

**RETRIBUTIVE AND RESTORATIVE JUSTICE
FOR VICTIMS AND RECONCILIATION:
CONSIDERATIONS ON THE *LUBANGA* CASE BEFORE THE ICC**

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ABSTRACT: Prosecution of crimes and redress for victims lie at the heart of the mandate of the International Criminal Court. The fact that both are equally weighted and that victims have a voice in Court's proceedings have been welcomed as important achievements of international criminal justice. Indeed, the other existing international criminal institutions do not provide for participation of victims in the criminal debate leading to the recognition of the liability of suspects. This improvement follows from a holistic understanding of the purpose of international criminal prosecutions: to deliver both retributive and restorative justice. While justice must be effectively delivered in order to have a deterrent effect and an impact in educating the public and helping propagating important concepts such as international harmony and equal worth of all persons, without a restorative component it cannot have a real impact on the interests of victims. This is particularly true in post-conflict societies when justice initiatives should be driven by the three goals of restoring the rule of law, restoring the rights that were violated and ensuring that there is a distributive element which benefits victims and contributes to addressing political and economic discrimination. In this context, international criminal prosecutions may be a vehicle to contribute to national reconciliation and to the restoration and maintenance of peace. This article proposes some considerations on the first ICC proceedings in relation to the role that victims can play in the process for the establishment of the truth through their participation and the impact that international criminal proceedings may have for national reconciliation.

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SUMMARY: 1. *Introduction* - 2. *The participation of victims before the ICC* - 3. *The Lubanga proceedings and its implication for victims* - 4. *The Lubanga proceedings for reconciliation in the DRC* - 5. *Conclusion*

1. *Introduction*

Prosecution of crimes and redress for victims lie at the heart of the mandate of the International Criminal Court (ICC). The fact that both are equally weighted and that victims have a voice in ICC proceedings have been welcomed as important achievements of international criminal justice. Indeed, the other existing international criminal institutions do not provide for participation of victims in the criminal debate leading to the recognition of the liability of suspects. This improvement follows from a holistic understanding of the purpose of international criminal prosecutions: to deliver both retributive and restorative justice.

Retributive justice, as the fundamental concept inherent to all criminal prosecutions, was accepted as a crucial objective for the ICC: to uphold due process rights and the rule of law. Essentially, it is an expression of outrage by the international community against the intolerable and heinous acts of individuals who have “violated societal norms” and who, as a result, are deemed deserving of punishment in the form of “punitive measures [...] assigned through unilateral processes.”¹

At the international level, retributive justice also plays a fundamental role in educating the public about what happened, and, in so doing, helps propagate important concepts for international harmony such as the equal worth of all persons and that “no

¹ See, D.M. GROMET AND J.M. DARLEY, “Retributive and Restorative Justice: Importance of Crime Severity and Shared Identity in People’s Justice Responses”, in *Australian Journal of Psychology* 2009-61, p. 50.

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one is above universal human rights criteria and that blatant disregard for those rights will not be condoned.”²

However, a system that principally rests on prosecution of perpetrators has its limitations. Some authors argue that international prosecutions alone cannot properly address crimes entailing gross human rights violations because “[T]he strict victim/perpetrator dichotomy does not account for the variety of ways in which ordinary individuals come to participate in violent actions”.³

Moreover, the *ad hoc* tribunals and the ICC are located far from the countries where the atrocities were committed. This distance contributes to the isolation of victims from the prosecutions. According to some commentators, this practical concern is exacerbated by the fact that these institutions are inclined to characterise victims in a post-conflict situation as driven by a sense of grief or revenge too strong to enable them to contribute either to the immediate trials or efforts to further the peace process through a measured criminal justice process.⁴

A further limitation to a system built on retributive justice alone is the fact that international criminal law focuses on mainly prosecuting high-ranking officials. While it is not an explicit legal requirement that only the most senior leaders are prosecuted, the reality is that systems in place, with limited resources, cannot afford prosecutions for all possible suspects. The selectivity of perpetrators (and crimes) is a serious limitation to the justice that international criminal law can deliver to victims and to its healing capacity.

