertain or unascertainable, and which are incapable of enforcement. Accordingly, a prerequisite to the grant of an award is the clear specification of the nature of the relief sought, its link to the harm caused by the Accused that it seeks to remedy, and the quantum of the indemnity or amount of reparation sought from the Accused to give effect to it. Placing the burden on the Chamber to substitute its own decision in these areas is inconsistent with a mechanism that is claimant-driven, and is also irreconcilable with the need for a fair and expeditious trial, the envisaged duration of the ECCC and the resources at its disposal.<sup>42</sup>

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<sup>40</sup> Supreme Court Chambers, Appeals Decision in Case 001, para 655.

<sup>41</sup> Case 001, Judgment, para 651.

<sup>42</sup> Judgment, para 665.

This laissez-faire approach, while privileging the wishes of civil parties, also proved problematic, in that very little guidance was provided to civil parties in advance of their filings of the level of precision expected by the Chamber to be considered ‘sufficiently certain or ascertainable’. Consequently, the bulk of the requests were rejected by the Chamber on the grounds of lack of specificity or that they fell outside the mandate of the ECCC. The Chamber agreed to the Civil Parties’ request that their names and those of the immediate victims be included in the final judgment, including a specification as to their connection with the crimes committed at S-21 and to the compilation and publication of all statements of apology made by the convicted KAING Guek Eav during his trial. These rulings were confirmed on appeal.

Before Case 002 and subsequent cases, as a result of an amendment that came into force subsequent to Case 001, the internal rules now indicate that the Civil Party Lead Co-Lawyers must collect from the civil party lawyers the reparations proposals pertaining to their clients and consolidate these into a single submission put forward to the Chambers.

Reparations shall be requested in a single submission, which may seek a limited number of awards. This submission shall provide:

- a) a description of the awards sought;
- b) reasoned argument as to how they address the harm suffered and specify, where applicable, the Civil Party group within the consolidated group to which they pertains; and
- c) in relation to each award, the single, specific mode of implementation described in Rule 23*quinquies*(3)(a)-(b) sought.<sup>43</sup>

At the ICC, Article 75(1) of the ICC Statute provides that the Court shall ‘establish principles relating to reparations to, or in respect of, victims’ and, based on these principles, the Court may ‘determine the scope and extent of any damage, loss and injury to, or in respect of, victims’ and paragraph 2 authorizes the Court either to ‘make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation’ or, where appropriate, to ‘order that the award for reparations be made through the Trust Fund provided for in Article 79.’ The provision does not specify whether such principles should be determined within the context of a particular situation or case before the Court or by the plenary of judges outside of the context of any case. Thus far, the judges have taken a case by case approach. At the time of writing, only the *Lubanga case* had reached the reparations phase, and as indicated earlier, in that case, the Trial Chamber judges delegated the task of determining reparations to the Trust Fund for Victims. On Appeal, the Appeals Chamber made clear that ‘a convicted person’s liability for reparations must be

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<sup>43</sup> Rule 23 *quinquies*, para 2.

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’.<sup>44</sup>

There are two ways in which reparation claims may be considered by the ICC.

First, victims may submit applications for reparations. Rule 94 of the Rules of Procedure and Evidence sets out the particulars that applicants must provide to substantiate their reparations claims, which include *inter alia* a description of the injury, loss or harm and where restitution of assets, property or other tangible items is sought, a description of them as well as supporting documentation. The Registry has incorporated a list of questions for victims, who may be individuals or organisations, in its standard application forms for a request for participation in proceedings and reparations at the ICC. These include open-ended questions about what the harm, loss and/or injury suffered, what the victim is seeking, and who the benefit should go to (the victim, his or her family and/or community).<sup>45</sup> In the *Lubanga case*, at the time of the issuance of the Trial Chamber’s decision on reparations, 85 applications for reparations had been received.

