

AEL 2024/14
Academy of European Law
European Society of International Law Paper

WORKING PAPER

**“Like all proceedings before the Court”:
*How to assess and afford fairness to convicted
persons in adjudicating and administering
reparations at the International Criminal Court***

Marie O’Leary and Daniela Alvarado

European University Institute

Academy of European Law

European Society of International Law

Annual Conference, Aix-en-Provence, September 2023

**“Like all proceedings before the Court”:
*How to assess and afford fairness to convicted persons in
adjudicating and administering
reparations at the International Criminal Court***

Marie O’Leary and Daniela Alvarado

ESIL Paper Series editors:

Adriana Di Stefano (University of Catania)

Federica Paddeu (Queens’ College, Cambridge)

Catharine Titi (CNRS-CERSA, University Paris Panthéon-Assas)

ISSN 1831-4066

© Marie O’Leary and Daniela Alvarado, 2024

This work is licensed under a [Creative Commons Attribution 4.0 \(CC-BY 4.0\)](#) International license.

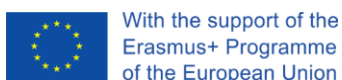
If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the series and number, the year and the publisher.

Published in April 2024 by the European University Institute.

Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu

Views expressed in this publication reflect the opinion of individual author(s) and not those of the European University Institute.

This publication is available in Open Access in [Cadmus](#), the EUI Research Repository:



The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Academy of European Law

The Academy of European Law coordinates several important research projects and offers advanced-level courses, including the annual summer courses in human rights law and the law of the EU, resulting in an extensive publications programme. The Academy also hosts the Secretariat of the European Society of International Law (ESIL), and assists in the organization of ESIL events.

Papers presented at ESIL events in 2011-2019 can be downloaded from [SSRN](#). As of 2022, the papers are available in the EUI CADMUS Research Repository.

[More information about the Academy of European Law](#)

European Society of International Law

The European Society of International Law (ESIL) is a dynamic network of researchers, scholars and practitioners in the field of international law. The Society's goals are to encourage the study of international law, to foster inquiry, discussion and innovation in international law, and to promote a greater understanding of the role of international law in the world today. The Secretariat of the Society has been based at the Academy of European Law since 2004 when the Society was set up.

[More information about ESIL](#)

ESIL Paper Series

The ESIL Paper Series features papers presented at ESIL events (Annual Conferences, Research Forums, and Interest Groups events). Publication in the ESIL Paper Series enables authors to disseminate their work widely and reach broader audiences without the usual delays involved in more traditional means of publication. It does not prevent the subsequent publication of papers in academic journals or edited collections.

[More information about the ESIL Paper Series](#)

2023 ESIL Annual Conference, Aix-en-Provence, 31 August – 2 September 2023

The 18th Annual Conference of the European Society of International Law was held in Aix-en-Provence on 31 August-2 September 2023. The overall theme of the conference was 'Is International Law Fair?'. The 2023 Annual Conference was hosted by the Faculty of Law and Political Sciences of Aix-Marseille University.

[More information about the 2023 ESIL Annual Conference](#)



Abstract

The ICC reparations process in a case commences immediately upon a trial judgement assigning guilt for crimes under the Court's jurisdiction. The defendant in the trial, now convicted at first-instance, becomes a party to those reparations proceedings which run in parallel to sentencing litigation and often alongside appeals. As affirmed by Trial Chamber II in Katanga, "The reparations phase, like all proceedings before the Court, is a judicial process", entailing rights outlined in the ICC texts. The trial is over, but the rights remain. This article delves into the reparation framework within the ICC by dissecting its intent and the role of the convicted individual. It examines the rights of defendants involved in reparations proceedings, addressing concerns regarding timing, equality of representation, and the right to confront accusations when faced with a lack of information and heavy redactions. It underscores the necessity to examine what is meant by 'fair trial rights' when the trial itself has concluded.

Keywords

International Criminal Court, Reparations, Rights of Suspects/Accused, Defence, Legitimacy, Fair Trials, Equality of Arms, International Criminal Law, Principles and Rules applicable to the Assessment of Reparations.

Author Information

Marie O'Leary is currently *acting* Principal Counsel of Office of Public Counsel for the Defence (OPCD) of the International Criminal Court. For nearly two decades, Ms. O'Leary has had the opportunity to serve ICL in various positions, on several committees, and as lecturer and author. She is barred in the U.S. (Minn) and holds *Bachelor of Arts (Journalism)* and *Juris Doctor* degrees from the *University of Saint Thomas*.

The views expressed herein are those of the author alone and do not reflect the views of the International Criminal Court.

Daniela Alvarado, Mexican qualified lawyer from *Facultad Libre de Derecho de Monterrey (2019)* and double Masters degree graduate in Criminal Law and Criminal Sciences, alongside with European and International Studies, specializing in European and International Criminal Law respectively from *Université de Bordeaux* and *Université des Pays de L'Adour (2023)*. Former legal intern at the Office of the Public Counsel for the Defence of the International Criminal Court.

Table of Contents

Introduction	3
PART I: The Development of the ICC Reparations Framework	6
The First Cases	7
The Role of the Convicted Persons.....	8
Part II: All Fair ‘Trial’ Rights, but	9
Appeal	10
Presumption of innocence and the standard of proof	10
Causation	11
Right of Confrontation – information and redactions regime.....	11
And the right to silence?	13
Part III: Emerging needs additional principles for fair reparations	13
Timing of the Reparations Proceedings	14
Joint and Several Liability	16
Conclusion	18

Introduction

“[T]he first ‘reparations regime’ ever realised in the history of international criminal jurisdiction”, as noted in the ICC Commentary,¹ was a significant step in establishing modern transitional justice mechanisms to work alongside the existing international criminal law processes that had been employed since the early 1990s. The evolution from no victim participatory rights² to the recognition of a right of victims to be distinctly heard in the proceedings to an actual right to reparation for the harm suffered by a victim of conflict violence is a demonstration of the commitment of modern International Courts and Tribunals to a more holistic model of transitional justice. Establishing the idea for such reparations mechanism is one thing, though; finessing the process and integrating it into a *sui generis* treaty-based international criminal

¹ Cattin, D., “Article 75: Reparations to victims.”, *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, ed. Ambos (Beck 2022), pp. 2243 [“ICC Commentary”].

