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# Reparative Justice after the *Lubanga* Appeal Judgment

New Prospects for Expressivism and  
Participatory Justice or 'Juridified Victimhood'  
by Other Means?

Carsten Stahn\*

## Abstract

*On 3 March 2015, the Appeals Chamber of the International Criminal Court (ICC) rendered its judgment on the principles and procedures of reparation. The judgment is of systemic significance for international criminal justice, since it establishes a liability regime for reparations that is grounded in the principle of accountability of the convicted person towards victims and the nexus between individual criminal responsibility and the obligation to repair harm. This new 'principle of liability to remedy harm' complements the punitive dimensions of ICC justice (e.g. conviction, sentence). It differs from purely civil forms of liability due to its connection to criminal proceedings which requires reconciliation of different interests, namely 'the rights of victims and the convicted person'. This contribution analyses the merits and risks of the approach taken by the ICC Appeals Chamber. It argues that the judgment marks significant progress over the Trial Chamber decisions, since it increases the expressivist potential of reparations and the prospects of participatory justice. But it also highlights existing tensions in the decision, such as its limited attention to societal frictions created through reparations, and its minimalist approach to non-accountability-related objectives of reparation.*

## 1. Introduction

Over the past decade, opinion has remained highly divided as to what extent the International Criminal Court (ICC) can serve as a forum for restorative

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justice, and how it can provide better justice for victims.<sup>1</sup> Supporters of the Court have struggled since Rome to articulate a coherent vision and framework of justice for victims in the ICC system. Camps have become entrenched in discourse. The ICC principles on reparation suggest that the ‘success of the Court, is to some extent, linked to the success of its system of reparations.’<sup>2</sup> But scepticism has been expressed as to what extent victim participation has merits in criminal proceedings, and whether the ICC can in fact improve the conditions of victims through adjudication.<sup>3</sup> The debate is rooted in tensions inherent in the Statute, namely: (i) different conceptions of the role and identity of the Court as a criminal court, human rights entity or security actor;<sup>4</sup> (ii) disputes over the feasibility and prioritization of goals, such retributive versus restorative justice;<sup>5</sup> (iii) controversies over the conceptualization of the role of victims in ICC proceedings; and (iv) more fundamental divides over the ability of the law to mitigate harm and suffering through legal processes and

- 1 See generally J-O. Wemmers, ‘Where Do They Belong? Giving Victims a Place in the Criminal Justice Process’, 20 *Criminal Law Forum* (2009) 395; L. Zegveld, ‘Victims’ Reparations Claims and International Criminal Courts: Incompatible Values?’ 8 *Journal of International Criminal Justice (JICJ)* (2010) 79; M. Pena and G. Carayon, ‘Is the ICC Making the Most of Victim Participation?’ 7 *International Journal of Transitional Justice (IJTJ)* (2013) 518; C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2014); C. McCarthy, ‘The Rome Statute’s Regime of Victim Redress: Challenges and Prospects’, in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015); L. Moffett, *Justice for Victims before the International Criminal Court* (Routledge, 2014); L. Moffett, ‘Elaborating Justice for Victims at the International Criminal Court’, 13 *JICJ* (2015) 281; J.B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011); C. Ferstman et al. (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff Publishers, 2010); E. Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (Martinus Nijhoff, 2008); M. Funk, *Victims’ Rights and Advocacy at the International Criminal Court* (Oxford University Press, 2010); S. Vasiliev, ‘Article 68 (3) and Personal Interests of Victims in the Emerging Practice of the ICC’, in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff, 2009) 635; G. Bitti and G. González Rivas, ‘The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court’, in International Bureau of the Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes* (Oxford University Press, 2006), 299.
- 2 See Order for Reparations, *Lubanga* (ICC-01/04-01/06-3129-AnxA), Appeals Chamber, 3 March 2015, § 2.
- 3 See C. Van den Wyngaert, ‘Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge’, 44 *Case Western Reserve Journal of International Law* (2012) 475; C. Chung, ‘Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?’ 6 *Northwestern Journal of International Human Rights* (2008) 459; O.C. Okafor and U. Ngwaba, ‘The International Criminal Court as a “Transitional Justice” Mechanism in Africa: Some Critical Reflections’, 9 *IJTJ* (2015) 90.
- 4 E. Jessberger and J. Geneuss, ‘The Many Faces of the International Criminal Court’, 10 *JICJ* (2012) 1081; G.P. Fletcher and J.D. Ohlin, ‘The ICC — Two Courts in One?’ 4 *JICJ* (2006) 428.
- 5 On reconciliation, see C. Stahn ‘International Criminal Justice and Reconciliation: Beyond the Retributive v. Restorative Divide’, 36 *FICHL Policy Brief Series* (2015), available online at [http://www.fichl.org/fileadmin/fichl/documents/FICHLPolicy.BriefSeries/150521.PBS.No.36\\_2015\\_Stahn..pdf](http://www.fichl.org/fileadmin/fichl/documents/FICHLPolicy.BriefSeries/150521.PBS.No.36_2015_Stahn..pdf) (last visited 7 July 2015).

