

Article

## **DID THE ICC FAIL CHILD VICTIMS IN THE LUBANGA REPARATIONS ORDER?**

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### ABSTRACT

In 2012, the International Criminal Court (ICC) convicted Thomas Lubanga Dyilo for enlisting, conscripting and using child soldiers during the Ituri conflict in the Democratic Republic of Congo (DRC). Two and a half years later, the Appeals Chamber of the Court issued an amended reparations order against Lubanga. This paper seeks to examine whether the amended order for reparations and the draft implementation plan for reparations in the Lubanga case failed child soldier victims by only ordering collective reparations instead of individual reparations. This article argues that despite the near impossible task at hand, which involved the diluting of victims' individual reparations requests, the ICC and TFV have come up with as good a reparations plan as possible, balancing individual victims' needs and requests with larger, community considerations.

Keywords: Reparations; International Criminal Court; Lubanga Case; Collective and Moral Reparations; International Criminal Law; Victims' Representation.

### **Introduction**

In 2012, the International Criminal Court (ICC) convicted Thomas Lubanga Dyilo for enlisting, conscripting and using child soldiers during the Ituri conflict in the Democratic Republic of Congo (DRC). In August 2012, the trial chamber issued its reparations order. Two and a half years later, the Appeals Chamber of the Court issued an amended reparations order against Lubanga. The two groups of legal representatives to the victims advocated for individual reparations from the start of the proceedings, and the victims' main aim was to reintegrate into society through reparations such as education grants, access to employment opportunities and other monetary means that would facilitate reintegration. However, the Court adopted the Trust Fund for Victims (TFV) approach to reparations, which was based on a collective community-based reparations approach.

The ICC, in endorsing the TFV's approach to reparations, took a collective, community-based approach to reparations in the Lubanga case. However, child soldier victims in this case did not see themselves as a collective group<sup>1</sup>. They were typically dispersed groups and not necessarily

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<sup>1</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Observations on the sentence and reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08,

based in the communities where they were initially abducted or conscripted. Both groups of victims advocated for individual reparations, rejecting the Trust Fund's community-based approach.

This article seeks to examine whether the amended order for reparations and the draft implementation plan for reparations in the Lubanga case failed child soldier victims by not granting their individual reparations requests and only ordering collective reparations instead.

This article will provide a brief background to the Lubanga case, before examining the right to reparations, the various reparations requests made by the parties to the case at the International Criminal Court (ICC or the Court), before lastly examining the draft implementation plan put forward by the Court. The ICC had to balance the individual reparations requests made by the child soldier victims with collective community interests. This article argues that despite the unenviable task at hand, the ICC and TFV have come up with a reasonably balanced reparations plan, balancing individual victims' needs and requests with larger community considerations, such as the need to not further exacerbate community tensions, and reaching the most victims possible despite limited resources at the ICC's disposal. However, each victim's experience is different and can impact them in different ways. In determining reparations in the Lubanga case from a collective lens, the ICC may have failed to recognise this individuality and agency of child victims. This article argues that in this way, the ICC failed child soldier victims by sacrificing their individual needs for larger collective considerations.

Given the precedent that the Lubanga reparations order and implementation plan will have, there is a need to recognise that if the ICC, or other international criminal tribunals, will lean towards collective reparations because of limited funds and resources, these processes and the reasoning behind the decisions taken by the Court need to be properly explained to victims. Court officials, lawyers and others working with victims need to constructively and exhaustively engage with the affected communities, and to understand and respect the varied needs of victims. While the international community may see the value in symbolic collective reparations, these reparations may not be as significant for the individual victim who is struggling to recover and get by. This dilemma demonstrates the uphill task of developing reparations programmes that can address individual as well as collective needs, without sacrificing one for the other.

## **I. Background to the Conflict and Case**

The background to the conflict was provided for in the public redacted version of the Closing Brief of the V02 Group of Victims dated 1 June 2011.<sup>2</sup> In the Closing Brief, the circumstances that led to the conflict arising were succinctly summarised. The inter-ethnic violence that arose in the DRC began in July 1999, and in 2002 the population of Ituri was 'plunged into conflict over land distribution and the ownership of natural resources'<sup>3</sup> as a result of the trade in and growing interest in the natural resources found in the district (which included gold, petroleum, timber, coltan and diamonds).<sup>4</sup> The multi-ethnic Ituri region,

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a/0053/09, a/0249/09, a/0292/09, a/0398/09 and a/1622/10), ICC-01-01/01-06, V01 team of legal representatives, 18 April 2012, para. 12.

<sup>2</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Closing Brief of the V02 Group of Victims, ICC-01/04-01/06, Trial Chamber I, 1 June 2011.

<sup>3</sup> *Idem*, para. 16.

<sup>4</sup> *Idem*, para. 14.

which consisted of a majority Hema population and other ethnic groups such as the Lendus, had coexisted peacefully before, making a living primarily off of agricultural activities. The violence that broke out in 2002 was then taken advantage of by local politicians who sought to control these resources and consolidated their power from the income they made through the trade in these resources.<sup>5</sup>

One such politician, Thomas Lubanga Dyilo (Lubanga) formed (and then became the President of) the *Union des Patriotes Congolais*, or the Union of Congolese Patriots (UPC), later renamed *Union des Patriotes Congolais/Reconciliation et Paix*, or the Union of Congolese Patriots/Reconciliation and Peace.<sup>6</sup> Lubanga established the military wing of his party, the *Forces Patriotiques pour la Liberation du Congo*, or the Patriotic Forces for the Liberation of Congo (FPLC) and became its head. In this capacity, from July 2002 to December 2003, Lubanga and other members of the FPLC ‘undertook the large-scale enlistment of children under the age of fifteen years who were trained in the FPLC training camps [...] and who subsequently participated actively in hostilities.’<sup>7</sup> It must be noted that some Hema child soldiers allegedly voluntarily joined the FPLC, though it can be argued that voluntary recruitment of children is often not voluntary at all, and that communities even encouraged this voluntary recruitment of children<sup>8</sup>, or were unaware that the recruitment of children into the armed forces was a war crime<sup>9</sup>. International criminal law assumes that those under 15 are not capable of exercising their consent when it comes to voluntarily joining armed groups.<sup>10</sup>

Lubanga was charged and later convicted by the ICC along with his co-perpetrators for agreeing to, and participating in, a common plan to build an army, whose purpose was to establish and maintain control over the Ituri region. It was because of the implementation of this common plan that children under the age of 15 were conscripted into the UPC/FPLC between 1 September 2002 and 13 August 2003.<sup>11</sup> Lubanga’s role in the UPC and FPLC and his awareness of his role, his exercise of authority and implementation of UPC/FPLC policies and plans, including the recruitment of children under the age of 15 and making them participate in hostilities, led to the charges and later conviction by the ICC.<sup>12</sup>

Lubanga was found guilty of the war crime of ‘enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities’ on 14 March 2012 and was sentenced on 10 July 2012 to 14 years’ imprisonment. This verdict and sentence was confirmed by the Appeals Chamber two years later, in December 2014.<sup>13</sup>

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<sup>5</sup> *Idem*, paras. 18–9.