Second, the Court may determine reparations on its own initiative *proprio motu*, regardless of whether any application has been made by victims. The ability for the Court to determine reparations *proprio motu* recognises that not all individuals who may be deserving of reparations will be in a position to apply to the Court, and that this should not prevent the Court from determining reparations in a general or specific way. It is made clear that these powers should be exercised on an exceptional basis<sup>46</sup> only, though the criteria for determining what may constitute such an exceptional situation are not spelt out and are likely to be considered on a case-by-case basis by the Court. As indicated, the Trial Chamber in the *Lubanga case* made reference to the importance of not restricting reparations awards to those who apply. It indicated: ‘All victims are to be treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings. Notwithstanding the submissions of the defence and the legal representatives of victims, it would be inappropriate to limit reparations to the relatively small group of victims that participated in the trial and those who applied for reparations.’<sup>47</sup> Under Rule 95 of the Rules of Procedure and Evidence, should the Court decide to utilise these *proprio motu* powers, it shall request the Registrar to notify this intention to the defendant(s) [the person(s)]

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<sup>44</sup> ICC, Prosecutor v. Thomas Lubanga, Appeals Chamber judgment, 3 March 2015, para. 118.

<sup>45</sup> These forms are available on the website of the Court, here: [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/victims/Pages/forms.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/forms.aspx).

<sup>46</sup> Article 75(1) refers to “on its own motion *in exceptional circumstances*” (emphasis added).

<sup>47</sup> ICC, Prosecutor v. Thomas Lubanga, *Decision establishing the principles and procedures to be applied to reparations*, 7 August 2012, para 187.

against whom the Court is considering making a determination], and to the extent possible, to victims and other interested persons or interested States.

The ICC Statute provides that reparations may be awarded on an individualized basis or, where it is deemed appropriate, on a collective basis or both. In the *Lubanga* decision on reparations, despite the fact that a number of individuals submitted applications for individualised reparations, the Trial Chamber favoured collective reparations in that case, and considered as appropriate the Trust Fund for Victims' recommended 'community-based' approach, which, it held 'would be more beneficial and have greater utility than individual awards, given the limited funds available and the fact that this approach does not require costly and resource intensive verification procedures.'<sup>48</sup> The Appeals Chamber affirmed the Trial Chamber's approach to the extent that the harm suffered by members of the community meets the eligibility standard for reparations.<sup>49</sup> It held that 'when only *collective* reparations are awarded pursuant to rule 98 (3) of the Rules of Procedure and Evidence, a Trial Chamber is not required to rule on the merits of the individual requests for reparations.'<sup>50</sup> It determined that applicants did not have an intrinsic right to have their applications considered individually. In reaching its decision, it made note of the fact that the applicants had included in their applications submissions relating to both individual *and* collective awards: 'through their Legal Representatives, the victims who had filed requests for individual reparations also supported reparations being awarded on a collective basis and made submissions relevant to the design and nature of any eventual collective reparation award'.<sup>51</sup> The reference by the Appeals Chamber to such 'in the alternative' submissions appears somewhat disingenuous, and is a lesson to counsel to take care with the making of such submissions.

The Statute further sets out that reparations may include restitution, compensation and/or rehabilitation.<sup>52</sup> In the *Lubanga* decision on reparations, the Trial Chamber makes clear that 'this list is not exclusive. Other types of reparations, for instance those with a symbolic, preventative or transformative value, may also be appropriate. As set out above, a gender-sensitive approach should be applied when determining the manner in which reparations are to be applied.'<sup>53</sup> In coming to a decision on the appropriate form(s) and scope reparations, the provisions allow for the appointment of

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<sup>48</sup> Ibid, para 274.

<sup>49</sup> ICC, Prosecutor v. Thomas Lubanga, Appeals Chamber judgment, 3 March 2015, para. 214.

<sup>50</sup> Ibid, para. 152.

<sup>51</sup> Id, para. 156.

<sup>52</sup> Article 75(1) of the ICC Statute.