² See, e.g. Office of the Prosecutor of the ICTY, Address to the Security council by Carla Del Ponte, Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, to the UN Security Council, Press Release, November, 2000.

court has been entirely another. Even 25 years on, these remain nascent processes in the developing field of international criminal law.

Yet from the moment this right to reparations was embodied in the Rome Statute, it has not been a question of whether or not to provide such restorative justice to victims, but one of framing the parameters of and for such procedures. The framers of the Rome Statute left the ultimate framework to the Court, itself, to shape.³ In the system established in the Rome Statute of the ICC, and since interpreted by the Court's Chambers, the order awarding reparations is based wholly on the convicted charges of an individual accused. That is, only after a defendant has been convicted of crimes under the ICC's jurisdiction may the Court determine the scope and extent of the harm suffered by victims based on principles and procedures applied to reparations.⁴ These reparations can have a collective or individual basis and, as listed in Article 75 of the Statute, can be in the form of restitution, compensation, rehabilitation, or even those with a symbolic, preventative, or transformative value.⁵ In this litigation and concomitant discussion, there has been some contemplation as to how this process is either a part of or adjacent to the criminal trial of a convicted defendant who bears the restorative responsibility in the reparations processes. However, the discussion of how to assess and afford fairness to convicted persons in adjudicating and administering reparations at the International Criminal Court is one for which lesser resource can be found.

The process that has developed is as unique as the Court itself; it would be impossible to compare the ICC reparations regime to any domestic system, nor is there an exact replica in international tribunals. However, the right to reparations has long been developed in judicial systems of the world and, perhaps more importantly, has been examined in cases before the International Court of Justice⁶, regional human rights courts,⁷ and *ad hoc* tribunals, such as the Kosovo Chambers.⁸ The use of their jurisprudence, as guidance, is entirely intuitive in developing the legal and normative framework of the ICC reparations regime. That is, recognizing that ICL is a crossroads of several fields of international law – namely, International Humanitarian Law, International Human Rights Law, and Public International Law – Article 21 of the Rome Statute guides ICC Chambers to develop the caselaw of the ICC drawing not only

³ “[...] “Article 75(1) of the Rome Statute (“Statute”) gives the Chamber a broad discretion to establish the principles that are to be applied to reparations for victims, including determining the scope and extent of any damage, loss and injury they experienced”. ICC-01/04-01/06-2904, p. 21 and 22.

⁴ *Prosecutor v. Thomas Lubanga Dyilo*, “Decision establishing the principles and procedures to be applied to reparations”, 7 August 2012, ICC-01/04-01/06.

⁵ *Ibid.*, para. 222.

⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*; *Factory at Chorzów, Jurisdiction*, 1927, P.C.I.J., Series A, No. 9, p. 21; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 81, para. 152; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 59, para. 119).

⁷ The European and inter-American regional mechanisms for the protection of human rights, on the other hand, impose a reparation regime in favour of the victim and against the State or States that do not comply with their human rights obligations. *Cfr.* In the case of the American Convention on Human Rights, this obligation is enshrined in Article 25, which establishes a general right to protection by “a simple and prompt remedy [...] before a court of competent jurisdiction”. This right is closely linked to the powers of the IACHR Court under Article 63 of the ACHR. Article 41 of the European Convention on Human Rights is its counterpart.

⁸ Kosovo Specialist Chambers, *Prosecutor v Mustafa*, Reparations Order against Salih Mustafa, KSC-BC-2020-05, 6 April 2022.

on its own law and practice, but more broadly on “applicable treaties and the principles and rules of international law” [Article 21(1)(b)] or “[f]ailing that, general principles of law derived by the Court from national laws of legal systems of the world [...]” [Article 21(1)(c)]. Critically, “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights [...]” [Article 21(3)].

However, while the ICC Chambers have noted that “*the reparations phase, like all proceedings before the Court, is a judicial process*”, it has found significant divergence from its own trial processes when put into practice. As developed in those first cases, re-aligning the fair trial guarantees of a criminal law process to one rooted in civil procedure has seen a shifting of certain Article 67 rights and abrogation of other Rome Statute provisions altogether in finding them inapplicable to reparations proceedings.

It seems the question that the litigants – and Chambers – continue to bump against is how can the Court ensure ‘fair trial guarantees’ when the trial itself has concluded? As a permanent institution, it is not a question that will fade or diminish with time, but a question that will only expand without proper attention to the need for clearly defined rights in a specialised process for a specialised institution. In examining what rights should be provided to those now named ‘convicted persons’, it is pertinent to examine first the underpinnings of the processes as developed for Rome Statute reparations, then look to the emergent case law, and, finally, highlight those areas that will continue to be significant matters for resolution in near and distant future.

As the international community has, and continues, to define the parameters of international criminal crimes adjudication, so now it must turn its attention to those intertwined procedures for holistic justice for all involved in the proceedings. To consider the human rights of the convicted persons and the fairness of all procedures to them, as well, is a vital component to ensuring the legitimacy of the system in its entirety.

As a fundamental basis to this inquiry, Part I of this article will re-examine the intent in the creation of the ICC reparations framework and the role of the convicted person envisaged within it. Part II will go beyond structure and role and look at the concrete defendant’s rights that are implicated in reparations proceedings: the timing of the procedure alongside appellate proceedings as potentially impacting a presumption of innocence; equality of arms issues in the ability to provide ‘adequate time and facilities’; the right of confrontation and to produce or challenge submissions when faced with a lack of information and heavy redactions. Part III will build upon that 20 years of caselaw to spotlight the areas that are emerging as exigent needs for fair reparations; in particular, a closer look at the finding of the ‘restorative’ nature of the proceedings as has having a vicarious ‘punitive’ effect on the convicted person in a system that, as yet, provides no clear processes for the follow-through on the convicted person’s liability. Namely, what work needs to be done in creating structures to inform indigent defendants of how they will be expected to reimburse the Trust Fund for Victims for money advanced, to inform non-indigent defendants of how frozen assets will be held and distributed, and, finally, to provide avenues for a convicted person to make claims of shared financial responsibility against the dozens of actors who may bear equal responsibility for the same crimes.