Restorative justice, therefore, is important in making the specific circumstances and needs of victims more integral to the international criminal justice process as it

² See, ANDRIEU K. “Transitional Justice: A New Discipline in Human Rights”, in *Online Encyclopedia of Mass Violence*, 2010, p. 5.

³ *Ibidem.* p. 7.

⁴ See, LUNDY AND MCGOVERN M., “Whose Justice? Rethinking Transitional Justice from the Bottom up”, in *Journal of Law and Society* 2008-35, p. 278.

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encourages the shift towards incorporating the victims' interests within the criminal proceedings.⁵

While neither of the justice outcomes sought suffices when pursued separately, combined they can come closer to actually delivering on the promise of justice.

The United Nations promote a holistic approach to transitional justice, which includes both restorative and retributive objectives.⁶ This is argued to be particularly important in post-conflict societies when justice initiatives should be driven by the three goals of restoring the rule of law, restoring the rights that were violated and ensuring that there is a distributive element which benefits victims and contributes to addressing political and economic discrimination. Elements of both retribution and restoration are present in this approach: to address the human rights violations, the perpetrators must be punished; to restore the rule of law and address unequal distribution of resources, measures must be designed which take the specific needs of the victims and the conditions within society into account.

Based on experience and research to date, it may be argued that elements of both restorative and retributive justice need to be present for international criminal law to deliver justice outcomes that are full and fair. International criminal justice deals with the most heinous crimes, which undeniably trigger deep international moral outrage. Moreover, international crimes often occur in intra-state conflict situations where it is a matter of neighbour against neighbour and community against community. These are circumstances where there is a close relationship between victims and perpetrators, so reconciliation becomes an important objective to achieve.

⁵ See, MARKUS FUNK T., *Victims' Rights and Advocacy at the International Criminal Court*, Oxford, OUP, 2010, 4 ; and A. H. GUHR, "Victim Participation During the Pre-Trial Stage at the International Criminal Court", in *International Criminal Law Review* 109, 110 - 2008, 8.

⁶ See, *The Rule of Law in Conflict and Post-Conflict Societies: Report of the Secretary-General*, S/2004/616, § 6, 2004.

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However, a state in transition is extremely fragile and volatile. More often than not, post-conflict societies must deal with dysfunctional institutions, limited resources and traumatised populations in an environment marked by huge failures in the judicial sector and a lack of public confidence in the government's ability to deliver on human rights, peace and security. Justice becomes quite a relative concept in such a context. Oftentimes there is a strong need for national and international action to ensure that justice is perceived as effective and actually delivered. This means that, in societies suffering from mass atrocities on a scale incomprehensible to those who have not lived through them, it is crucial that the response is timely and takes a broad view of justice, incorporating both retributive and restorative elements. In this regard, there is increased recognition that in the delivery of justice outcomes, victims - like perpetrators - must be subjects as well as objects.

The fact that the ICC has the possibility to provide for both retributive and restorative justice has the potential for effectively addressing impunity where national courts are not yet willing or able to do so and can play an important role in a comprehensive justice approach. Moreover, the fact that the ICC may intervene while the conflict is still on-going invites debate on peace and justice.

The question whether prosecuting people for core international crimes is an obstacle to peace is an old one. Peace and justice are not mutually exclusive. On the contrary, impunity fosters the desire for revenge in those victimized by mass crimes, and thus incentivizes a restart of the conflict. In this context, the actions of the ICC may have an 'extra-judicial' impact insofar it may have positive effects on the ground, easing on-going tensions which in turn can facilitate national reconciliation understood as the long-term setting aside of disputes between previously fighting groups.⁷

This article proposes some considerations on the first ICC proceedings in relation to the role that victims can play in the process for the establishment of the truth

⁷ See, MÉNDEZ J.E., National Reconciliation, Transitional Justice and the ICC, in *Ethics and International Affairs*, Vol. 15, Issue 1, p. 25-44,2001.

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through their participation in the proceedings and the impact that international criminal proceedings may have for national reconciliation.