<sup>6</sup> *Idem*, para. 19.

<sup>7</sup> *Idem*, para. 21.

<sup>8</sup> M.A. Drumbl, ‘Unlawful Recruitment and Use of Children: From Proscription to Prevention’, *Reimagining Child Soldiers in International Law and Policy*, 2012, p. 15.

<sup>9</sup> E. Birchall, E. Francq & A. Pijnenburg, ‘The International Criminal Court and Reparations for Child Victims of Armed Conflict, Briefing Paper No. 4 (2011)’, at [http://www.essex.ac.uk/tjn/documents/paper\\_4\\_children\\_in\\_conflict\\_large.pdf](http://www.essex.ac.uk/tjn/documents/paper_4_children_in_conflict_large.pdf), (accessed on 18 March 2017), para. 66.

<sup>10</sup> Drumbl 2012, *supra* note 9, p. 15.

<sup>11</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Case Information Sheet, Situation in the Democratic Republic of the Congo, ICC-01/04-01/06 at [https://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx](https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx) (accessed on 18 March 2017).

<sup>12</sup> Closing Brief of the V02 Group of Victims, *supra* note 3, para. 22.

<sup>13</sup> Case Information Sheet, *supra* note 12.

## II. The Right to Reparation and the Protection of Children

This section will examine the rights children are entitled to, and their right to reparations, from a theoretical point of view, before examining how these rights were manifested before the ICC in the Lubanga case. The right to reparations is recognised in international law. It is enshrined in the United Nations Resolution on Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>14</sup> The preamble to the Basic Principles references the right to a remedy for human rights violations in numerous other international instruments.<sup>15</sup> As mentioned in the preamble to the Basic Principles, children share this right to reparations as protected persons. However, child victims are not a homogenous group and should not be seen as such.

Reparations can take the form of individual reparations, or material benefits, and are usually focused on repairing the harm sustained by an individual. This can take the form of financial compensation or access to services such as health care, education and housing for example. Collective or symbolic reparations focus on repairing the damage sustained to a community as a whole, and includes memorials and monuments, learning centres and public apologies.

The main guiding document that enshrines the rights of children under international law is the Convention on the Rights of the Child (CRC). The CRC recognises children as the main owners of their rights and acknowledges their ‘distinct legal personality.’<sup>16</sup> Two important elements of the CRC that warrant focus and provide overarching guidance throughout this paper are: the best interests of the child, contained in Article 3(1) of the CRC, and the evolving capacities of the child, contained in Articles 5 and 12(1) of the CRC. ‘Working together, these principles recognise the continued need for protection as well as the increasing ability to make personal decisions as children grow in age and maturity.’<sup>17</sup> The CRC also contains no derogation clause, and applies during all times, whether during times of peace or conflict.

The definition of a child in the CRC is pegged at the age of 18, although in the case of an armed conflict this presents a contradiction since the CRC, in Article 38, allows for states to recruit individuals into the armed forces from the age of 15. As the CRC acknowledges, children, by

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<sup>14</sup> The Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law, E/CN.4/RES/2005/35 (16 December 2005).

<sup>15</sup> *Basic Principles* preamble, Article 8 of the Universal Declaration of Human Rights, Article 2 of the International Covenant on Civil and Political Rights, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment, and Article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in Article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), Article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and Articles 68 and 75 of the Rome Statute of the International Criminal Court.

<sup>16</sup> *Idem*, para. 226.

<sup>17</sup> S. M. Miano, ‘Toward a Child-Oriented Approach to Reparations: Reflecting on the Rights and Needs of Child Victims of Armed Conflict’, *The Fletcher Journal of Human Security* XXVIII 2013, at [http://fletcher.tufts.edu/~media/Fletcher/Microsites/praxis/xxviii/article2\\_miano\\_ChildReparatio ns.pdf](http://fletcher.tufts.edu/~media/Fletcher/Microsites/praxis/xxviii/article2_miano_ChildReparatio ns.pdf) (accessed on 18 March 2017), p. 30.

their very nature, require the continued need for protection. Allowing such a low age of recruitment to be determined by states ‘fails to take into account the fact that effective protection of children from the impact of armed conflict requires an unqualified legal and moral commitment, which acknowledges that children have no part in armed conflict.’<sup>18</sup> Even where children allegedly voluntarily join armed forces, these rights should apply, acknowledging that in the best interests of the child, and the evolving capacities of the child, such recruitment could not have been completely voluntary. This is demonstrated in the DRC, as it was then permissible to recruit children into the armed forces at the age of 15. In the *Lubanga* case, the ICC therefore charged Lubanga with the recruitment of child soldiers under the age of 15, as children above the age of 15 could be recruited into the armed forces. This is despite the definition of the child being pegged at the age of 18 by the CRC.

The ICC has a reparations mandate as set out by the Rome Statute, which entered into force on 1 July 2002.<sup>19</sup> The ICC can only make an order for reparations ‘subject to a judgment of guilt and the criminal conviction of the accused.’<sup>20</sup> Article 75 of the Rome Statute contains the obligation for the ICC to establish the principles relating to reparations.<sup>21</sup> The Court makes an order for reparations against a convicted person, and can, as stated in Article 75(2), order that a reparations award be made through the TFV.<sup>22</sup> The ICC, following the guidance provided in the Basic Principles, can define the concept of reparations as one that ‘goes far beyond the notion of financial compensation alone and should include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.’<sup>23</sup>

Reparations are and should rightfully be central to healing. It is important to consider both individual and collective reparations, when considering what reparations should be awarded to fulfil this central objective. Although the issue of child soldiers had been examined before the Special Court for Sierra Leone, the *Lubanga* case before the ICC was very significant because, unlike in Sierra Leone, it was the first time the issue of reparations for former child soldier victims had been addressed. The reparations order in *Lubanga* is therefore significant because it will undoubtedly lay a precedent for similar situations in the future.