PART I: The Development of the ICC Reparations Framework

In the discussions establishing the Rome Statute, the prevailing interest in reparations arose in the need to create a right to more fulsome 'justice' and "historical possibility to the world community to recognize and enforce the right of victims to reparations, which is a constitutive part of the right to justice".⁹ In these discussions, there is repeated reference to fair trials being not just for the accused persons, but also for the victims who should be assured an effective remedy.¹⁰

While IHRL considers criminal proceedings as a form of reparation¹¹ and establishes a regime of reparations regardless of conviction,¹² to embed a specific conviction-dependent process in a criminal court was a new challenge for international criminal law. Unlike human rights courts where the entity responsible for repairing the damage caused by serious violations is an entire State apparatus, in the international criminal process the scope of the ICL reparations award is, in principle, limited to the specific culpable perpetrator(s).

The early Rome Statute discussions show that incorporating a reparations regime at the ICC was not necessarily a universally welcomed idea, with some concerned that it could 'distract' from core functions of adjudicating guilt or acquittal.¹³ However, as part of reconciliation and restorative processes,¹⁴ international criminal law – through the ICC -- has focused reparations arising out of the criminal trials as dependent on a conviction against an individual. In the end, it was, as noted in the ICC Commentary, "the Rome compromise".¹⁵

When it came to rights, the initial discussions envisaged that they would need "to be sorted out and placed in a logical sequence".¹⁶ "Like all proceedings before the Court", the ICCPR was used as a yardstick."¹⁷ In blending civil and criminal law concepts, it seems that differing stage-

⁹ ICC Commentary, p. 2241.

¹⁰ *Ibid.*, pp. 2241-2242.

¹¹ To understand the wide range of measures ordered by the IACHR Court, it is possible to group them into the following 6 Forms of Reparation: (i) Restitution; (ii) Rehabilitation, (iii) Satisfaction, (iv) Guarantees of non-repetition, (v) Obligation to investigate and sanction, and (vi) Compensation and reimbursement of costs and expenses. The first five Forms of Reparation are also identified as Non-Pecuniary Forms of Reparation. Regarding the Obligation to Investigate and Sanction, this is the obligation of the States to guarantee the rights to life, integrity, and personal liberty through the effective investigation of the facts that affected such rights and, if applicable, to punish those responsible. It implies that the State must remove all obstacles, *de facto* and *de jure*, that impede the due investigation of the facts, and use all available means to expedite said investigation and the respective procedures, to avoid the repetition of the violation. Compliance with this obligation, in turn, contributes to the reparation of the victims and their families. See also Corte IDH. Caso Velásquez Rodríguez Vs. Honduras. Fondo. Sentencia de 29 de julio de 1988. Serie C No. 4. para. 177, 178 and 181.

¹² Perez-Leon-Acevedo, J.P., "Reparation Principles at the International Criminal Court", *General Principles of Coherence and Law*, eds Andenas et al. (Brill 2019), p. 339 citing *Velasquez-Rodriguez v Honduras*.

¹³ Friman, H., *The International Criminal Court: The Making of the Rome Statute*, ed. Lee, (Kluwer 1999), p. 263.

¹⁴ *Ibid.*, p. 264.

¹⁵ ICC Commentary, p. 2243.

¹⁶ Friman., p. 249.

¹⁷ *Ibid.*, p. 262.

dependent terminology for the defendant was already imagined as a potential stumbling block – ‘suspect’ and ‘accused’ were both imagined in the context of fair trial rights. To address this, the reparations procedure adds in a new term to reflect a change of status for certain defendants – ‘convicted person’.¹⁸

The First Cases

With the first case came the first conviction and, in turn, the first reparations proceedings. As developed in those first cases, the ICC reparations process in an individual case commences immediately upon a trial judgement assigning guilt of war crimes, crimes against humanity, genocide, and/or aggression. The defendant in the trial, now convicted at first instance, becomes a party to those reparations proceedings which run in parallel to sentencing litigation and often alongside appeals, as well. However, even at the start of its very first case, seemingly in the arrest warrant itself, the Pre-Trial Chamber had a mind to emphasize the significance of reparations in the ICC’s framework stating:

The reparation scheme provided for in the Statute is not only one of the Statute’s unique features. It is also a key feature. In the Chamber’s opinion, the success of the Court is, to some extent, linked to the success of its reparation system,

After Mr Thomas Lubanga was convicted at first instance, the process took root, and it was the Trial Chamber (with review of the Appeals Chamber at some turns) to develop the law to realise the promises of reparations as contained in the Rome Statute.

One of the first principles to arise in carving out a procedure was to deem the reparations proceedings as a judicial process, although some have yet referred to the powers of a Chamber in this regard as ‘quasi-legislative’.¹⁹ The Appeals Chamber has remained clear – “an order for reparations should be classified as a ‘fundamental’ decision, treated in the same manner as a decision of conviction, acquittal or sentence”.²⁰

The ICC Rules of Procedure and Evidence (RPE), however, do not provide significant detail as to how reparations before the ICC should be conducted, so the first stage of the first case required an identification of the reparations principles to be applied universally. These principles “*mainly examined case-law of regional human rights courts, reparations principles adopted via non-binding resolutions of international organizations, and international human rights treaties [...] rather than comparative (criminal) law*”,²¹ already diverging from the larger investment in international and domestic criminal law practice applied in the trials and appeals.

¹⁸ *Ibid.*, pp. 247-248.

¹⁹ Perez-Leon-Acevedo, p. 342 *referencing* Conor McCarthy, Reparations and Victim Support in the International Criminal Court (CUP 2012), p. 131.

²⁰ *Prosecutor v. Thomas Lubanga Dyilo, Decision on “Order for Reparations”*, ICC-01/04-01/06-3129-AnxA, 03 March 2015, par. 67.

²¹ Perez-Leon-Acevedo, p. 335.

For certain matters that lacked clarity, the Chambers found that these contested issues “could be resolved during the reparations implementation process”,²² pushing significant jurisprudence down the line to the later decisions in the process.

The Role of the Convicted Persons

In this textual lacunae of ICC reparations, however, there is one significant mandate of the process dictated to the Chambers; ICC Rule 97.3 requires that “[i]n all cases, the Court shall respect the rights of victims and the convicted person.” This provision has played a significant role in underpinning the developing jurisprudence.