2. The participation of victims before the ICC

One of the main innovations of the Rome Statute has been to change the role of victims from witnesses – constituting the majority of the incriminatory or exculpatory evidence presented in the proceedings – to the one of autonomous participants.⁸ From now on, they do not anymore support the thesis developed by one of the parties in the proceedings, namely the Prosecution or the Defence, as traditionally understood, but they present “their views and concerns” in an independent manner, benefiting from rights and obligations deriving from their status of *participants* in the proceedings. The Rome Statute provides for the participation of victims at any stage of the proceedings. Victims have to submit their request to the Registrar in writing, preferably before the beginning of the phase of the proceedings in which they wish to participate to.

Several provisions of the legal texts of the ICC provide expressly for a role to play by victims in specific proceedings. Participation of victims to specific proceedings may also be inferred from other provisions of the Rome Statute which do not explicitly confer a role to victims, but, when read in conjunction with article 68(3) of the Statute,

⁸ See, DONAT-CATTIN D., The Rights of Victims in ICC Proceedings, in *Collection of Essays on the Rome Statute of the International Criminal Court* (F. Lattanzi & W. Schabas eds.) 1999. See also, DONAT-CATTIN D., Article 68 - Protection of victims and witnesses and their participation in the proceedings, in *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, Second Edition (O. Triffterer), 2008.

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may allow victims to present their views and concerns when their personal interests are affected.⁹

Victims participate in the proceedings by expressing their “views and concerns”. Taking into account the jurisprudence developed by the Court, this expression correspond to the manner of participation and specifically to the modalities of participation which are ruled upon by the Chambers.¹⁰ Indeed, the legal instruments of the Court do not provide details about the modalities of participation of victims in the proceedings.

It is important to note that Chambers have repeatedly stated that the modalities of participation shall ensure a meaningful – as opposed to a symbolic – participation of victims. Victims may respond to the submissions from other participants in the proceedings once they have been authorised to participate, express their views and concerns to the Chamber orally or in writing, have access to the documents contained in the record of the case, be notified of public documents filed – as well as of confidential documents when their personal interests are affected – to present evidence and to challenge the admissibility and relevance of evidence submitted by the other participants, to question witnesses, including experts, to testify as witnesses or to appear in person before a Chamber.

In the vast majority of the cases, victims participate through their lawyers who file written submissions and/or present oral arguments on their behalf. In this regard,

⁹ See article 15(3) of the Rome Statute, as well as article 19(3) of the Rome Statute, rule 59(3) of the Rules of Procedure and Evidence. In accordance with article 19 of the Rome Statute, victims may submit observations to the Court. Rule 59 of the Rules of Procedure and Evidence provides that victims having communicated with the Court in relation to the case may make representations to the relevant Chamber in writing. See also the proceedings deriving from the application of article 53 of the Rome Statute and rule 92(2) of the Rules of Procedure and Evidence (decision of the Prosecutor not to initiate an investigation or not to prosecute), as well as articles 56(3) and 57(3)(c) of the Rome Statute (measures to preserve evidence ; measures for the protection and privacy of victims) in accordance with rules 87 and 88 of the Rules of Procedure and Evidence, or more broadly rule 93 of the Rules of Procedure and Evidence.

¹⁰ See rule 89(1) of the Rules of Procedure and Evidence.

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continuous contacts between counsel and victims are essential. From these exchanges, counsel gains an in-depth knowledge of the file of each client, allowing him or her to be able to present their stories, their views and concerns to the judges, to the other participants and to the public. In practice, legal representation can be provided by a lawyer from the list of counsel maintained by the ICC, as well as by a lawyer of the Office of Public Counsel for Victims, an independent section within the Court which provides support and assistance directly to victims or their legal representatives.¹¹

The legal representation is generally organised collectively given the large number of victims who wish to participate in proceedings. This corresponds to the “common legal representation”. In such a case, the Chamber and the Registry shall ensure that the individual interests of each of the victims forming the group are taken into consideration and that no conflict of interest arises between them.

The presence of a legal representative enables victims both to benefit from a legal expertise and to be heard before the Court, without being exposed to risks for their security and well-being. Legal representatives of victims are bound by the Code of Professional Conduct for Counsel in the same manner as any counsel appearing before the Court. They are in general authorised to participate in hearings and the scope of their intervention is regulated by the modalities of participation established by the Chamber for the benefit of victims in a specific situation or case.