potential unintended side-effects of ICC action, such as the creation of new categories of victimhood<sup>6</sup> or risks of re-stigmatization.

Existing discourse is marked by a paradox. Whenever capacity limits or adjudicative failures of the ICC become apparent, victims are used as argument to defend the legitimacy of the Court. When trial expediency or budget is discussed, victims are presented as an obstacle to the Court's performance or success. It is unlikely that this contradiction will ever be fully solved. It might to some extent even be a productive tension in the Court's design.

ICC practice has received a new spin with the Appeals Chamber decision on reparations<sup>7</sup> rendered on 3 March 2015 in the *Lubanga* case. The decision established a new regime of individual responsibility for reparations that combines perpetrator-centred considerations with victim-oriented rationales.<sup>8</sup> It reflects a fresh approach towards reparative justice that seeks to reconcile the value of reparation processes and acknowledgement of harm with the essentially 'criminal' nature of the Court, and its inherent limitations.

## 2. Context

Article 75 of the ICC Statute sets out that the Court shall 'establish principles relating to reparations to, or in respect of victims'.<sup>9</sup> The judges failed to reach the agreement required to articulate these principles through collective judicial action, for example, by including them in the Rules of Procedure and Evidence, and thus left their specification to case law. The *Lubanga* case marked the first opportunity to clarify principles and procedures of reparation. At trial, the issue of reparations remained largely in the shadow of debates on the judgment under Article 74<sup>10</sup> and sentencing.<sup>11</sup> The Appeals Chamber

6 See S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood', 76 *Law and Contemporary Problems* (2014) 235.

7 Judgment on the Appeals Against the 'Decision Establishing the Principles and Procedures to Be Applied to Reparations' of 7 August 2012, *Lubanga* (ICC-01/04-01/06 A A 2 A 3), Appeals Chamber, 3 March 2015 (hereafter 'AC Reparations Judgment').

8 For reactions, see L. Moffett, 'Justice for Victims in Lubanga Case?' Justice Hub, 4 March 2015, available online at <https://justicehub.org/article/justice-victims-lubanga-case>; B. McGonigle Leyh, 'Fine-tuning the ICC's Reparations Regime', PILPG, 17 March 2015, available online at <http://publicinternationallawandpolicygroup.org/pilpg-public-international-law-in-action/>; Redress, 'At Long Last, Reparations for Victims Can Now Proceed in the ICC's First Case', 3 March 2015, available online at <http://www.redress.org/news/press-release-appeals-chamber-decision-on-reparations-in-lubanga-case>; J. Pablo Pérez-Leon, 'The Emerging Case-Law of the ICC Appeals Chamber in Comparative Perspective', *EJILTalk!*, 12 June 2015, available online at <http://www.ejiltalk.org/the-emerging-reparations-case-law-of-the-icc-appeals-chamber-in-comparative-perspective/> (all websites last visited 23 July 2015).

9 Art. 75 ICCSt.

10 Judgment pursuant to Article 74 of the Statute, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 14 March 2012.

11 Decision on Sentence pursuant to Article 76 of the Statute, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 10 July 2012.

judgment made it clear that the adjudication of reparation claims is not only an annex to criminal proceedings, but also a core part of ICC proceedings that requires careful judicial scrutiny.