Reparations implemented in isolation from other transitional justice measures can be counter-productive. Individual and collective reparations should be implemented together and should be undertaken as part of other truth-seeking and transitional justice mechanisms. They are ‘likely to be less effective if they do not have direct impact on the victims’ situation.’<sup>24</sup>

Article 15 of the Basic Principles states that reparations should be ‘adequate, effective and prompt’ and ‘proportional to the violations and the harm suffered’<sup>25</sup>. The Basic Principles have identified the following forms for reparations; 1) restitution, 2) compensation, 3) rehabilitation, 4) satisfaction and 5) guarantees of non-repetition.<sup>26</sup> When looking at each of the five forms of

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<sup>18</sup> G. Machel, *UN study on the impact of armed conflict on children*, New York: United Nations 1996 para. 231.

<sup>19</sup> 2002 Rome Statute of the International Criminal Court, 2187 UNTS 90, (1998).

<sup>20</sup> Birchall, Francq & Pijnenburg 2011, supra note 10, para. 16.

<sup>21</sup> Rome Statute, supra note 20, art. 75.

<sup>22</sup> *Idem*, art. 75(2).

<sup>23</sup> Birchall, Francq & Pijnenburg 2011, supra note 10, para. 133.

<sup>24</sup> UNICEF Innocenti Research Centre in cooperation with the International Center for Transitional Justice, ‘Children and Truth Commissions’ 2010 at [http://www.unicef-irc.org/publications/pdf/truth\\_commissions\\_eng.pdf](http://www.unicef-irc.org/publications/pdf/truth_commissions_eng.pdf), p. 52.

<sup>25</sup> Basic Principles, supra note 16, art. 15.

<sup>26</sup> Basic Principles, supra note 16, arts. 19-23.

reparations, from the lens of child soldier victims, there are several ways to inform reparations based on the best interests and evolving capacities of children, and this is examined in the paragraphs below. Informing reparations from the perspective of child victims helps to shift the narrative from the child being a vulnerable person who is a victim of the circumstances into a more resilience-oriented approach. Consulting with children throughout the reparations process and shaping a reparations award around their views and considerations also helps to acknowledge the agency of children.

The first of the five identified forms of reparations as articulated in the Basic Principles, restitution, aims to restore victims back to their circumstances before they faced violations. One crucial way for children to have restitution is for them to return to their communities and more importantly, to reintegrate back into the community. There are often several difficult stigmas associated with returning, especially for girl victims who may have experienced sexual violence. Restitution for child victims in armed conflict is also important to ensure that they are not recruited into similar situations of armed conflict again. ‘When returning home causes harm or contradicts children’s preferences, doing so may not be in their best interest and may not facilitate authentic restitution. Whether young people decide to reintegrate into their places of origins or to resettle elsewhere, measures of support, such as transitional homes, should be provided to help restore them to their original situation.’<sup>27</sup>

Compensation is the second listed form of reparations in the Basic Principles. While the direct economic compensation in the form of cash may seem like the most obvious means of reparations, it may not always be in the best interests of the child. Compensation in this form could cause strain in communities and among families that do not receive such financial compensation. A more effective approach would be to consider the child’s long-term interests. This can include education grants and training that would make up for lost opportunities. Such measures also have the added value of enhancing the well-being of the community and reducing the risk of stigmatisation for the child victims.

In situations of armed conflict, where children have been involved in hostilities and are victims of the violence these situations entail, irreparable damage has been done to the ‘relationships and social fabric among individuals, communities, societies and cultures.’<sup>28</sup> It was therefore crucial that the reparations order in the DRC recognised the need to address the healing of these relationships and the social fabric.

### **III. Reparations Submissions before the ICC**

This section examines the submissions and observations on reparations made by the legal representatives of victims, the Office of the Public Counsel for Victims (OPCV), and other parties (UNICEF and other non-governmental organisations) before the ICC in the Lubanga case. As the legal representatives for the victims who made applications before the ICC, the V01 and V02 legal representative teams made submissions to the ICC on the types of reparations requested by their clients. The OPCV was given leave to make observations on reparations before the Court as it was appointed the legal representative for all the remaining unrepresented applicants for reparations. UNICEF and other organisations were similarly allowed to make reparations submissions due to their expertise and experience working with

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<sup>27</sup> *Idem*, p.37.

<sup>28</sup> D. Mazurana & K. Carlson, ‘Children and Reparation: Past Lessons and New Directions,’ *Innocenti Working Paper 2010-08*, p. v.

children in conflict situations. These actors were best-placed to represent the victims in the reparations deliberation, because of their direct contact with and representation of victims, presumably therefore making reparations submissions that have acknowledged the agency of children, and are made in their best interests and with their evolving capacities in mind.

### III.1 Victims and Counsel for Victims Groups

The types of reparations requested by the child soldier victims aimed to reintegrate them into society. These requests took the form of grants for education, access to employment opportunities and other monetary means to facilitate reintegration.

The Legal Representatives of the V01 group of child soldier victims, in their observations on the sentence and reparations, noted that among the views and concerns elicited from their relatively small group of clients, these views and concerns were ‘widely divergent. This may be partly because these victims do not form a group and are acting individually. On other points, however, their views and concerns clearly converge.’<sup>29</sup> This highlights the disparity between victims as they did not see themselves as a collective group, which influenced their requests for individual reparations (which included employment opportunities, microcredit and medical and psychological care). The V01 submission noted the difficulties in having collective reparations because ‘even though the Ituri community suffered from Lubanga’s crimes, it also supported and collaborated with the leaders who engaged in these crimes, such that an award for reparations to the whole Hema community would not be reasonable and could be perceived as unjust by other communities.’<sup>30</sup> However, nine out of twelve of the former child soldiers<sup>31</sup> supported several collective measures such as an outreach campaign and the creation of a memorial, to ‘benefit the social group of former child soldiers as a whole without being perceived as unjust or encouraging the enlistment of children in future conflicts, in particular initiatives that could encourage the reintegration of former child soldiers into society.’<sup>32</sup> What is commendable is that the victims in the V01 group prioritised, as criteria in determining who should receive reparations, girls who had been infected with HIV or had a child as a result of rape and those who had been victims of sexual abuse or slavery.<sup>33</sup>

The Legal Representatives of the V02 group of child soldier victims, in their observations on sentencing and reparations, stated clearly their preference for reparations to be awarded primarily on an individual basis, ‘because it was the child who suffered personally’<sup>34</sup>, but also that reparations should be considered for all children who were recruited into the armed forces, who may not have taken part in the proceedings. Collective reparations were also argued for to avoid the impression that child soldiers were being rewarded for their participation in the hostilities. The Legal Representatives surmised that, on behalf of their group of victims, the

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<sup>29</sup> *Prosecutor v. Thomas Lubanga Dyilo* Observations on the sentence and reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09 and a/1622/10, ICC-01-01/01-06, V01 team of legal representatives, 18 April 2012, para. 12.