In those first cases, in particular that of *Lubanga*, the Chambers were clear to announce that the accused-cum-‘convicted person’ is not only a party to the proceedings in reparations, but also a rights-bearer: “*The Chamber has stressed the defence is a party to the reparations proceedings, and it is critical that the principles established by the Chamber do not prejudice, or operate inconsistently, with the rights of the convicted person to a fair and impartial trial*”.²³ The Appeals Chamber has clarified that “[a]s the trial of the person has concluded, in the context of reparations, this right is understood to be the right to fair and impartial reparations proceedings”.²⁴ This, it found “[i]n the case law of international human rights bodies, the concept of a ‘fair and impartial trial’ includes the principle of equality of arms in an adversarial proceeding which, in principle, is the same in both civil and criminal cases”. Equality of arms puts no party at a substantial disadvantage, such that “[e]ach party must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party” such that “the ‘litigants’ confidence in the workings of justice, which is based on, inter alia, the knowledge that they have had the opportunity to express their views on every document in the file”.²⁵

Many of the first discussions in the litigation, then, centred on whether fair trial rights could even be invoked if the person had no identifiable assets or property for the purpose of reparations and as any symbolic reparations would be voluntary.²⁶ Was there even a role for an insolvent convicted person in the process? The Chambers held, however, that provisions for the convicted person’s rights imbued in the texts and jurisprudence “*would be unnecessary if the Chamber had concluded that the convicted person was unaffected by the reparations process [...] Not least, the[decisions and orders] will be an expression of the Court's disapproval and condemnation of the wrongdoing of the convicted person*”.²⁷ In sum, the solvency of a person would not be a pre-requisite to participate as a party.

²² *Prosecutor v. Thomas Lubanga Dyilo*, “Decision establishing the principles and procedures to be applied to reparations”, ICC-01/04-01/06-2911, 7 August 2012, para. 37.

²³ *Prosecutor v. Thomas Lubanga Dyilo*, “Decision establishing the principles and procedures to be applied to reparations”, ICC-01/04-01/06-2911, 7 August 2012, para. 23.

²⁴ *Prosecutor v. Thomas Lubanga*, Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’, ICC-01/04-01/06 A7 A8, 18 July 2019, par. 248

²⁵ *Ibid.*, Para 248-249.

²⁶ *Prosecutor v. Thomas Lubanga Dyilo*, “Decision establishing the principles and procedures to be applied to reparations”, ICC-01/04-01/06-2911, 7 August 2012, para 22-23.

²⁷ *Ibid.*, para. 23.

Arising in the same context is balancing the rights of the convicted person and the rights of the victim – a thread that has become woven through virtually every reparations decision and order taken at the ICC. As the *Lubanga* Chamber announced in the first Reparations Order: “as in all proceedings before the Court, the Chamber ‘must strike a fair balance between the divergent rights and interests of the victims on the one hand and those of the convicted person on the other’”.²⁸

This balance, however, has been one that often recognises, and reinforces, the significance of the one part – the victims. For example, in the *Lubanga* Reparations Award decision, it reminded that victims have a “prominent part” in “this final phase of the proceedings” and “the exercise of the Defence’s right to respond belongs to that context”.²⁹ Similar statement was issued in the first Reparations Order of the Kosovo Specialists Chamber, which “[r]ecall[ed] that reparations at the KSC ought to be victim-driven and victim-centered”³⁰ and that the amounts awarded “properly reflects the rights and interests of the victims, bearing in mind the rights of the convicted person”.³¹

Part II: All Fair ‘Trial’ Rights, but ...

By 2017, with three ongoing reparations processes at various stages of proceedings, the process had been somewhat distinguished from ‘trials’ as “a distinct phase of the judicial proceedings before the Court”, such that “the rules applying to criminal proceedings brought against an accused person do not necessarily find application at the reparations phase”.³² Thus, the rights afforded to a convicted person had been somewhat cleaved from ECtHR fair trial guarantees as the *Lubanga* Chamber held that the fair trial guarantees of Article 6.1 “are not necessarily the same” as those cases concerning civil rights and “are less onerous than they are for criminal charges”.³³

In practice, it became evident that, in the context of ‘fair trial rights’, the reparations process may *not* actually be ‘like all other proceedings’ and often required distinctions. In the limited cases going forward to ICC reparations proceedings, there have been a certain number of rights litigated in detail, with a broader understanding of what rights do – and do not – apply in reparations.

²⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Corrected version of the “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable”, ICC-01/04-01/06-3379-Red-Corr-tENG, December 21, 2017, par. 55. See also para. 234.

²⁹ *Ibid.*

³⁰ Kosovo Specialist Chamber, *Prosecutor v Mustafa*, Reparations Order against Salih Mustafa, KSC-BC-2020-05, 6 April 2023, para. 211.

³¹ *Ibid.*, para. 214.

³² *Prosecutor v. Thomas Lubanga Dyilo*, Corrected version of the “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable”, December 21, 2017, *citing* Decision on Admissibility of Appeals against Decision on Reparations, ICC-01/04-01/06-2953, para. 70.

³³ *Ibid.*

Appeal

At the outset, it is important to note the clear right to appeal given to a convicted person in these proceedings arising out of his or her status as party to the proceedings. The Appeals Chamber has clearly held:

that article 82 (4) of the Statute gives the convicted person the right to appeal orders for reparations. This right is unencumbered. Furthermore, the Appeals Chamber does not have to determine, in the present case, whether an appeal by the convicted person is inadmissible if he or she is not adversely affected by an impugned decision."³⁴ [Emphasis added.]