The Trial Chamber decision on principles and procedures on reparations of 7 August 2012<sup>12</sup> outsourced the reparation regime largely to the Trust Fund for Victims (the ‘Trust Fund’). It paid lip service to the ‘integral part’ of reparations in the ‘overall trial process’<sup>13</sup> and two goals of reparation, namely to oblige perpetrators to ‘repair the harm’ caused and ‘to ensure that offenders account for their acts’.<sup>14</sup> But it considered it unnecessary for judges to ‘remain seized throughout the reparations proceedings’<sup>15</sup> and further refrained from issuing a reparation order against *Lubanga* in light of his indigence. It argued that an order against the convicted person would be pointless since ‘symbolic reparations’, such as possible public or private apology would require his agreement.<sup>16</sup> It found that reparations should, in the particular case, be awarded ‘through’ the Trust Fund<sup>17</sup> and charged the Trust Fund with the dual mandate to ‘determine the appropriate forms of reparations and to implement them’.<sup>18</sup> It endorsed a ‘community-based approach’ to reparations,<sup>19</sup> without deciding on individual applications. This approach was visibly geared towards facilitating swift collective reparation through the Trust Fund. But it caused disappointment among victims and triggered separate appeals under Article 82(4) of the Statute by legal representatives of Victims V01<sup>20</sup> and Victims V02<sup>21</sup> who sought express judicial recognition of accountability and harm through the reparation process.

### 3. Approach of the Appeals Chamber

The Appeals Chamber reversed the approach taken by the Trial Chamber. It is curious that it has taken the Appeals Chamber in total more than two and a half years to decide on the appeals. But the change of direction is fundamental.

12 Decision Establishing the Principles and Procedures to be Applied to Reparations, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 7 August 2012 (hereafter ‘TC Reparations Decision’).

13 *Ibid.*, § 260.

14 *Ibid.*, § 179.

15 *Ibid.*, § 261.

16 *Ibid.*, § 269.

17 *Ibid.*, § 270.

18 *Ibid.*, § 266.

19 *Ibid.*, § 274.

20 Appeal against Trial Chamber I’s Decision Establishing the Principles and Procedures to Be Applied to Reparation of 7 August 2012, *Lubanga* (ICC-01/04-01/06), V01 team of legal representatives, 3 September 2012.

21 Appeal against Trial Chamber I’s Decision Establishing the Principles and Procedures to be Applied to Reparations of 7 August 2012, *Lubanga* (ICC-01/04-01/06), Office of Public Counsel for Victims/V02 team of legal representatives, 24 August 2012.

### A. The Principle of Accountability towards Victims

The Appeals Chamber amended the decision by the Trial Chamber<sup>22</sup> and issued an amended Order for Reparations.<sup>23</sup> In its approach, the Chamber took into account that the ICC reparation regime requires reconciliation of different interests, namely 'the rights of victims and the convicted person'.<sup>24</sup> The Chamber's most important conceptual clarification is its commitment to the principle of accountability of the offender towards victims,<sup>25</sup> and its formal expression in the reparation order. The power of a court to issue binding orders against individuals for purposes of reparation, as reflected in Article 75(2), is still exceptional on the international level.<sup>26</sup> Previously, the Trial Chamber had briefly acknowledged the principle of accountability in its decision on the Defence request for leave to appeal.<sup>27</sup> The Appeals Chamber reinforced this finding. It recognized a 'principle of liability to remedy harm',<sup>28</sup> which flows 'from the individual criminal responsibility' of the perpetrator for the crimes.<sup>29</sup>