<sup>30</sup> *Idem*, para. 16.

<sup>31</sup> *Idem*, paras. 18–9.

<sup>32</sup> *Idem*, para. 17.

<sup>33</sup> *Idem*, para. 29.

<sup>34</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Observations of the V02 group of victims on sentencing and reparations, ICC-01-01/01-06, V02 team of legal representatives, 18 April 2012, para. 16.

reparations order should be both individual and collective, and that individual reparations should be considered with the aim of restitution and compensation, while collective reparations should be considered with the aim of rehabilitating the community.<sup>35</sup>

While this article does not delve into this issue in detail, it acknowledges the unfortunate exclusion of gender-based violence in the crimes for which Lubanga was prosecuted, and the Appeal Chamber's finding that the definition of victims as provided for in rule 85(a) of the Rules of Procedure and Evidence did not include those who had suffered harm as a result of the commission of crimes within the jurisdiction of the Court. The Appeals Chamber unfortunately found that sexual and gender-based violence could not be defined as a 'harm resulting from the crimes for which Mr. Lubanga was convicted.'<sup>36</sup> This confirmed the Trial Chamber's findings that there was insufficient evidence to suggest that Lubanga had ordered or encouraged, or was even aware of, sexual violence occurring during the conflict. Despite significant evidence of sexual exploitation by armed forces, the Trial Chamber had found that it was 'unable to conclude that sexual violence against the children who were recruited was sufficiently widespread that it could be characterised as occurring in the ordinary course of the implementation of the common plan for which Mr. Lubanga is responsible.'<sup>37</sup>

However, the Appeals Chamber did find that such victims of sexual and gender-based violence should not be precluded from benefitting from the TFV's assistance activities. The Appeals Chamber was of the view 'that it is appropriate for the Board of Directors of the Trust Fund to consider, in its discretion, the possibility of including such victims in the assistance activities undertaken according to its mandate under regulation 50(a) of the Regulations of the Trust Fund.'<sup>38</sup> The Appeals Chamber also suggested that the draft implementation plan should include a referral process for victims of sexual and gender-based violence to other NGOs that provide appropriate services.

### **III.2 Office of the Public Counsel for Victims**

The OPCV provided valuable insight into the reparations that should be ordered for child victims in their submission. As the legal representative for any unrepresented applicants before the Court, the OPCV received applications for reparations and filed submissions on the principles concerning reparations that the Chamber should consider 'on behalf of those victims who have not submitted applications but who may fall within the scope of an order for collective reparations'<sup>39</sup>.

From the outset of the OPCV's observations, the infeasibility of individual reparations was highlighted. Unfortunately, this was based purely on practical considerations, as the OPCV observed that the convicted person had no assets which could have been used to support the

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<sup>35</sup> *Idem*, para. 20.

<sup>36</sup> *Idem*, para. 196.

<sup>37</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06, Trial Chamber I, 10 July 2012, para. 74.

<sup>38</sup> *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 A A 2 A 3, 3, Appeals Chamber, 3 March 2015, para. 199.

<sup>39</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Observations on issues concerning reparations, ICC-01-04/01-06, Office for the Public Council for Victims, 18 April 2012, para. 6.



reparations award. Another practical consideration given undue cause was the limited resources at the TFV's disposal.<sup>40</sup> The OPCV was of the view that a combination of individual and collective reparations would be the best solution.

### III.3 OPCV – Individual Reparations

The OPCV suggested limiting individual reparations to the former child soldiers and their close family members. The OPCV advocated for the concept of 'project of life' as first developed by the Inter-American Court of Human Rights, acknowledging that there is no existing form of compensation that could fully repair the harm suffered by child soldier victims. The concept of 'project of life' recognises that each individual has a life plan that allows for the full self-actualisation of the person and that damage suffered to one's life plan is irreparable or only repairable with great difficulty. Acknowledging that former child soldiers who have suffered severe physical injury or psychological trauma may experience a greater disruption to their 'project of life', the OPCV argued that all those who had been recruited at a young age would have been 'deprived of vital aspects of their childhood' which would impact the quality of their 'project of life' in the future.<sup>41</sup> The OPCV also recognised this especially with regard to victims of sexual violence who were involved with armed groups.

The Office recommended that the application of the 'project of life' concept in the Lubanga case should depend on the individual's specific needs and should include '*inter alia* reintegration into society, physical and mental health care, provision of some form of education or vocational training and sustainable work opportunities.'<sup>42</sup> This is very much in line with what the victims had requested. In fact, the OPCV observations went on to say that the Trial Chamber should not request any proof of damage to their 'life plan' from the victims based on the concept of 'project of life'. 'Indeed, the very fact of conscription of children below the age of fifteen into the FPLC between September 2002 and 13 August 2003 constitutes *per se* sufficient proof of damage to the "life plan" of the former child soldiers concerned.'<sup>43</sup> This is a very positive interpretation as it does not unduly place a heavy burden on child soldier victims to prove the harm they suffered.

While recommending individual reparations for child soldier victims and their family members, the OPCV did not believe that this should come in the form of giving cash compensation to the former child soldiers. The OPCV was mindful that this could have negative repercussions and would defeat the purpose of giving reparations.

### III.4 OPCV – Collective Reparations

With regards to collective reparations, the OPCV looked at this from various angles, taking several factors into consideration. For instance, non-material damage suffered by child soldier victims, non-material damage suffered by the family members of child soldier victims, and the compensation of medical expenses and collective reparations in a larger sense. The OPCV did note that 'for the purpose of implementing such collective reparations, some form of individual

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<sup>40</sup> *Idem*, para. 12.

<sup>41</sup> *Idem*, para. 54.

<sup>42</sup> *Idem*, para. 57.

<sup>43</sup> *Idem*, para. 60.

identification and verification process would be required.<sup>44</sup> The OPCV suggested that any collective reparations in the Lubanga case should first be directed at the former child soldier victims and their relatives and notes that this is in line with the TFV's rehabilitation mandate. Collective reparations should also be considered for a precise community affected by the recruitment of children into the armed forces and in such cases, would not need to identify individual beneficiaries. Symbolic measures were also considered, including public apologies and acknowledgements of responsibility, commemorations and tributes, inclusion of an accurate account of violations in training and education and guarantees of non-repetition. These measures were also encouraged because they would not entail significant financial commitments.<sup>45</sup> However the OPCV suggested leaving it up to the TFV to decide on the actual design of such a reparations programme.<sup>46</sup>

While individual reparations are deemed important and necessary for individual victims, they are often not feasible due to a lack of financial ability on the defendant's part and the general lack of resources from another implementing body (whether that be a national government or the TFV for example). However, as stated above, it is difficult to identify collective reparations without some level of individual identification.