<sup>53</sup> ICC, Prosecutor v. Thomas Lubanga, *Decision establishing the principles and procedures to be applied to reparations*, 7 August 2012, para 222.



appropriate experts to assist the Court in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court is also obligated to invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.<sup>54</sup>

Rule 98(1) provides that ‘individual awards for reparations shall be made directly against a convicted person’, and paragraphs 2–4 detail modalities for using the Trust Fund for Victims to allocate or distribute the reparations awards made by the Court to victims. Paragraph 2 provides that the Court may order that awards for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim, whereas paragraphs 3 and 4 provide that awards for reparations be made through the Trust Fund, ‘where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate,’ or when made ‘to an intergovernmental, international or national organization approved by the Trust Fund.’ Paragraph 5 provides that ‘other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.’ In the *Lubanga* decision on reparations, the Trial Chamber decided to make the award of reparations through the Trust Fund.<sup>55</sup>

#### **e) Appeals**

Both the ICC and ECCC allow victims to appeal reparations orders. At the ICC, this is the only time in the trial process when victims can lodge on their own motion an appeal,<sup>56</sup> whereas before the ECCC, the opportunity to appeal reparations orders is part of the wider set of procedural rights afforded to civil parties.

At the ECCC, the reparations order issued in the course of the judgment on Case 001 was appealed. The Supreme Court Chamber of the ECCC issued its decision on 3 February 2012.

At the ICC, thus far reparations have only arisen in the *Lubanga* case, and the Appeals Chamber issued its decision on 3 March 2015. Despite the fact that the Rules of Procedure and Evidence indicate that appeals ‘shall be heard as expeditiously as possible’,<sup>57</sup> it took two and a half years for this Appeals Chamber to issue its decision. In a preliminary decision on procedural matters concerning the conduct

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<sup>54</sup> Article 75(3) of the ICC Statute; Rule 97(2) of the Rules of Procedure and Evidence.

<sup>55</sup> ICC, Prosecutor v. Thomas Lubanga, *Decision establishing the principles and procedures to be applied to reparations*, 7 August 2012, paras. 269-275.

<sup>56</sup> Art. 82(4) of the Rome Statute provides that ‘A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under Article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence’.

<sup>57</sup> Rule 156(4) of the Rules of Procedure and Evidence.

of the appeal,<sup>58</sup> the ICC Appeals Chamber determined that the convicted person has an unencumbered right to appeal orders for reparations, regardless of whether the convicted person is adversely affected by the decision.<sup>59</sup> Furthermore, the Appeals Chamber decided that the individuals who are allowed to appeal an order for reparations are a wider group than just those victims who participated in the trial proceedings or sentencing phase. They may also include other persons who claim to have suffered harm as a result of the crimes in relation to which the accused was convicted and who request reparations.<sup>60</sup> This is thus significantly wider than the ECCC framework where only those victims that were recognised as civil parties may lodge an appeal. The ICC Appeals Chamber also indicated that while persons not yet identified as victims may have valid concerns which might appropriately be taken up in the course of the appeal, those individuals do not have the right, exercised through counsel, to bring an appeal.<sup>61</sup>

#### **f) Enforcement of awards**

A central concern to those international criminal courts and tribunals that have the possibility to award reparations is how these awards will be enforced. If awards are made against convicted perpetrators and these persons are indigent, there is a likelihood that the awards would remain incapable of enforcement. At the domestic level, most courts have the practice of making reparation awards that correspond to the harm that claimants suffer, irrespective of whether these awards are capable of being enforced. Successful claimants would need to take separate and additional measures to enforce domestic damage awards, which might consist of orders to freeze assets, garnishing orders or the like. Some would argue that awarding damages that correspond to the level of harm irrespective of the capacity for enforcement is an important acknowledgement by courts of the significance, both in terms of quality and quantum, of the harm victims suffered. Neither the ICC Trial Chamber nor the ECCC have taken this approach. As the ECCC's Supreme Court Chamber has articulated: 'considering the *sui generis* and dual private/public character of the ECCC reparations regime, this Chamber holds that an award that, in all probability, can never be enforced, i.e., is *de facto* fictitious, would belie the objective of *effective* reparation and would be confusing and frustrating for the victims. Unlike in the civil action, where seeking a title of execution against an indigent defendant is based on a choice and private interest of the plaintiff, in proceedings that have elements of reparations, the effectiveness requirement mandates that there be a tangible availability of funds.'<sup>62</sup>

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<sup>58</sup> ICC, The Prosecutor v. Thomas Lubanga, *Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings*, Appeals Chamber, ICC-01/04-01/06AA2A30A21, 14 December 2012.