The Chamber noted that an order against the convicted person is 'indicative of that person's individual liability for the reparations awarded'.<sup>30</sup> It specified that the accountability of the offender must be 'expressed' through an order 'against' the convicted person, 'even if reparations are ordered "through" the Trust Fund in accordance with the second sentence of article 75 (2)'.<sup>31</sup> It argued that this principle of accountability applies in all cases, that is, individual and collective awards. This interpretation is supported by the framing of the right to appeal under Article 82(4) which is awarded to the convicted person without condition,<sup>32</sup> and Rule 98 of the Rules which requires an award 'against a convicted person' in case of both individual and collective reparation.<sup>33</sup> The Chamber held expressly that the indigence of the convicted person is not an obstacle to the 'imposition of liability for reparations'.<sup>34</sup> It

22 See Art. 83(2) ICCSt.

23 See Order for Reparations, *supra* note 2.

24 Rule 97(3) ICC RPE.

25 AC Reparations Judgment, *supra* note 7, § 69.

26 See C. Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press, 2008), 321–322, 355, 365 *et seq.* Rule 23*quinquies* (3) of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia establishes a civil claim system related to conviction. It can be implemented through an 'order that the costs of the award shall be borne by the convicted person against the convicted person' or through 'a specific project' that 'appropriately gives effect to the award'.

27 See Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 29 August 2012, § 23 ('[Reparations] will be an expression of the Court's disapproval and condemnation of the wrongdoing of the convicted person').

28 AC Reparations Judgment, *supra* note 7, § 101.

29 *Ibid.*, § 99.

30 *Ibid.*, § 99.

31 *Ibid.*, § 70.

32 *Ibid.*, § 68.

33 *Ibid.*, § 72.

34 *Ibid.*, § 104.

derived this conclusion from the powers of the Trial Chamber to seek state assistance to freeze property and assets for purposes of reparation under Article 75(4), and the duty of the Presidency under Regulation 117 of the Regulations of the Court to monitor ‘the financial situation of the sentenced person on an ongoing basis’, even after completion of the sentence.<sup>35</sup>

This reading of Article 75 is a clear victory for victims who sought express judicial acknowledgement of accountability towards victims and liability for reparations through the Trial Chamber decision on reparations, independently of the perpetrator’s indigence. It strengthens the expressivist dimensions of ICC reparations<sup>36</sup> which are of key importance, in light of the limited resources of the Trust Fund.<sup>37</sup>

### ***B. The Link Between Criminal Conviction and Reparation***

A second major contribution of the judgment is its articulation of the link between criminal conviction and reparation under Article 75. The ICC reparations regime differs from classical civil claim models due to its nexus to the criminal case and specifically the focus on conviction.<sup>38</sup> The judgment makes this nexus apparent. It clarifies that ‘reparation orders are intrinsically linked to the individual whose criminal responsibility is established in a conviction and whose culpability for these criminal acts is determined in a sentence’.<sup>39</sup>

This approach was not uncontested. At previous stages of the proceedings, other actors, such as the Trust Fund, had claimed that the scope of reparations should not necessarily be limited by the charges, since reparations pursue different objectives than the trial, namely to provide *meaningful* reparation to victims.<sup>40</sup> Reference was made to the wording of Article 75 (‘in respect of victims’) to encompass a broader group of victims in reparations.<sup>41</sup>

35 *Ibid.*, §§ 103–104.

36 On expressivism and its limits, see M. deGuzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’, 33 *Michigan Journal of International Law* (2012) 265; M. Elander, ‘The Victim’s Address: Expressivism and the Victim at the Extraordinary Chambers in the Courts of Cambodia’, 7 *IJTJ* (2013) 95.

37 The emerging ICC system differs partly from the ECCC system. In both cases, an order for reparation must be directed against the convicted person. But in *Case 002/1*, the Trial Chamber of the ECCC qualified reimbursement of costs by the convicted persons, and use of alternative sources as ‘distinct’ and ‘mutually exclusive’. Judgement, *Case 002/1*, Trial Chamber, 7 August 2014, § 1118.

38 In some domestic systems (e.g. France), reparation may be awarded even in case of acquittal.

39 AC Reparations Judgment, *supra* note 7, § 65.

40 See e.g. Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp–Trust Fund for Victims’ First Report on Reparations, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 1 September 2011, § 30 (‘Trust Fund First Report’). See also Submission on reparations issues, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 10 May 2012, § 58. For a discussion, see A. Wiersing, ‘Lubanga and its Implications for Victims Seeking Reparations at the International Criminal Court’, 4 *Amsterdam Law Forum* (2012) 21, at 31.