The OPCV favoured a collective approach to the reparations award in this case, as the legal representative of a significantly large group of victims. While this may have been necessary to encompass all or most of the child victims in the Lubanga case, individual applications for reparations were not given the full weight that they deserved.

### **III.5 Observations by UNICEF and NGOs**

UNICEF was granted leave by the Trial Chamber to make representations in the reparations proceedings on 20 April 2012. UNICEF noted their own expertise in the protection of children, especially children who had been recruited by armed forces and highlighted their own experience in the DRC and in the Ituri district itself, justifiably giving them more local knowledge and experience than any other actor during the trial process at the ICC. UNICEF submitted that the Court should grant a reparations order that contained both individual and collective reparations, based on the overriding consideration of the best interests of the victims based on Article 3 of the CRC.

UNICEF noted the importance of individual reparations which 'highlight the value of each human being, and confirm that each is an individual rights-holder, which is particularly important for child victims.'<sup>47</sup> This did not take away from the importance of collective reparations however, and UNICEF did acknowledge the importance of addressing the needs of the affected communities to 'avoid the dilemma of granting reparations only to those victims who have been reached and who have had the ability to come forward.'<sup>48</sup> UNICEF suggested the need for individual reparations to be flexible enough to include rehabilitation measures that would benefit the communities at large.

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<sup>44</sup> *Idem*, para. 84.

<sup>45</sup> *Idem*, para. 109.

<sup>46</sup> *Idem*, para. 95.

<sup>47</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Submission on the principles to be applied, and the procedure to be followed by the Chamber with regard to reparations, ICC-01/04-01/06, United Nations Children's Fund, 10 May 2012, para. 7.

<sup>48</sup> *Ibid.*

Their submission can be summarised as follows:

- ‘(a) reparations should be designed with the best interests of the victims as a primary consideration, recalling that they were children at the time;
- (b) the eligibility for reparations in this case should be assessed as broadly as possible;
- (c) reparations should do no harm and should be applied in a non-discriminatory manner;
- (d) in formulating reparations, the local and national contexts should be understood and respected and thus the views of the victims, their families and communities should be a major consideration in formulating reparations; and (e) reparations should be crafted to promote non-repetition of the crimes.’<sup>49</sup>

This article agrees with UNICEF that individual and collective reparations ‘are not mutually exclusive, but rather mutually reinforcing.’<sup>50</sup> At least till the Appeal Chamber decision, there appeared to be a misunderstanding among many actors before the Court that collective reparations would rule out the possibility of individual reparations and that awarding individual reparations would not benefit a larger community group who should perhaps rightfully receive such benefits.

Whether one considers there to be a hierarchy of reparations, in that individual reparations should come first followed by collective reparations, or that individual reparations should be conceived broadly enough to benefit the wider community, either approach allows for a broad inclusion of victims who would be able to access the benefits from a reparations order. This is especially so for those who may not have come forward to make an application for reparations, such as women and girls, out of fear or concerns of stigmatisation. It is also here that collective reparations have an important role to play because ‘community reparations would mitigate the serious risk that non-Hema communities, notably the Lendu community, may perceive reparations granted by the Court as a ‘reward’ to Hema children who were associated with Lubanga’s armed group.’<sup>51</sup>

Like UNICEF, the International Centre for Transitional Justice (ICTJ) was also granted leave to make representations on reparations before the ICC. The ICTJ, acknowledging the limited resources for reparations, felt that ‘the award of reparations in this case should prioritise the immediate and direct victims of the crime, i.e. the victims of forced recruitment committed by the convicted person, their immediate families and persons who suffered harm as a result of intervening to prevent victimisation.’<sup>52</sup> This however did not mean that the ICTJ felt the need to exclude larger, community-based reparations but considered the importance of giving effect to reparations to immediate victims. The ICTJ suggested awarding individual compensation to immediate victims, but was also cognisant of the potential dependence on financial compensation that victims could develop and the high expectations this could set. However, the ICTJ argued that this practical consideration should not ‘reflexively respond to unrealistic expectations about individual reparations by either proposing the concept of ‘collective reparations’ as a default approach or by proposing the payment of a lump sum of money that makes no distinctions among victims’ experience and needs.’<sup>53</sup>

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<sup>49</sup> *Idem*, para. 6.

<sup>50</sup> *Idem*, para. 12.

<sup>51</sup> *Idem*, para. 36.

<sup>52</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Submission on Reparations Issues, ICC-01/04-01/06-2842, International Centre for Transitional Justice, 10 May 2012, para. 15.

<sup>53</sup> *Idem*, para. 18.

UNICEF and the ICTJ, along with the legal representatives for both victims' groups, clearly indicated a preference for individual reparations, informed by direct consultations with their clients or through their collective experience working with children in armed conflict situations. However, no party suggested excluding collective reparations at the expense of individual ones, and in fact all highlighted the benefits of having a reparations order that would contain both. Giving recognition to the harm suffered by individual victims, they advocated for a hierarchy of reparations, with individual reparations as a priority, recognising the impossibility of having one form of reparations without the other.

#### **IV. Reparations Order in March 2015**

On 3 March 2015, the Appeals Chamber of the ICC issued its Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with its amended order for reparations. This judgment was very significant because it established a reparations regime on the liability of the convicted person and his accountability towards victims.

The initial Decision establishing the principles and procedures to be applied to reparations issued by the Trial Chamber on 7 August 2012 mostly passed on the application of the reparations regime to the Trust Fund for Victims and found that reparations should be awarded through the TFV. The Trial Chamber was of the view 'that the TFV is well placed to determine the appropriate forms of reparations and to implement them.'<sup>54</sup> The Trial Chamber also did not issue a reparations order against Lubanga himself because he was indigent. 'This approach was visibly geared at facilitating swift collective reparation. But it caused disappointment among victims and triggered separate appeals by legal representatives of Victims V01 and Victims V02 who sought express judicial recognition of accountability and harm.'<sup>55</sup>

The V01 team of legal representatives appealed the Trial Chamber's decision on the following grounds: the Trial Chamber had erred in law first, by dismissing the individual applications for reparations without entertaining them and second, by absolving the convicted person from any obligation as regards reparations, in violation of Article 75(2) that determines that reparations orders should be made against a convicted person.<sup>56</sup> The OPCV and the V02 team of legal representatives also made a joint appeal against the Trial Chamber's reparations decision, similarly appealing against the Trial Chamber's dismissal of individual applications for reparations without considering their merits and allowing the TFV the 'unfettered discretion to decide whether applicants are to be included in reparations programme.'<sup>57</sup> The submission

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<sup>54</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, Trial Chamber I, 14 March 2012, para. 266.