This right has proved to be of great importance in helping to shape the emerging law with a contest of legal and factual decisions taken by the Trial Chambers. In this context, it is also clear that the right to a reasoned decision, and the underpinning principles, carry through to reparations proceedings.³⁵

Presumption of innocence and the standard of proof

In finding the 'presumption of innocence' no longer applicable in reparations proceedings, the ICC Chambers were required to revisit of the standard of proof, as 'beyond reasonable doubt' is a part of Article 66 and correlative to that presumption. For this, the *Lubanga* Chamber held that, "[g]iven the Article 74 stage of the trial has concluded, the standard of 'a balance of probabilities' is sufficient and proportionate to establish the facts that are relevant to an order for reparations when it is directed against the convicted person".³⁶ This distinction, as made in the first issuance of reparations principles, is probably the most significant departure from criminal fair trial rights as found in international courts and tribunals, though it is consistent with other, some subsequent, ICL reparations regimes.³⁷

By contrast, the principle related to "Rights of the Defence", which follows thereafter, indicates that "[n]othing in these principles will prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial."³⁸ Having just noted in paragraph 254 that a lower burden is in place as 'the trial' is concluded', it is unarticulated how the full scope of Article 67 'fair and impartial trial' rights can remain in force. All the more so in that this one-sentence principle – with no citation – is the sum total of that section.

³⁴ *Prosecutor v. Thomas Lubanga Dyilo*, 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", ICC-01/04-01/06-2953, December 14, 2012, para. 66.

³⁵ *Prosecutor v. Bosco Ntaganda*, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order, ICC-01/04-02/06-2782, September 12, 2022.

³⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, August 7, 2012, para. 253.

³⁷ See e.g. ECCC, *Case No. 001*, Appeal Judgement, para. 531; KSC, *Prosecutor v Mustafa*, Reparations Order, 6 April 2023, para 102.

³⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, 7 August 2012, para. 255.

Causation

The early *Lubanga* decisions also introduced discussions of proximate harm into the litigation to “replace the causation theory that is required for a sentence of conviction or acquittal”.³⁹ As “there is no agreed upon standard of causation in international law or specific standard identified in the Court’s legal texts” the Appeal Chamber held that, based on ICC Rule 85(a), the relevant principle embodied in this rule is that: Reparation is to be awarded based on the harm suffered as a result of the commission of any crime within the jurisdiction of the Court.”⁴⁰

Herein lies a great deal of the reparations rights litigation, especially when factoring in issues of transgenerational harm and indirect victimhood. Proximate harm in the context of ‘widespread or systematic’ crimes or ongoing armed conflict is a difficult task, to say the least. However, the Appeals Chamber has held that the decisions taken in this regard “must be ‘sufficiently detailed’ so as to identify the harms arising from the convictions” at least to be able to retain that right to challenge on appeal.⁴¹

The examination of causation *vis-à-vis* the convicted person has strayed into discussions about the permissible presumptions that can be made by a Trial Chamber in issuing reparations. On this, the Appeals Chamber has rejected certain ECtHR jurisprudence encouraging strict preconditions on presumptions, favouring alternate jurisprudence of that body which finds that “the level of persuasion necessary for reaching a particular conclusion [is] intrinsically linked to the specificities of the facts, the nature of the allegations made and the Convention right at stake”.⁴²

Right of Confrontation – information and redactions regime

One of the most discussed rights in the current litigation is the right of confrontation in the sense of a convicted person’s ability to make submissions with limited disclosures or significant redactions to materials.

In the very first case, the *Lubanga* Defence argued that ‘substantial redactions’ curtailed the ability to intervene in a meaningful way; they deemed it ‘manifestly unfair’.⁴³ There, the Appeal Chamber relied on “other human rights courts, such as the IACtHR, [which] have ordered reparations on a collective basis when dealing with mass crimes and mass victimization and

³⁹ ICC Commentary, p. 2250.

⁴⁰ *Prosecutor v. Thomas Lubanga Dyilo*, 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 Mars, 2015, paras 78-79.

⁴¹ *Ibid.*, paras 184.

⁴² *Prosecutor v. Germain Katanga*, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled “Order for Reparations pursuant to Article 75 of the Statute”, ICC-01/04-01/07-3778-Red, para. 76 *citing Nachova and others*.

⁴³ *Prosecutor v. Thomas Lubanga Dyilo*, Defence submissions on the principles and the procedure to be applied with regard to reparations, ICC-01/04-01/06-2866, April 18, 2022. para. 12.

that such orders “only determined the framework for the implementing [entity]”.⁴⁴ They have later highlighted that “[v]arious provisions regulate disclosure and redactions in the criminal phase of the proceedings but, other than provisions in the Regulations of the Registry that regulate action by that organ, there are no other specific provisions regulating redactions in reparations proceedings”.⁴⁵

The Appeals Chamber in *Al Mahdi* went on to hold that there was “no error in withholding some information from the convicted person concerning those victims eligible to receive reparations where the information disclosed to the defence adequately allowed them to make submissions on the victims’ eligibility for reparations”.⁴⁶ In *Lubanga*, they further found that there was “no error in the Trial Chamber’s decision to authorise redactions to the whereabouts of persons who had consented to the disclosure of their dossiers” as it did not infringe Mr Lubanga’s rights.

⁴⁷ The Appeals Chamber went on to determine:

*The manner in which redactions were applied is indicative of the emphasis on the victims’ desire to withhold information. It appears that the identity of victims who did not consent to disclosure was redacted with the understanding that their refusal to disclose their identity was related to security reasons. The Appeals Chamber considers that, in the particular context of the present proceedings, it would not have been an error to assume that the victims who did not consent to disclose their identity were potentially subject to objective risks to their security, based on despite the absence of individualized risk assessments and the absence of some of those victims’ clear expression of fear for their safety. Furthermore, the relevance of the names of the victims to Mr. Lubanga, in the context in which the Trial Chamber used the requests in this case, has not been substantiated. Therefore, the Appeals Chamber finds no error in the Trial Chamber’s balancing of the victims’ security and the impact of redactions on the rights of Mr. Lubanga.*⁴⁸

The issue of being able to access information relevant to submissions has also been litigated in the *Ntaganda* case, where the Appeals Chamber held that “[t]he Trial Chamber erred in ordering victims to reveal their identity to the convicted person as a pre-condition to having their claims for individual reparations assessed by the TFV, thereby essentially creating an unnecessary obstacle to certain victims to receive reparations”.⁴⁹

⁴⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Order for Reparations, March 3, 2015, ICC-01/04-01/06-3129-AnxA, para. 166.

⁴⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’, ICC-01/04-01/06-3466-Red, July 18, 2019. para 249.

⁴⁶ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted Judgment on the appeal of the victims against the “Reparations Order”, ICC-01/12-01/15-259-Red2, March 8, 2018, para.87.