41 See Trust Fund First Report, *supra* note 40, § 44.

The Appeals Chamber rejected such an autonomous reading of the reparations regime envisaged under Article 75. It adopted a more perpetrator-centred model. It tied the scope of reparations under Article 75 essentially to the content of the criminal trial. The Chamber justified this understanding by two main considerations: (i) its reliance on offender accountability as the 'main' purpose of reparations;<sup>42</sup> and (ii) the application of standards of fairness. It held that the convicted person must have 'received sufficient information about the localities of the crimes' which form the basis of reparations and that liability for reparations should 'not exceed the scope of the crimes' which marked the basis of conviction.<sup>43</sup> It did not require full symmetry between the trial judgment and reparations, but left some flexibility to rely on 'localities' referred in witness testimony presented at trial.<sup>44</sup>

### C. Legal Certainty

Following its criminal law-oriented logic, the Appeals Chamber stressed the need for legal certainty. It held that a judicial reparation order must contain at least five 'essential elements':

- 1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence; 4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.<sup>45</sup>

This approach is unique to the ICC. It reconciles the idea of accountability towards victims with need for specificity and protection of 'the rights of the convicted persons.'<sup>46</sup> It also distinguishes the different roles of the Trust Fund, namely the Fund's 'assistance mandate' which is not linked to conviction, and its role in implementing Court orders for reparations.<sup>47</sup>

The Appeals Chamber specifically reversed the generic use of the concept of 'community' reparations by the Trial Chamber. It clarified that collective reparations to a community require the establishment of a sufficient link between the harm suffered by community members and the crimes of the convicted person.<sup>48</sup>

42 Order for Reparations, *supra* note 2, § 2.

43 AC Reparations Judgment, *supra* note 7, § 227.

44 *Ibid.*, § 228.

45 *Ibid.*, § 1.

46 *Ibid.*, § 184.

47 *Ibid.*, § 183.

48 *Ibid.*, § 211 ('where an award for reparations is made to the benefit of a community, only members of the community meeting the relevant criteria are eligible'), § 212.



This jurisprudence is of cardinal importance for the conception of reparations at the ICC and to the Court's identity. It makes it clear that reparation orders are subject to requirements of fairness and specificity, and geared at providing justice to victims of crimes that formed part of the conviction.<sup>49</sup>

#### **D. The sui generis Nature of Reparation Liability**

The judgment carefully avoided a specific legal characterization of the ICC reparation system, for example, as a civil or administrative liability regime. The 'liability to remedy harm' is neither a pure replication of criminal responsibility nor a classical form of human rights accountability.

The Appeals Chamber clarified that responsibility for reparations is different from the determination of individual criminal responsibility. The Order for Reparation specifies that the causal link between crimes and harm can be based on criteria of 'but/for' causation and 'proximate cause'.<sup>50</sup> This approach leaves considerable flexibility. It is more demanding than a 'presumption of collective injury' in cases of massive human rights violations, but less stringent than the 'direct and immediate link' test, advocated by the Defence.<sup>51</sup>

Similarly, standards of proofs are more relaxed than at trial, due to the 'fundamentally different nature of reparation proceedings' and the potential 'difficulty victims may face in obtaining evidence'.<sup>52</sup> Causality does not have to be established 'beyond reasonable doubt'. It requires merely 'sufficient proof of the causal link' between the crime and harm suffered, which needs to be assessed 'in light of the specific circumstances of the case'.<sup>53</sup>

The emerging system differs at the same time partly from the determination of state violations in human rights adjudication. It takes into account that defendants do not necessarily have the means to investigate evidence of violations and might face difficulty in examining and providing evidence 'against hundreds or thousands of victims'.<sup>54</sup> The Trial Chamber argued that a 'wholly flexible approach' should be applied in cases where reparations are made 'through the Trust Fund'.<sup>55</sup> The Appeals rejected this approach and upheld a more demanding 'balance of probabilities' standard.<sup>56</sup> This regime is more flexible than the criminal trial, but more rigorous than certain collective claim mechanisms against states.<sup>57</sup>

49 See Queen's University Belfast's Human Rights Centre (HRC) and University of Ulster's Transitional Justice Institute (TJI) Submission on Reparations Issues pursuant to Article 75 of the Statute (*Katanga* HRC and TJI Submissions), *Katanga* (ICC-01/04-01/07), Trial Chamber II, 14 May 2015, § 6.