<sup>59</sup> *Ibid*, para 66.

<sup>60</sup> *Id*, para 69.

<sup>61</sup> *Id*, para 72.

<sup>62</sup> Supreme Court Chamber, para 667.

Before the ICC, the Trial Chamber determined that Mr. Lubanga's indigence was relevant to whether he should be liable for any reparations awarded. However, the Appeals Chamber overruled this approach. It determined that indigence is not an obstacle to the imposition of liability for reparations on the convicted person, because assets of the convicted perpetrator may in principle be located and seized at some future date.<sup>63</sup>

Both the ICC and ECCC provide that reparations awards are to be made against convicted perpetrators. In the case of the ICC, a framework is established for the cooperation of states in the search and seizure of assets and other property of the accused, as described in Section I.2(a) above. In addition, States parties are obliged to give effect to fines and forfeitures ordered by the Court, as well as reparations orders. Rule 217 of the Rules of Procedure and Evidence provides that: 'the Presidency shall, as appropriate, seek cooperation and measures for enforcement [...] as well as transmit copies of relevant orders to any State with which the sentenced person appears to have direct connection by reason of either nationality, domicile or habitual residence or by virtue of the location of the sentenced person's assets and property or with which the victim has such connection.' Rule 218(3) provides further that 'in order to enable States to give effect to an order for reparations, the order shall specify: (a) The identity of the person against whom the order has been issued; (b) In respect of reparations of a financial nature, the identity of the victims to whom individual reparations have been granted, and, where the award for reparations shall be deposited with the Trust Fund, the particulars of the Trust Fund for the deposit of the award; and (c) The scope and nature of the reparations ordered by the Court, including, where applicable, the property and assets for which restitution has been ordered.' States would not have the ability to modify the reparations orders specified by the Court.<sup>64</sup> The correct procedure is instead for persons affected by reparations orders to appeal the Court's reparations decision. In accordance with these provisions, it is envisioned, at least as a matter of principle, that the Trial Chamber may order reparations without having previously identified the assets. Clearly however, it is most advantageous for assets to be identified much earlier in the process so that there is less chance of dissipation and they can be frozen and made available to enforce reparations orders following a conviction. The ECCC Internal Rules have no comparable provisions for securing the assets of accused persons either on a protective basis or following conviction. The Internal Rules simply provide that after the final judgement is delivered, 'the enforcement of reparations shall be made at the initiative of a Civil Party.'<sup>65</sup>

States parties clearly have the obligation to enforce reparations orders emanating from the ICC. However, it is not evident how national courts will deal with the competing claims for assets, or how they will assign priorities in order to adjudicate between these claims. For instance, reparations orders

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<sup>63</sup> ICC, Prosecutor v. Thomas Lubanga, Appeals Chamber judgment, 3 March 2015, paras. 102-105.

<sup>64</sup> Rule 219

<sup>65</sup> Internal Rules 113(1).

against former heads of State or senior officials may give rise to competing claims against the perpetrator for corruption or misappropriation of state. There may also be additional creditors and/or victims who did not apply through the ICC reparations process, whose claims would need to be adjudicated by national courts. In certain cases, assets belonging to perpetrators may have been frozen pursuant to Security Council or other sanctions regimes, and the ability of the ICC to obtain control of those assets for the purposes of reparations is untested. As a matter of principle, States' obligations pursuant to Article 103 of the UN Charter would trump any obligations they have to cooperate with the Court, however the ability of the Security Council to order the transfer of assets to the Court is untested. The Relationship Agreement between the International Criminal Court and the United Nations<sup>66</sup> provides no guidance.