⁴⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’, ICC-01/04-01/06-3466-Red, 18 July 18 2019, para 27.

⁴⁸ *Ibid.*, para 275.

⁴⁹ *Prosecutor v. Bosco Ntaganda*, Decision on the Request on behalf of the Convicted Person seeking communication of material by the Trust Fund for Victims and the lifting of redactions applied by the Registry and the Legal Representatives of Victims to the victims’ dossiers, ICC-01/04-02/06-2847, April 20, 2023, paras 15, 22.

At the same time, the same Appeals Chamber has held that a Trial Chamber “*must ensure that the convicted person is adequately on notice as to the information on which it will rely in making its order, so that he or she has a meaningful opportunity to make representations thereon, and it must give notice as to the manner in which it intends to assess that information*”.⁵⁰

And the right to silence?

In an international criminal proceeding, and preserved in Rome Statute Article 67(1)(g), a defendant retains a “right to not be compelled to testify or to confess guilt and remain silent”. While regional human rights courts⁵¹ can order a form of reparation of a public act of acknowledgment of responsibility and reparations to the memory of the victims by a State, any measure of similar order to a criminal defendant in reparations proceedings would seem to fall foul of the right to remain silent in the proceedings.

Indeed, in extrapolation, the Chambers have held that a convicted person cannot be forced to apologize or participate in the reparations process; it must be purely voluntary.⁵² Further, as expressed in the ICC Commentary, “[w]ith respect to fundamental rights of the convicted person, it would be unacceptable to oblige him/her to apologise unless the declaration of apology would be genuine and sincere vis-à-vis the victim(s)”.⁵³

Part III: Emerging needs additional principles for fair reparations

Reparations processes, especially those as lofty and novel as the ICC’s, should be lauded, and, as noted by Professor Luke Moffett, can be seen as an avenue to “ensure peace, reconciliation or to vindicate victims”.⁵⁴ While the need for fairness in reparations process has been identified from the earliest points of the Rome Statute development and in subsequent cases, the need would appear to be compounding in the cases of the ICC, but also in a wider net of ICL.

While the ICC draws upon other jurisdictions as sources of law, as permitted in Article 21, it is critical to recognise that those other jurisdictions also draw back from the ICC’s decisions.⁵⁵ Indeed, the ICC is “*not an isolated or self-contained regime*” as it “*converges towards coherence and unity of international law amidst institutional diversification*”.⁵⁶

⁵⁰ *Prosecutor v. Bosco Ntaganda*, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”, ICC-01/04-02/06-2782, September 12, 2022, para. 685.

⁵¹ Corte IDH. *Caso de las Hermanas Serrano Cruz Vs. El Salvador*. Fondo, Reparaciones y Costas. Sentencia de 1 de marzo de 2005. Serie C No. 120; *Caso Carpio Nicolle y otros*, 3, párr. 136; *Caso Masacre Plan de Sánchez*. Reparaciones, par. 100; and *Caso “Instituto de Reeducción del Menor”*, para. 316.

⁵² *Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, August 7, 2012, para. 269.

⁵³ ICC Commentary, pp. 2248-2249.

⁵⁴ Moffett, 2023. “Reparations as Balance.” *Journal of Social Philosophy* 1–19.

⁵⁵ Perez-Leon-Acevedo, p. 337: “*the ECCCC and EAC have invoked the ICC’s case-law and/or instruments concerning reparations*” citing to *Case 001 and the Prosecutor v Hissane Habre*.

⁵⁶ *Ibid.*, 345

This is evident in the recent decision on reparations announced at the Kosovo Specialist Chambers – its first -- which heavily upon ICC practice, indicating:

*the KSC, like at the International Criminal Court (ICC), a system of reparations is foreseen within the context of criminal proceedings. The Panel notes in this respect that Article 22 of the Law and Rule 168 of the Rules mirror to some extent the wording of the relevant provisions on reparations in the legal texts of the ICC. For that reason, the Panel finds it appropriate to take guidance from the case-law of the ICC, including for formulating the principles relating to reparations.*⁵⁷

There is a need, then, for ICC to 'get it right' not just for its own cases, but for the larger coherence of international criminal law and the fairness of transitional justice mechanisms, more broadly. From the above, we can see clearer concepts emerging as the ICC adds cases to its reparations roster, but there simply isn't the volume to identify principles in a more cohesive – or swift – manner through that particular caseload.

Nevertheless, there exists a variety of issues that could perhaps be developed outside of the courtroom in discussion and modification at a more legislative level, particularly, the normative framework as directed and undertaken by the ICC Presidency and the Assembly of States Parties. Not the least of these areas for development include principles related to those yet-unknown areas we can imagine ahead. Critical decisions relating to the defendants' rights are nearly upon us, and it is unclear how they will be addressed. In particular, issues related to ordered reimbursement to the Trust Fund for Victims for money advanced, information to non-indigent defendants on how frozen assets will be held and distributed, and, finally, avenues for a convicted person to make claims of shared financial responsibility against the dozens of actors who may bear equal responsibility for the same crimes all remain issues that have not been fully explored.

Likewise, the opportunity to have certain reflections from the acquittal of the accused persons or from the removal of charges by the prosecution, invites a reflection on how to respond to the needs of the victims on a broader approach. The Statute's recognizes that it is mindful that millions of people have been victims of unimaginable atrocities, however, the condition that reparations are intrinsically linked to individuals whose criminal responsibility is established in the specific convictions.

For the purpose of this article, it is important to highlight two other major areas that have arisen in the litigation warranting further attention - the timing of reparations proceedings and joint and several liability.

Timing of the Reparations Proceedings

Timing of reparations has been a significant area of litigation in the ICC system and is one that could be discussed in the larger framework as opposed to litigation on a case-by-case basis. Most pertinent to this discussion -- at what point can the process start? The presumption of

⁵⁷ Kosovo Specialist Chamber, *Prosecutor v Mustafa*, Reparations Order against Salih Mustafa, KSC-BC-2020-05, 6 April 2023, para. 211, para. 63.

innocence and the expectations of victims to receive any reparations in a timely manner are both critically impacted by this discussion.