50 Order for Reparations, *supra* note 2, § 59.

51 AC Reparations Judgment, *supra* note 7, § 126.

52 Order for Reparations, *supra* note 2, § 22.

53 *Ibid.*

54 *Katanga* HRC and TJI Submissions, *supra* note 49, § 49 (supporting a 'balance of probabilities').

55 TC Reparations Decision, *supra* note 12, §§ 253–254.

56 AC Reparations Judgment, *supra* note 7, § 83.

57 On the UN Compensation Commission, see R. Singh, 'Raising the Stakes: Evidentiary Issues in Individual Claims Before the United Nations Compensation Commission', in Permanent Court of Arbitration (ed.), *supra* note 1, 62–93.

## 4. Implications

The Appeals Chamber judgment has far-reaching consequences for the adjudication of reparations at the ICC. According to the decision, liability for reparations needs to be established separately in each case, in addition to conviction. This interpretation provides a partly autonomous basis for the 'imposition of liability for reparations',<sup>58</sup> based on Article 75 and human rights instruments, such as the United Nations Basic Principles on Reparation for Victims.<sup>59</sup>

The ICC approach places significantly more emphasis on detailed legal analysis and judicialization of reparations than more victim-oriented mass claim proceedings. The judgment implies that the determination of the five 'essential' requirements cannot be delegated to non-judicial organs, such as the Trust Fund or the Registrar. Reparations will thus require intensive Trial Chamber scrutiny, both during trial proceedings and after the judgment on conviction.

The judgment will make it necessary to provide greater weight to reparation proceedings in ICC practice. The Appeals Chamber noted that the Trial Chamber is 'not required to rule on the merits of individual requests for reparation' when awarding 'collective reparations'.<sup>60</sup> It formally rejected the existence of an 'internationally recognized human right to consideration of individual applications for reparations' in cases where a 'collective award is made'.<sup>61</sup> But in all cases, that is, individual and collective reparation, the Trial Chamber must clearly define the harm caused, establish causality, identify the modalities of reparations and specify the victims eligible. This involves significant legal analysis.

The adjudication on liability for reparations may differ from individual criminal responsibility. In its decision, the Appeals Chamber established a new principle of proportionality in relation to liability for reparations. It held: 'A convicted person's liability for reparations must be proportionate to the harm caused, and *inter alia*, his or her participation in the commission of crimes for which he or she was found guilty, in the specific circumstances of the case'.<sup>62</sup>

The application of this proportionality test might re-open debates on aspects of individual criminal responsibility in reparation proceedings. For instance, modes of liability that were not shown beyond reasonable doubt at trial, but might satisfy the 'balance of probabilities' test applicable in reparations, might be brought back to the table.

58 AC Reparations Judgment, *supra* note 7, § 100.

59 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, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, § 15 ('where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim').

60 AC Reparations Judgment, *supra* note 7, § 152.

61 *Ibid.*, § 155.

62 *Ibid.*, § 118. On proportionality, see also UN Basic Principles, *supra* note 59, § 15 ('Reparation should be proportional to the gravity of the violations and the harm suffered').