In the event that property or assets are located and frozen, a question arises as to the circumstances and modalities in which they will be made accessible for the purposes of reparations. The ICC will have a number of uses for the assets which go beyond reparations, such as for instance, the payment of defendants' legal costs that had, prior to the location of the assets, been covered by legal aid. In accordance with Rule 221(1) of the RPE, the Presidency is mandated to decide on the disposition or allocation of such assets. Of note, Rule 221(2) specifies that the Presidency 'shall give priority to the enforcement of measures concerning reparations to victims'. In the *Lubanga* case, the only case that at the time of writing had progressed to the reparations phase, this Rule was inapplicable given the absence of assets in the custody of the Court. The Regulations of the Court provide no further clarity,<sup>67</sup> though Regulation 117 affirms that the Presidency shall monitor the financial situation of the sentenced person on an ongoing basis, even following completion of a sentence of imprisonment.<sup>68</sup> The Appeals Chamber made reference to this provision when determining that the indigence of a convicted perpetrator at the time of issuance of the reparations order should not impede the Trial Chamber from determining his or her liability.<sup>69</sup> However, the Appeals Chamber did not address the issue as to what will happen to assets which come into the Court's possession after the closure of reparations phase of a case. On the one hand, the possible eventuality of such a late receipt of assets could be an important rationale for victims' legal representatives to encourage the Court to order reparations that are adequate and effective, even if the means to enforce such reparations are not immediately available to the Court. As indicated, this was not the approach taken by the Trial Chamber in the *Lubanga* case, where the decision to make the award through the Trust Fund was largely based on the absence of immediately available assets. However, it is consistent with the approach taken by the Appeals Chamber. On the other hand, the

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<sup>66</sup> Concluded on 4 October 2004.

<sup>67</sup> Regulations of the Court 116(2).

<sup>68</sup> *Ibid*, Reg. 117.

<sup>69</sup> ICC, Prosecutor v. Thomas Lubanga, Appeals Chamber judgment, 3 March 2015, para. 104.

Statute does not provide a clear avenue for victims' legal representatives to seek to re-open reparations proceedings after the close of a case.

Both the ICC and the Special African Chambers make reference to trust funds, which could be used to enforce court-ordered reparations. The ICC Trust Fund for Victims has been established for some time whereas no trust fund has been established yet in connection with the work of the Special African Chambers.

As will be further described, the ICC Trust Fund has a dual mandate. It may use the voluntary funds it collects to provide assistance to victims and their families outside the context of a case. The Court may also award court-ordered reparations through the Trust Fund where it is most practicable to do so. These court-ordered reparations are funded by fines and forfeitures, but particularly where there have been none, the Court has clarified that the voluntary funds collected by the Trust Fund may be applied to the enforcement of reparations awards. In the decision on reparations in the *Lubanga case*, the Trial Chamber held that:

when the convicted person has no assets, if a reparations award is made "through" the Trust Fund, the award is not limited to the funds and assets seized and deposited with the Trust Fund, but the award can, at least potentially, be supported by the Trust Fund's own resources. ... Regulation 56 of the Regulations of the TFFV imposes an obligation on the TFFV's Board of Directors to complement the resources collected from a convicted person with "the other resources of the Trust Fund", providing the Board of Directors make all reasonable efforts to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under Rule 98(3) and (4) of the Rules. In the Chamber's view, the wording of Regulation 56 of the Regulations of the TFFV suggests that the "need to provide adequate resources" includes the need to fund reparation awards. In circumstances when the Court orders reparations against an indigent convicted person, the Court may draw upon "other resources" that the TFFV has made reasonable efforts to set aside.