<sup>55</sup> C. Stahn, 'Reparative Justice after the Lubanga Appeals Judgment on Principles and Procedures of Reparation', *EJIL:Talk!* 2015, at <http://www.ejiltalk.org/reparative-justice-after-the-lubanga-appeals-judgment-on-principles-and-procedures-of-reparation> (accessed on 18 March 2017).

<sup>56</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Appeal against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparation of 7 August 2012, ICC-01/04-01/06, V01 team of legal representatives, 3 September 2012, para. 19.

<sup>57</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Appeal against Trial Chamber I's Decision establishing the principles and procedures to be applied to reparation of 7 August 2012, ICC-01/04-01/06, V02 team of legal representatives, 24 August 2012, para. 11.

highlighted that the Trial Chamber had failed to give victims the full effect to their right to reparations.

The Chamber's key findings were, firstly, that an order for reparations under Article 75 of the Rome Statute needed to contain, at a minimum, five essential elements. These included directing the order for reparations against the convicted person, clearly indicating the convicted person's liability with respect to the reparations awarded and the harm caused to the victims, and explain the reasoning behind the type of reparations awarded, whether collective, individual or both.<sup>58</sup>

The Appeal Chamber stated that the convicted person's liability for reparations had to be proportionate to the harm caused, and that only victims who had suffered harm as a result of the crimes for which Lubanga was found guilty were eligible for a reparations claim. 'Where an award for reparations is made to the benefit of a community, only members of the community meeting the relevant criteria are eligible.'<sup>59</sup>

The Appeals Chamber also notably recognised the individual liability of an accused person for reparations, reversing the Trial Chamber's decision to not hold Lubanga liable for reparations, with the Appeals Chamber stating that the 'obligation to repair harm arises from the individual criminal responsibility for the crimes which caused the harm and, accordingly the person found to be criminally responsible for those crimes is the person to be held liable to reparations.'<sup>60</sup> The Chamber also noted that such individual liability for reparations was consistent with the UN Basic Principles. The Appeals Chamber furthermore found that the Trial Chamber had erred in considering Lubanga's indigence as a factor for liability for reparations, and noted that the indigence of the convicted person 'is not an obstacle to imposing liability because the order may be implemented when the monitoring of the financial situation of the person sentenced reveals that he or she has the means to comply with the order.'<sup>61</sup>

It is argued that this determination on Article 75 of the Rome Statute was a 'clear victory for victims who sought express judicial acknowledgement of accountability, independently of the perpetrator's indigence. It strengthens the expressivist dimensions of ICC reparations which are of key importance, in light of the limited resources of the Trust Fund.'<sup>62</sup> By expressly ordering reparations against the convicted person, even if ordered through the TFV, these expressivist dimensions were strengthened. While several parties to the proceedings, especially the TFV, were consistently advocating for reparations to have a wider scope and that they should not be limited by the charges in order to reach a broader group of victims, the Appeals Chamber has decisively said that the scope of reparations needed to be tied to a conviction.

The Appeals decision clarified several potential misunderstandings on the nature of reparations that the Trial Chamber had awarded, with several parties being under the impression that the Trial Chamber had awarded both individual and collective reparations. Another potential misunderstanding was that individual reparations requests that had been filed pursuant to rule

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<sup>58</sup> *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 A A 2 A 3, 3, Appeals Chamber, 3 March 2015, para. 1.

<sup>59</sup> *Idem*, para. 8.

<sup>60</sup> *Idem*, para. 99.

<sup>61</sup> *Idem*, para. 104.

<sup>62</sup> Stahn 2015, *supra* note 56.

94 of the Rules of Procedure and Evidence were to be decided upon by the TFV. The V01 Legal Representatives of Victims argued that the Trial Chamber ‘violated the right of the victims to have their individual requests examined and adjudged by the Trial Chamber when it delegated this decision to the ‘unfettered discretion’ of the Trust Fund.’<sup>63</sup> The Appeals Chamber found that the Trial Chamber awarded reparations only on a collective basis and had not made any individual reparations orders, and mentioned the Trial Chamber’s endorsement of the TFV’s community-based approach which ‘would be more beneficial and have greater utility than individual awards, given the limited funds available and the fact that this approach does not require costly and resource-intensive verification procedures.’<sup>64</sup> The Appeals Chamber noted the uncertainty about the type of reparations that had been awarded by the Trial Chamber but also noted that when the decision is read as a whole ‘and particularly in light of the Trust Fund’s Observations on Reparations upon which the Impugned Decision is based, this reference was not intended to order reparations on both a collective and individual basis.’<sup>65</sup>

On the transmission of individual reparations applications to the TFV, the Appeals Chamber noted that victims made applications for individual or collective reparations without knowing what type of reparations would be finally adopted. The Appeals Chamber highlighted the need to obtain victims’ consent in seeking their participation in the design of collective reparations, in light of the principle identified by the Trial Chamber that reparations are voluntary.

The fifth element of a reparations order under Article 75 is that a reparations order should identify the victims who are eligible to benefit from reparations or set out the criteria for their eligibility. The Trial Chamber did not identify eligible victims under Article 75, although it did identify characteristics of groups of eligible victims.<sup>66</sup> The Appeals Chamber recalled that it was those who suffered harm as a result of the crimes committed by Lubanga who could claim reparations against him. It follows that there needed to be such a causal link between the harm suffered by those in that community and the crimes that Lubanga was found guilty of. The Appeals Chamber was of the view that broad formulations of reparations as suggested by the Trial Chamber could lead to those not meeting the criteria being included in the reparations award and ‘considers that the Impugned Decision is erroneous in this respect and must be amended to clarify that members of communities are entitled to an award for reparations in so far as the harm they suffered meets the criterion of eligibility in relation to the crimes of which Mr Lubanga was found guilty.’<sup>67</sup> However, the Appeals Chamber still favoured the TFV’s approach by considering the possibility of including people in the affected communities even where they did not necessarily meet this criteria, because the ‘meaningfulness of reparation programmes with respect to a community may depend on inclusion of all its members, irrespective of their link with the crimes for which Mr Lubanga was found guilty.’<sup>68</sup>

It is important for those in the ICC determining a reparations order and its implementation to not assume that child victims have the same priorities as adult victims or that child victims share ‘a uniformity of needs or priorities.’<sup>69</sup> Victims in Lubanga sought reparations that would help them lead a dignified life and while it is unfortunate that the ICC’s reparations award lost its

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<sup>63</sup> Appeals Chamber judgment, supra note 39, para. 137.