The judgment increases the need to hear victims in the determination of reparations,<sup>63</sup> or in the implementation phase.<sup>64</sup> According to the Appeals Chamber's approach towards community-based reparations, even collective reparations require an application or registration process by victims. The reparation practice in the *Katanga* case shows that this has repercussions for the organization of victim participation after conviction. It may make it necessary to allow certain additional victim applications for participation in reparation proceedings.<sup>65</sup>

The express duty of the Trial Chamber to identify harm to victims for purposes of reparation, and to assess the extent of that harm, might require the Trial Chamber to enter into new evidentiary analysis before making an Order for Reparations.<sup>66</sup> Requests of victims for reparation under Rule 94 may identify harm that is not mentioned in the Trial or Sentencing Judgment. This might require the Trial Chamber to convene hearings to assess harm specifically for purposes of reparation, based on submissions of victims, their legal representatives or experts (Rule 97). In its decision, the Appeals Chamber specifically left the possibility open for a 'future Trial Chamber' to address harm not mentioned in the Sentencing Decision.<sup>67</sup> Following practice in the Extraordinary Chambers in the Courts of Cambodia, the ICC might allow victims to make broader statements of suffering in reparation hearings.<sup>68</sup>

The Appeals Chamber jurisprudence also has significant ramifications for the running of trials. Regulation 56 foresees the possibility of victims to present evidence for purposes of reparations at trial.<sup>69</sup> The new liability regime provides a strong incentive for victims to lead evidence at trial<sup>70</sup> regarding the underlying crimes and localities to broaden the potential basis for reparations. It mandates clearer differentiation at trial between evidence related to conviction and sentencing, and evidence for the purpose of reparations.

Finally, the judicialization of reparation orders has certain institutional implications. It requires expertise and skills that differ in some ways from criminal adjudication. Ultimately, the approach of the Appeals Chamber might

63 Jurisprudence has made it clear victims are 'parties' in reparation proceedings, rather than mere participants. See TC Reparations Decision, *supra* note 12, § 267.

64 See Reparation Order, *supra* note 2, § 76 ('The [newly] composed Trial Chamber may be seized of any contested issues arising out of the work and the decisions of the Trust Fund').

65 See Registry's Observations pursuant to Order ICC-01/04-01/07-3532, *Katanga* (ICC-01/04-01/07), Trial Chamber II, 15 May 2015 (hereafter '*Katanga* Registry's Observations'), § 2; *Katanga* HRC and TJI Submissions, *supra* note 49, § 15.

66 AC Reparations Judgment, *supra* note 7, § 185.

67 *Ibid.*, § 187.

68 *Katanga* HRC and TJI Submissions, *supra* note 49, § 20.

69 It states: 'The 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.'

70 See Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Lubanga* (ICC-01/04-01/06 OA 9 OA 10), Appeals Chamber, 11 July 2008, which confirmed that 'participating victims may possibly lead evidence pertaining to the guilt or innocence of the accused'.

point towards the need for targeted expertise in this field at the Court, or even the establishment of a specialized 'Reparations Chamber'.

## 5. Evaluating Merits and Risks

The judgment marks in many ways a step forward. In most cases, options of individual reparation, including compensation, will remain remote and unsatisfactory. This is a reality. The Appeals Chamber decision does not try to mask this. It rather seeks new ways to recognize victimhood and alleviate suffering and harm. It makes it clear that establishment of accountability towards victims through reparation proceedings may be an asset per se that can provide a greater sense of justice to victims. It sends a clear message that the Court should not rush over reparation decisions, but listen to victims and pay greater attention to their harm. It increases the modalities of participatory justice and options for consultation of victims at the reparation stage in line with the aims of the Principles on Reparation.<sup>71</sup> It provides greater weight to expressive features, such as the direct recognition of harm in the Reparation Order<sup>72</sup> and the judicial acknowledgement of the link between the convicted person and victims.

But the decision also has certain risks and downsides. There are capacity questions. It is still uncertain whether and how the ICC would be able to handle this new type of litigation in cases where victim numbers are significantly higher than in *Lubanga* or *Katanga*.<sup>73</sup>

Participation in reparation proceedings is a challenge. In many cases, the original victim statement is given years before the reparation proceedings. Seeking additional views of victims on the required elements of the Reparation Order, or extending the scope of applications in the reparation phase, may delay the reparation process, or exceed the Court's capacity.