... "the responsibility of the Trust Fund is first and foremost to ensure that sufficient funds are available in the eventuality of a Court reparation order pursuant to Article 75 of the Statute".<sup>70</sup>

This holding was reversed on Appeal. In particular, the Appeals Chamber made clear that it was for the Trust Fund for Victims, in the exercise of its full discretion, to apply its voluntary funds towards the

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<sup>70</sup> ICC, Prosecutor v. Thomas Lubanga, *Decision establishing the principles and procedures to be applied to reparations*, 7 August 2012, paras 271-272.

implementation of a reparations award against an indigent convicted perpetrator. The Court did not have the power to oblige the Trust Fund for Victims to apply its voluntary resources in this way.<sup>71</sup>

The ECCC has not established a Trust Fund, even though this arguably could have been established by the judges as part of their revision of the Internal Rules. Amidst the calls from civil society to establish some form of fund or related mechanism to ensure that reparations awards could be implemented, the ECCC judges instead took the decision to allow the Lead Co-Lawyers to identify specific projects that appropriately give effect to reparations. In order for these specific projects to be recognised by the Trial Chambers as reparations awards, they will have had to have been ‘designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding’.<sup>72</sup> In essence, this places the burden on civil parties to determine and agree projects which amount to collective and moral reparations and seek independent funding for such projects. Thereafter the Trial Chamber may ‘recognise’ these projects as reparations. This limits to the greatest possible extent the role of the ECCC Trial Chamber, to rubber-stamping projects developed with external funding by the civil parties.<sup>73</sup>

## **II. Assistance and Support to Victims**

Some of the ad hoc tribunals and the International Criminal Court have, over time, developed programmes of assistance to support to witnesses which goes beyond the witness support provided to those coming to testify for the prosecution in court hearings.

At the ICTR, there was concern that witnesses’ basic needs were not being met, nor were they benefiting from physical and psychological rehabilitation. This was in contrast to the extensive measures in place to support accused persons in custody. It was understood that these gaps, if left unaddressed, had the potential to undermine the positive impact of justice before the Tribunal. A Trust Fund support programme for witnesses and potential witnesses was established in 2000 to provide measures of support to ‘ensure that [witnesses] receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault; and to develop short term and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family.’<sup>74</sup> The ICTR has also provided medical support and counselling to mainly sexual violence witnesses via a clinic it established in Kigali, Rwanda, including HIV-AIDS diagnosis and treatment. Important as a matter of principle, the mandate of the programme significantly

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<sup>71</sup> ICC, Prosecutor v. Thomas Lubanga, Appeals Chamber judgment, 3 March 2015, paras. 111-114.

<sup>72</sup> Internal Rules 23 *quinquies* 3(b).

<sup>73</sup> The development of this narrow ‘recognition’ mandate is explored in Christoph Sperfeldt, ‘Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia’ (2012) 12 International Criminal Law Review 457

<sup>74</sup> See Rule 34 of the ICTR’s Rules of Procedure and Evidence.

evolved over time.<sup>75</sup> However, it suffered from a range of controversies and insufficient funding has limited its effectiveness. The Rules of Procedure and Evidence of the Special Court for Sierra Leone have taken on board many of the ICTR's rehabilitative goals. In accordance with Rule 34, the Witnesses and Victims Section is mandated to support witnesses, victims who appear before the Special Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances. As part of this mandate, the Section is mandated to provide them with 'adequate protective measures and security arrangements and develop long- and short-term plans for their protection and support' and 'ensure that they receive relevant support, counselling and other appropriate assistance, including medical assistance, physical and psychological rehabilitation, especially in cases of rape, sexual assault and crimes against children'.<sup>76</sup> The ICTY's mandate is more limited; it can provide counselling and support, however there is no reference in its rules to physical and psychological rehabilitation or the long term protection of victims.<sup>77</sup>

The ICC Trust Fund for Victims also has a support mandate. The main difference between the ICTR or SCSL and the ICC models is that the former focus on support to witnesses – mainly those who testified at trial, whereas the latter's assistance mandate is geared to the much wider constellation of victims of crimes within the jurisdiction of the court, the majority of whom will have very little interaction with the ICC. It is also highly discretionary; thus far, the Trust Fund has not carried out activities in all or most active 'situation' countries, but has chosen to concentrate its activities mainly in DRC and Uganda. Victims' legal representatives, civil society groups working with victims and others may alert the Trust Fund to needy victims however they have little opportunity to insist on a shift to the Trust Fund's orientation, other than through general public reporting. For instance, victims and civil society in Kenya have sought for many years to encourage the Trust Fund to become active in that country, though at the time of writing, no activities had been planned.