<sup>64</sup> Trial Chamber judgment, supra note 55, para. 274.

<sup>65</sup> Appeals Chamber judgment, supra note 39, para. 141.

<sup>66</sup> *Idem*, para. 205.

<sup>67</sup> *Idem*, para. 214.

<sup>68</sup> *Idem*, para. 215.

<sup>69</sup> Mazurana & Carlson 2010, supra note 29, p. 25.

focus on some of these aspects of individual healing for the benefit of community healing, it has managed to award a reparations order that places significant emphasis on this.

### **V. Trust Fund Filing on Reparations and Draft Implementation Plan of 3 November 2015**

The Trust Fund submitted its Filing on Reparations and Draft Implementation Plan on 3 November 2015, following a request for extension from the original deadline in September 2015. Referencing the Basic Principles and the five forms of reparations, the TFV reiterated in its Filing on Reparations the Appeal Chamber's finding that restitution in a situation of enlisting and conscripting child soldiers is unachievable, given their experience and the time that has now passed since the crimes occurred. 'In the view of the Trust Fund it is therefore conceptually impossible that any collective form of reparations award could result in restoring the *status quo ante* for all victims in this case.'<sup>70</sup>

The Trust Fund therefore limited its reparations to collective reparations only, following the Appeal Chamber's decision. This was to include reparative measures such as rehabilitation and other types of reparations, including symbolic, preventative and transformative reparations, and the provision of medical services as stated by the Appeals Chamber. The Trust Fund noted 'that its experience has convinced it to rely on what it refers to as "integrated reparations programming" – organizing the delivery of material support (livelihood), physical and psychological rehabilitation as an integrated collective reparations programme.'<sup>71</sup> The Trust Fund indicated that the Draft Implementation Plan will be implemented over three years from the completion of the procurement process.<sup>72</sup> The Trust Fund has committed 1 million Euros towards the reparations awards in the *Lubanga* case, following a formal declaration on Lubanga's indigence.<sup>73</sup>

The Trust Fund distinguished between direct and indirect victims, and stated that 'the beneficiary of reparations must fall within the definition of victim'<sup>74</sup>. The definition of indirect victim was limited to 'family members of direct victims, persons who attempted to prevent the commission of one or more of the conviction crimes, persons who suffered harm when helping or intervening on behalf of direct victims, and persons who suffered personal harm as a result of the offenses'<sup>75</sup> as stated in the Appeals decision. This is a relatively narrow definition of indirect victims and therefore allows for reparations to benefit those most affected by the crimes Lubanga was convicted of.

The Trust Fund also adopted a low standard of proof for the presumption of psychological harm in order to prove causality with the crimes for which Lubanga was convicted. In the best interests of the child, this paper agrees with the Trust Fund's approach to adopt such a presumption of psychological harm once a child's participation in military activities has been

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<sup>70</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Filing on Reparations and Draft Implementation Plan, ICC-01/04-01/06, The Trust Fund for Victims, 3 November 2015, para. 193.

<sup>71</sup> *Ibid*, para. 212.

<sup>72</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Filing on Reparations and Draft Implementation Plan Annex A, Draft Implementation Plan for collective reparations to victims, ICC-01/04-01/06-3177, Trust Fund for Victims, 3 November 2015, para. 173.

<sup>73</sup> *Idem*, paras. 174–5.

<sup>74</sup> *Idem*, para. 6.

<sup>75</sup> *Idem*, para. 8.

established.<sup>76</sup> This presumption of harm also extends to indirect victims due to the harm suffered by direct victims through their service in the UPC and FPLC. Such a low standard of proof is welcomed as it helps to capture the many direct and indirect victims in the reparations order that chose not to, or were unable to, file reparations requests.

Concerns were expressed by the Trust Fund about reparations exacerbating existing ethnic tensions between the Hema and Lendu communities. As most of those eligible for reparations in this case would be predominantly from the Hema ethnic group, it could heighten existing ethnic tensions. The Trust Fund noted that the problem is ‘exacerbated when consideration is given to the other two Ituri affiliated cases before the Court, the case of the *Prosecutor v. Katanga* and the *Prosecutor v. Ntaganda*’<sup>77</sup> and that Hema could receive more reparations from these other two cases while the Lendu will yet again not receive any. While this is a very valid concern, the reparations order in the Lubanga case needs to and has addressed the child victims who served in the UPC/FPLC. The ethnic considerations, though valid, should not expand the reparations order too wide such that it takes away from the direct child victims in this case.

In determining the number of potentially eligible victims, the Trust Fund regrettably admitted that despite their best efforts, it was not in a position to assist the Court with identifying a definite number of potentially eligible victims, both direct and indirect.<sup>78</sup> The TFV, for planning purposes, therefore estimated the number of victims based on the information at hand and puts this number at 3,000 potentially eligible direct and indirect victims, adding that a final determination will be made during the plan’s actual implementation.<sup>79</sup>

The TFV seems to have conflated several of its assistance activities and reparations. Noting the overlap, the TFV did state that the ‘Trust Fund would respectfully like to underline again that reparations and assistance are two distinct mandates. By providing these examples under the assistance mandate the Trust Fund does not want to indicate that Mr Lubanga’s financial liability should be limited to what the Trust Fund deemed the most effective use of its resources under the assistance mandate.’<sup>80</sup> However, it is quite clear that the draft implementation plan has been heavily influenced by the TFV’s existing assistance mandate and its past experience in delivering this mandate.

When drafting the implementation plan, the Trust Fund, based on the Appeal Chamber’s request, considered the views of those victims who directly participated in the proceedings. While the Chamber noted that these views should not take precedence over other victims, it is clear that they had a significant role in shaping the reparations plan. It is this author’s opinion that it is unfortunate that while the role of those victims who directly participated in the proceedings was crucial, their role had also been sacrificed for wider collective considerations in the implementation plan that the Trust Fund drafted. Despite practical considerations and the sheer number of victims in these situations, collective reparations should not substitute a victim’s right to individual reparations, and risks devaluing the harm suffered by individual victims.

## **VI. Did Reparations Progress Victims’ Rights or Fail Them?**

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<sup>76</sup> *Idem*, para. 18.

<sup>77</sup> *Idem*, para. 22.

<sup>78</sup> *Idem*, para. 26.

<sup>79</sup> Trust Fund Filing on Reparations, *supra* note 71, para. 253.

<sup>80</sup> *Idem*, para. 267.