Further, an overly ambitious approach towards the specification of harm poses problems. In the Reparation Order, the Appeals Chamber directed the Trust Fund to 'provide, in the draft implementation plan, the anticipated monetary amount that it considers necessary to remedy the harms caused by the crimes for which Mr Lubanga was convicted'.<sup>74</sup> Submissions in the *Katanga* case indicate that an individualized quantification might not be feasible in all circumstances.<sup>75</sup> Individualization of harm may raise unreasonable expectations. How will the ICC deal with this in cases where there is a broader crime base affecting thousands of victims? If it is clear at the outset that only collective reparation can be awarded, or that only a specific amount of

71 Order for Reparations, *supra* note 2, § 1.

72 *Katanga* HRC and TJI Submissions, *supra* note 49, § 21 ('quoting from or citing their submissions to the Court within the reparation order would benefit this process').

73 In *Katanga*, 365 victims have been recognized by the ICC.

74 Order for Reparations, *supra* note 2, § 78.

75 See *Katanga* Registry's Observations, *supra* note 65, § 11, defending 'the possibility of standardized awards for particular types of harm as opposed to individually assessed awards'.

resources is available for individual reparation, it might not make sense to quantify the harm of each victim. The prospects of large-scale asset recovery from indigent defendants during or after completion of the sentence remain often remote. The discrepancy between what is abstractly due and what can be effectively remedied may cause grievances and dilemmas of prioritization. There might be a need for a certain standardization of harm assessment in future cases.

Extended reparation proceedings may have unintended negative side effects. ICC action may increase victim fatigue with the Court, through duplication of procedures and overload of information. There is a risk that economic considerations may dominate reparation. In the worst case, judicialization of harm and ongoing struggles over modalities of reparation can forestall a sense of closure with the past. These factors should be taken into account by the Court when it determines the scope and timing of reparation proceedings.

Criminal proceedings tend to narrow the focus of responsibility to individuals. This focus does not necessarily coincide with societal perceptions. Through their selectivity and abstraction, ICC proceedings may create fictive conceptions of victimhood or hierarchies among victims.<sup>76</sup> These tensions are even more apparent in the context of reparations. The focus on victimization reflected in crimes and charges may privilege the harm of one group and sideline victimization of others. The *Lubanga* case posed particular problems since it predominantly involved perpetration and victimization within one group, that is, the Hema population. The Reparation Order hints at this tension in footnote 44, where it acknowledges that selectivity ‘could give rise to a risk of resentment on the part of other victims and re-stigmatisation of former child soldiers within their communities.’<sup>77</sup> It is doubtful whether this underlying tension can always be prevented or balanced out even through a victim-centric exercise of the Prosecutor’s charging discretion.<sup>78</sup>

This dilemma is connected to a deeper criticism in relation to the Chamber’s treatment of the objectives of reparation. The Order for Reparation prioritizes accountability over broader concerns, such as well-being, security or peace.<sup>79</sup> Rationales, such as relief of suffering, deterrence of future violations, societal reintegration or reconciliation, are treated as secondary objectives that should be pursued ‘to the extent possible.’<sup>80</sup> Critics are thus likely to remain sceptical as to whether this new regime of liability for reparations will make an actual difference to the lives of victims.

76 See Kendall and Nouwen, *supra* note 6; K.M. Clarke, *Fictions of Justice: The International Criminal Court and Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, 2009).

77 Order for Reparations, *supra* note 2, note 42.

78 The OTP Strategic Plan 2012–15 remains vague on this point. It postulates a ‘victim-centred approach in all aspects of the work of the OTP’. See OTP, Strategic Plan 2012–2015, 11 October 2013, § 21. It promises to replace the notion of ‘focused investigations’ by the ‘principle of in-depth, open-ended investigations’ (§ 23). But it stresses the need to maintain ‘focus to avoid over-expanding the investigations at the expense of efficiency’ (*Ibid.*).

79 Order for Reparations, *supra* note 2, § 2.

80 *Ibid.*, § 71.

The Appeals Chamber has formulated its principles with respect to ‘the circumstances of the specific case.’<sup>81</sup> But these principles are likely to extend beyond the *Lubanga* case or even the ICC. The judgment opens the door for further creativity. This is its legacy — and an important turning point for further practice.

81 AC Reparations Judgment, *supra* note 7, § 55.