The established rights granted to victims is very much dependant on the perspectives and interpretation proposed by legal representatives themselves in each case in their submissions to the relevant Chambers. This makes the richness of the developing system, but is also a factor of fragility. Indeed, the first proceedings before the Court have demonstrated the very complex nature of the legal framework of said proceedings and allow concluding that the effective participation of victims mainly depends on the interpretation by the Chambers of the relevant provisions of the legal

¹¹ See regulations 80 and 81 of the Regulations of the Court.

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texts. Furthermore, the answers to the questions of the aim of the participation of victims in proceedings before the ICC, and about the modalities which would render such participation *effective* are still not, to the certain extent, addressed.

Regarding the manner in which the Chambers interpret the relevant provisions, the practice has shown different approaches depending on whether participation is granted at the preliminary stage – where modalities of participation are rather restrictive – or at trial – where legal representatives are entitled to access confidential documents, to present evidence, to call victims to appear before the Chamber as witnesses or to present their views and concerns in person without taking the oath.

The participation of victims should aim at taking into consideration factors which have always been considered essential by victims of crimes, as well as to establish a methodology which benefit as a large number of victims as possible.

According to numerous studies in the matter, in addition to the right to reparations, the right to receive information regarding the case constitutes one of the most fundamental interests of victims when they participate in criminal proceedings. Victims also attach a great value to the fact of being duly informed and better understand their role in criminal proceedings so as to avoid having false hopes and being disappointed by the process. The protection of their security and well-being, their intimacy, their story and their personality constitutes another fundamental interest for victims. Finally, some commentators consider that victims are generally satisfied when they feel they have been heard.¹²

The entirety of said factors falls under the primary responsibility of the Court itself but also of the legal representatives who are expected to face these challenges. The involvement of victims in the proceedings before the ICC implies the need of taking

¹² See, *inter alia*, NAQVI Y., “The Right to Truth in International Law Fact or Fiction?”, in *International Review of the Red Cross*, vol. 88, June 2006, p. 267; KIZA E., RATHGEBER C., and ROHNE H., *Victims of War: An Empirical Study on War Victimization and Victims Attitudes towards Addressing Atrocities*, Hamburger Institut für Sozialforschung, Hamburg, 2006 available at: <http://www.his-online.de/fileadmin/verlag/pdf/978-3-936096-73-6.pdf>.

into consideration the realities of each country, as well as the cultural and social specificities of the affected communities, and even the ones of the families concerned; factors such as complex and long proceedings to which probably hundreds or thousands of victims will participate while the proceedings will be held far away from the locations where the crimes were committed; the need to constantly inform victims in a language they can understand despite the logistical difficulties to reach them so that they can express their views and concerns and consequently to represent their interests in the proceedings.

The first proceedings concluded before the ICC (the *Lubanga* proceedings) shows that justice matters for victims and that they expect a careful, independent, fair, transparent, effective and watchful justice, mindful of the rights of all participants in the proceedings. A justice which is protective and restorative, able to establish the truth about the crimes that have been committed.

3. *The Lubanga proceedings and its implications for victims*

On 14 March 2012 Trial Chamber I of the ICC delivered its judgment in the case of Thomas Lubanga Dyilo.¹³ Shortly afterwards, on 10 July 2012, Lubanga was sentenced to 14 years of imprisonment.¹⁴

Lubanga was charged and found guilty of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities in the Ituri region in the Democratic Republic of the Congo (DRC) between 2002 and 2003.

The judgment marks the first time that a *militia* leader is held responsible for crimes committed within the DRC. The case is particularly significant for the development of jurisprudence concerning child soldiers. It builds upon relevant decisions of other tribunals, including those of the Special Court for Sierra Leone, and

¹³ See, *The 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.

¹⁴ See, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, Trial Chamber I, 10 July 2012.