The *Lubanga* case faced some criticism in the failure to provide the reparations principles already in those early days of the Court, well before any first conviction was entered,⁵⁸ with the Chambers largely settling on reparations processes commencing at the time of any first-instance conviction. There have been two notable Defence challenges to this timing – one team asking for reparations to come later, one sooner.

On the request for *sooner*, the Defence of Mr Abd-al-Rahman had asked for reparations principles and processes to be established even at the Pre-Trial stage.⁵⁹ The Appeals Chamber, in reviewing the Single Judge’s denial of the Defence request, established error of the Impugned Decision “in denying request to establish procedures for potential reparations on grounds that it lacked jurisdiction”.⁶⁰ The Appeals Chamber held:

*It is in the interest of both victims and the person suspected or accused of crimes under the Court’s jurisdiction that procedural issues relevant to reparations receive judicial supervision as early in the life of a case as possible. [...] It is not necessarily the case that the reparations proceeding begins only after a person has been convicted.*⁶¹

While the Appeals Chamber, by Majority, as noted above, held that these early stages could see reparations processes already in play, it found that it was ‘inappropriate’ to grant relief of the Defence’s request to overturn a Pre-Trial Chamber decision that denied taking those initial steps.⁶² It held:

Although the legal framework governing reparations leaves a considerable amount of discretion to judges as to how to conduct reparations proceedings, there is no room to order a bifurcation of the proceeding as suggested in Mr Abd-Al-Rahman’s Request [] Rather than advancing ‘additional principles’ that fit within this framework, Mr Abd-Al-Rahman has essentially suggested that the existing procedures be thrown out. Therefore, whether dismissed in limine or assessed on its merits the outcome is the same: there is no basis in the

⁵⁸ Resolutions adopted by the Assembly of States Parties, Amendments to rule 4 of the Rules of Procedure and Evidence, ICC-ASP/10/Res.3, 20 Dec 2011. See also Perez-Leon-Acevedo, p. 339.

⁵⁹ *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 18 August 2020 entitled ‘Decision on the Defence request and observations on reparations pursuant to article 75(1) of the Rome Statute’, ICC-02/05-01/20-237, 18 December 2020, para. 21.

⁶⁰ *Ibid.*, para. 15

⁶¹ *Ibid.*

⁶² *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, *Ibid.*, para. 22. “The Defence request a modified procedure for the submission and assessment of applications for reparations in nine separate stages, by which nearly the entire proceeding concerning reparations would occur before and largely independent of an eventual conviction of Mr Abd-Al-Rahman in the criminal proceedings against him, under the supervision of the Pre-Trial Chamber. Under his proposal, the Registry would complete the submission of applications to the Court during the pre-trial phase, presenting any information and recommendations about the modalities of reparations, the implementation of awards, or other matters to the Pre-Trial Chamber. At that time, the Pre-Trial Chamber would order the Registry to disclose the applications to the Trust Fund for Victims (the ‘TFV’), and after receiving the applications it would make public calls for voluntary contributions.”

*Court's reparations regime for the adoption of a proposal such as the one presented in Mr Abd-Al-Rahman's Request.*⁶³

On the request for *later*, the Defence of Mr Bemba asked for a stay of reparations processes following that first-instance trial judgment, pending a final decision on appeal. This request later became significant in that, on 8 June 2018, the Majority Appeals Chamber reversed the conviction and acquitted Mr Bemba of all charges. That reparations processes that had begun, thus, had to end. The Chamber in that instance, while acknowledging that reparations cannot be continued in absence of a convicted person, issued a decision terminating those proceedings which gave an 'acknowledgement of victims' and 'Appreciation of work efforts during the reparations phase'.⁶⁴ While it referenced the work of the TFV Assistance Mandate, it stopped short of issuing principles for future proceedings as had been requested by the Legal Representatives of Victims.⁶⁵ From this, it became clear that for any reparations actions occurring prior to a final determination of guilt, it is critical to ensure that the presumption of innocence of the defendant can be maintained.

The recent years have seen the Trust Fund for Victims more actively using its Assistance Mandate [found in Regulation 50 of the Regulations of the Trust Fund for Victims] to provide reparations even in advance of any conviction, especially in light of the significant time these trials can take. Even with the best intentions, the Chambers still have a responsibility to oversee that the rights of defendants are not impugned – this is especially true in these earliest stages where the Article 66 presumption of innocence is still very much a right guaranteed to the defendants. This, itself, has been the subject of litigation on behalf of named, and sometimes unnamed, defendants. Such caution has been noted by the Appeals Chamber that the "*real risk that the different mandates of the Trust Fund, namely its assistance mandate, which is not linked to or limited by the parameters of a conviction in a specific case before the Court, and its role in implementing court orders for reparations may be blurred in a manner prejudicial to the rights of the convicted person*".⁶⁶ In practice, then, it is for the TFV, and the Chambers, to ensure that the good goal of assisting victims at the earliest stages does not impinge upon the rights of the defendants at the earliest stages through proper review and management.

Joint and Several Liability

It would be remiss to not address the fact that the reparations regime of an international criminal court is made entirely complex by the nature of the crimes before it and the vast scale of victimhood ("hundreds and possibly thousands more victims suffered harm as a consequence of the crimes of which Mr Lubanga was convicted", as noted in the *Lubanga*

⁶³ *Ibid.*

⁶⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, Final decision on the reparations proceedings, ICC-01/05-01/08-3653, 3 August 2018.

⁶⁵ *Ibid.*

⁶⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Order for Reparations, ICC-01/04-01/06-3129-AnxA, 3 March 2015, para. 182.

Reparations Order⁶⁷). It is already a massive endeavour to determine an individual’s criminal responsibility in the context of conflict – amongst a plurality of actors in a multitude of incidents, but to try to assign exactly his or her ‘share’ of the responsibility is extremely difficult.