By entrusting the entire reparations order to the TFV at the ICC, the Court endorsed the Trust Fund's approach to reparations (a collective, community-based approach)<sup>81</sup>. The question here is whether the ICC had to endorse the TFV's approach, in light of Lubanga's individual liability and his indigence. Given that UNICEF notes that more than thirty times that number of children 'were released from armed groups in Ituru just one year after the events of the present case took place'<sup>82</sup>, perhaps such an approach was the only available option in order to truly reach all child victims who were recruited by Lubanga. The ICC and Trust Fund have tried to strike a balance here, by limiting the reparations award to their relatively narrow definition of direct and indirect victims.

It is this author's opinion that in dismissing individual child soldier victims' applications for reparations that were filed before the Court, the ICC failed them. The Trust Fund's screening process during the implementation of the Draft Implementation Plan 'obviates the need for prior submission of applications and justifying documentations by victims'<sup>83</sup>. Asking individual victims to file such reparations claims seems futile if they were never going to be considered on such an individual basis. By engaging with child soldier victims throughout the reparations process, including through the consultations that shaped the draft implementation plan, the ICC has acknowledged their agency in the process. However, disregarding their individual views for a pre-determined collective approach undermines this agency. It has been argued that expectations should have been set from the start of the whole trial and reparations process that while their individual requests could not have been fulfilled, their individual needs and experiences could help to shape the larger collective reparations order. 'The participatory process of developing and implementing the collective reparations programme recognizes that victims occupy a central role in the process of designing and implementing reparations that are meaningful and beneficial to victims.'<sup>84</sup> Given the role of the TFV in drafting and implementing the reparations order and their leaning towards a predominantly collective-based reparations and assistance programme, such a bias was bound to occur and should have been foreseen from the start.

Rather than responding to the suffering of individual child soldier victims, the TFV's community-based approach supposes that it was the community that suffered, despite the community's active support of child recruitment during the conflict.<sup>85</sup> In being unable to separate their mandate to provide assistance to victims from their reparations mandate, the TFV may be 'undermining its ability to acknowledge and remedy individual victims' suffering.'<sup>86</sup> The Court and TFV should not collectivise the experience of each victim only because they were commonly recruited into the same armed force.

However, the Trust Fund, in their filing on reparations and draft implementation plan, has tried to achieve what appears to be a very balanced reparations order in theory. Whether such a balance is achieved remains to be seen. The ICC and TFV have acknowledged individual criminal responsibility for reparations and this promotes accountability in the transitional justice

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<sup>81</sup> C. Ferstman, 'The Dilemma of Reparations', United States Institute of Peace, 14 October 2012, available at <http://www.usip.org/olivebranch/the-dilemma-reparations> (accessed on 18 March 2017).

<sup>82</sup> UNICEF submission, *supra* note 48, para. 9.

<sup>83</sup> Draft Implementation Plan, *supra* note 71, para. 29.

<sup>84</sup> *Idem*, para. 23.

<sup>85</sup> L. Moffet, 'Justice for Victims in Lubanga Case?', 4 March 2015, available at <https://justicehub.org/article/justice-victims-lubanga-case> (accessed on 18 March 2017).

<sup>86</sup> *Ibid.*

process. The relatively narrow definition of direct and indirect victims manages to encompass those who were most affected by the crimes for which Lubanga was convicted. While the Lubanga reparations order may not have been able to contain all the express wishes of the 129 individual victims, although this author argues that this should have been the priority, the draft implementation plan was able to include many direct victims of Lubanga's crimes who did not file a reparations claim for one of several reasons, including fear and stigmatisation. The lack of consistency in a victim's testimony was also not considered a reason for their disqualification for reparations.<sup>87</sup> This acknowledges the trauma that many victims would have suffered and allows for their inclusion in obtaining reparations.

The Trust Fund's 'thick approach', in which it does not just take into account human behavior but also its context as well, allowed it to address the various dimensions and manifestations of harm suffered by the victims in this case.<sup>88</sup> In addressing the harm suffered by victims, it allowed for the inclusion of sexual and gender based violence as it is not possible to 'disaggregate the harm of sexual and gender based violence from the range of other harms that male and female soldiers have experienced as a result of their enlistment, conscription and use under Thomas Lubanga.'<sup>89</sup> This is a definite success of the Draft Implementation Plan by the Trust Fund as it has managed to address the Court's exclusion of the victims of sexual and gender based violence.

The Trust Fund, recognising the victims' loss of identity, family, and ties to their community through their recruitment in an armed group, and noting the reparations requested by victims in initial consultations, has proposed a reparations programme that 'will promote rehabilitation and healing; and will contain provisions for medical and psychological treatment of trauma experienced by recruited youth, as well as, offer socio-economic support initiatives.'<sup>90</sup> This also included group therapy for families affected<sup>91</sup> and 'vocational and accelerated literacy training; and improving the capacity of victims to access economic opportunities; conflict resolution and gender training for victims and communities, life skills development, gender-sensitive training addressing gender-based violence, peace education and promotion of a culture of peace in affected communities.'<sup>92</sup> The TFV faced numerous considerations from victims and the affected communities and had the unenviable task of balancing different needs, while facing financial and logistical constraints. However, despite this near impossible task at hand, this paper believes that the TFV has come up with as good as a reparations plan as seems possible under the circumstances.

## Conclusion

This paper has argued that the reparations order did not fully address the needs of the children who were the main victims in this case. By ordering collective reparations, victims' individual experiences and needs were not addressed. The agency of child victims was acknowledged in their consultations throughout the formulation of the reparations plan, but this was then not given due weight when prioritising collective reparations over individual ones. Collective reparations also ignored the community's part in supporting child recruitment during the conflict, which was seen as acceptable during the time. However, this paper has also shown that

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<sup>87</sup> Draft Implementation Plan, *supra* note 71, para. 53.

<sup>88</sup> *Idem*, para. 40.

<sup>89</sup> *Idem*, para. 40.

<sup>90</sup> *Idem*, para. 68.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Idem*, para. 69.

collective reparations were the only sustainable option given the various considerations in this case. These considerations include the need to reach the most victims possible despite limited resources, although restricted by the Appeals Chamber to those harmed by the crimes using child soldiers. There was also a conscious awareness by the various parties involved that the reparations order should not exacerbate ethnic tensions. By compensating only individual victims, who were mostly Hema child soldiers, there was the very real possibility of exacerbating ethnic tensions. The Trust Fund has done an admirable job in drafting a reparations plan that includes most of the victims' requested reparations, with the exception of financial compensation. Given the limited resources and finances that the Court has, the Trust Fund has still managed to mostly preserve the victims' wishes despite this.