In accordance with Rule 98(5) of the Rules of Procedure and Evidence, the emphasis of the Trust Fund's assistance mandate is on victims and their families who have suffered physical, psychological and/or material harm as a result of crimes within the jurisdiction of the Court.<sup>78</sup> The Trust Fund can entertain such assistance when the Trust Fund considers that it is necessary to provide such support<sup>79</sup> and outside of the boundaries of any ongoing criminal case and irrespective of any conviction.

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<sup>75</sup> See generally, Emily Haslam, 'Law, Civil Society and Contested Justice at the International Criminal Tribunal for Rwanda', in Marie-Bénédicte Dembour and Tobias Kelly (eds) *Paths to International Justice: Social and Legal Perspectives*, Cambridge: Cambridge University Press, 2007, 57, 66-9; Anne-Marie de Brouwer, 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families' (2007) 20(1) *Leiden Journal of International Law* 207, 216-217.

<sup>76</sup> Rule 34 (A)(ii) and (iii) of the SCSL's Rules of procedure and evidence.

<sup>77</sup> See Rule 34 of the ICTY's Rules of Procedure and Evidence.

<sup>78</sup> Regulation 48 of the Regulations of the Trust Fund for Victims, Resolution ICC-ASP/4/Res.3, 3 December 2005.

<sup>79</sup> *Ibid*, Regulation 50(a).

This assistance and support mandate operates outside of and distinct from any role that the Trust Fund has to enforce court-ordered reparations. One worry of the drafters was the potential for the assistance mandate of the Trust Fund to negatively impact, or appears to so impact, on the impartiality of ongoing court proceedings. In order to avoid those potentialities, the Regulations of the Trust Fund set out a procedure whereby, when the Trust Fund wishes to engage its assistance mandate, it is obligated to notify the Court of its intention to undertake specified activities, and provide an opportunity for the relevant Chamber to determine that a specific activity or project, would pre-determine any issue to be determined by the Court.<sup>80</sup>

### **III. Conclusions**

In conclusion, the practice of the ad hoc and internationalised tribunals as well as the International Criminal Court relating to the issues of reparations and support and assistance remain relatively new and novel.

With respect to reparations, it is not possible to say that there is a clear or emerging trend in relation to the way in which the ECCC and ICC have approached their reparation mandates, given the emphases of those bodies on their sui generis status and their particularised legal frameworks. Both bodies have felt constrained by what they appear to perceive as the weight of their mandates and the boundless numbers and complex needs of the victims, however the ways in which they have approached their fears of the mandate differ. There is a sense that the reparations mandate ought to be easier to implement; that the difficulties make the mandate a nuisance, annoying, a stain on the otherwise ‘more straightforward’ work of international investigations and prosecutions. Yet, in contrast, the ‘difficulties’ of the reparations mandate are the challenges that judges and other court officials must progressively embrace. It is part and parcel of the unique opportunity they have to mete out justice for the most serious crimes under international law. Victims’ legal representatives and civil party lawyers need to employ a great deal of creativity to push back against the constrained approaches to reparations by both the judges and ordinary court officials.

In the areas of support and assistance, whilst there have been a number of important developments before the ad hoc tribunals and the ICC, the main challenge for victims and their legal representatives is to progressively change the dynamic before these bodies. Rehabilitation and assistance are not simply charitable gifts that may be afforded should the budgets be present and should court officials be sufficiently motivated or interested in a particular country situation or form of victimisation. They

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<sup>80</sup> Id, Regulation 50(a)(ii) and (iii).



should be part and parcel of the service these bodies provide, which should be a service that is accountable and transparent not only to States parties but to the end-users themselves.