In light of the principle of ‘accountability for the offender’, an order for reparations shall be issued in all circumstances against the convicted person, irrespective of the person’s indigence,⁶⁸ Therefore, the financial situation of the convicted person cannot be regarded as material to the determination of the size of the reparations award for which he is liable.⁶⁹ This is necessary as the five people who have been the subject of reparations orders before the ICC, to date, have faced significant financial obligations as a result of their convictions – with one million USD serving as the smallest obligation and rising to over 50 million euro at highest.⁷⁰

These first cases coming before the ICC have exemplified this, finding that the decision of an individual’s responsibility will be for all of the harm suffered for all the convictions. For example, the decision against Mr Lubanga in reparations was taken without consideration of other cases that may come later even though in process already and the Appeals Chamber in *Katanga* held that reparations are ‘remedial’, not ‘punitive’ measures.⁷¹

Correlative to this, then, is the need to identify a framework for identifying overlap in reparations orders in the same conflict – not just within one Situation of the ICC, but also in those cases of complementarity. There has been some reference to this in the reference to such possibilities to date, but no actual process announced or plan to formulate such mechanisms. For example, in the recent *Ntaganda* case – with some overlapping with the *Lubanga* case of the same Situation – the Trust Fund for Victims recently submitted:

*that the Lubanga reparations programmes be adopted for the purposes of the present proceedings. According to the TFV, if either or both of the convicted persons in the two cases cease to be indigent, the Trial Chamber’s imposition of liability in solidum means that any of the co-perpetrators who has repaired the harms will have the right to seek to recover from the co-perpetrators their proportionate share.*⁷²

⁶⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Corrected version of the “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable”, ICC-01/04-01/06-3379-Red-Corr-tENG, December 21, 2017.

para. 280.

⁶⁸ *Prosecutor V. Bosco Ntaganda*, Reparations Order, 8 March 2021, ICC-01/04-02/06, par. 69; Al Mahdi Reparations Order, ICC-01/12-01/15-236, para. 97

⁶⁹ *Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 246.

⁷⁰ Germain Katanga - \$ 1,000,000. Ahmad Al Faqi Al Mahdi - € 2.7 million. Thomas Lubanga Dyilo - \$ 10,000,000. Bosco Ntaganda - \$ 31,300,000. Dominic Ongwen - € 52,429,000.

⁷¹ *Prosecutor v. Bosco Ntaganda*, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled “Order for Reparations pursuant to Article 75 of the Statute”, ICC-01/04-01/07-3778-Red, March 9, 2018, par. 185.

⁷² *Prosecutor v. Bosco Ntaganda*, Observations in relation to the ‘Defence Appellant Brief Against the 8 March Reparations Order’ and the ‘Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order’, ICC-01/04-02/06-2713, 30 September 2021, para. 201.

The Trial Chamber adopted this approach and it was later affirmed by the Appeals Chamber who held:

that the Trial Chamber correctly imposed joint and several liability. In particular, it correctly proceeded on the understanding that other persons' contribution to the harm resulting from the crimes for which the person has been convicted is irrelevant to that person's liability. It was therefore not an error for the Trial Chamber "to hold [Mr Ntaganda] liable for the full amount necessary to repair the harm" caused by the crimes of which he was convicted, irrespective of the ongoing implementation of a reparations order with respect to the same harm in the Lubanga case. Furthermore, the Trial Chamber correctly found that in relation to the type of liability which it imposed on Mr Ntaganda, both he and Mr Lubanga "remain liable to reimburse the funds that the TFV may eventually use to complement the reparation awards for their shared victims."⁷³

While the Appeals Chamber clarifies that "the Trial Chamber should specifically set out the manner in which the imposition of joint liability impacts the overall amount and apportionment of the award as a part of its reconsideration of these issues",⁷⁴ how any such recovery could take place between the defendants (should one become solvent) is unclear. To an even lesser extent, how could these men recover from solvent actors who are convicted in other jurisdictions for the same crimes?

This further raises an entirely additional point of complementarity and State cooperation. While ICC RPE Rule 219 outlines the non-modification of any Reparations Order by an implementing state, the texts do not outline review procedures to be taken by the Court itself should there be a change of circumstance. Further, Article 75.5 refers to Part 9 of the Rome State to call upon States Parties to cooperation, it is unclear how cooperation will work *vis-à-vis* the convicted person who may need to see States' help in reparations proceedings, as well.

Conclusion

The International Criminal Court's reparations regime is one that has faced both applause in its novelty and innovation and simultaneous criticism when attempting to find its way through the same. As a milestone in international criminal law, reparations afforded by the ICC itself have shown to be a challenge on many fronts, with the need for pioneering litigation to be conducted by those first prosecutors, counsels, and judges who have been tasked with finding a path forward to a more holistic idea of justice in response to the gravest crimes.

Yet, the treatment of the defendant – the person responsible and subject to separate punitive measures of the trial – must be wholly factored into the framework, as well. While the focus shifts to restorative justice, recognition that one defendant will likely never be able to afford full restorative payment must be recognized in developing a sustainable process. Efficacy of the ICC reparations system relies on the will of the international entities and, to date, contributions

⁷³ *Prosecutor v. Bosco Ntaganda*, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order", ICC-01/04-02/06-2782, 12 September 2012, para. 271.

⁷⁴ *Ibid.*, para 274.

to the TFV. With more cases having passed through this system, the international community can now acknowledge that debts owed to the Trust Fund for Victims can easily outweigh the actual funds allocated to it, with the TFV fronting costs for each and every convicted person’s responsibility to date. The emerging reality likely means that the success of this system – and full realization of the all of the ICC goals – relies on a frank discussion about sustainability of the reparations systems in place.

At the same time, it is becoming more evident that the rights of those persons in the proceedings require a dedicated, and urgent, conversation. Too often, discussions like these fall into the ‘after the trial’ pile; as explained by one Defence practitioner -- thinking about the convicted person after his or her responsibility has been often found as ‘an abandoned side’ of international criminal justice.⁷⁵ This also includes a conversation about how to better identify the ‘individual’ in individual criminal responsibility at the reparations stage – a stage focused on restoring the harm from the criminal acts of not an ‘individual’, but a plurality of actors engaged in a conflict. While reparations are an integral and critical part of the ICC mandate, the choices taken in implementation invite us to continue to question the natural limits of the role of the individual convicted person in this process as one arising out large-scale conflict and as distinct from the criminal punitive or rehabilitative measures ordered.

⁷⁵ Lecolle, C., Relocation Issues of Released and Acquitted at International Criminal Courts and Tribunals: A Defence Perspective, JICJ, vol. 21, Iss. 1, March 2023, pp. 167-184, <https://doi.org/10.1093/jicj/mqad012>.