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sets a very high standard for the prohibition of the use of child soldiers. It applies even if, for example, their families support their actions due to the circumstances of the conflict. A high threshold for accountability is also established in relation to children who played an ‘indirect role’ (who were forced to carry out daily activities which might not necessarily require the use of weapons or combat). Indeed, in examining the level of danger the child was exposed to, the judges “[f]ound that both the ‘child’s support and this level of consequential risk’ meant that a child could be actively involved in hostilities even if he or she was absent from the immediate scene of the conflict.”¹⁵

While the judgement marks a significant step against the punishment of crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities, it is also criticised for its overly narrow focus. In particular, sexual and gender-based violence (SGBV) crimes were not included in the charges brought against Lubanga despite the notorious fact said crimes were committed as part of the recruitment practice, as shown during the trial by numerous witnesses who testified that such crimes were in fact committed. This is at best inconsistent with a growing appreciation that crimes and human rights violations specific to women are not just a casualty of conflicts, but a deliberate tool thereof. The importance of tackling violence against women more holistically in conflict and post-conflict situations was stressed at the ICC Review Conference held in Kampala in 2010.¹⁶

The exclusion of SGBV crimes has caused disappointment among victims who considered that the presentation of the Prosecution case did not fully take into account what happened to them and the extent of their victimisation. In turn, this choice by the Prosecution not to charge any gender-based crimes will limit the possibility for victims to ask for reparations of the harms suffered in contrast with the increasing international

¹⁵ See *supra* note 13, paras. 1355–1356.

¹⁶ See, Resolutions and Declarations Adopted by the Review Conference - *The Impact of the Rome Statute System on Victims and Affected Communities*, 2010, RC/Res.2.

recognition that justice demands the strengthened implementation of gender-sensitive reparations schemes.

On 7 August 2012, Trial Chamber I issued the decision establishing principles and procedures to be applied to reparations¹⁷, delegating the reparation regime largely to the Trust Fund for Victims. The judges indicated two goals of reparations, namely to oblige perpetrators to “*repair the harm*” caused, and “to ensure that offenders account for their acts”¹⁸. But they considered it unnecessary to remain seized throughout the reparations proceedings. Furthermore, the Chamber refrained from issuing a reparation order against Lubanga in light of his indigence. It found, instead, that reparations should, in the particular case, be awarded “through” the Trust Fund for Victims and tasked the Fund with the dual mandate of “determine the appropriate forms of reparations and to implement them.”¹⁹

This approach caused disappointment among victims and triggered several appeals. In particular, victims questioned the fact that Lubanga was not considered liable for reparation and that the Chamber only adopted a collective approach to reparations.

On 3 March 2015, the Appeals Chamber rendered its judgment on the principles and procedures of reparation, reversing the Trial Chamber decision and issuing an “amended” Order for Reparations²⁰.

¹⁷ See, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012.

¹⁸ *Ibidem*, para. 179.

¹⁹ *Ibidem*, para. 266.

²⁰ See, *The 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), ICC-01/04-01/06-3129, Appeals Chamber, 3 March 2015.

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The Appeals Chamber's most important conceptual clarification is the establishment of the principle of accountability of the convicted person towards victims which complements the punitive dimensions of the ICC.

The Appeals Chamber recognized a "principle of liability to remedy harm", which flows "from the individual criminal responsibility" of the perpetrator.²¹ It specified that the accountability of the offender must be "expressed" through an order "against" the convicted person, even if reparations are ordered 'through' the Trust Fund in accordance with the second sentence of article 75(2) of the Rome Statute. In this regard, the Chamber held expressly that the indigence of the convicted person is not an obstacle to the imposition of liability for reparations.

This finding is a clear victory for victims who sought express judicial acknowledgment of accountability, independently of the convicted person's indigence.

A second major contribution of the judgment is its articulation of the link between criminal conviction and reparations under article 75. The ICC reparations regime differs from civil claim models due to its *nexus* to the criminal case, and specifically the focus on conviction. The judgment clarifies that "reparation orders are intrinsically linked to the individual whose criminal responsibility is established in a conviction and whose culpability for these criminal acts is determined in a sentence."²²

This approach was not uncontested. At previous stages of the proceedings, several actors, including the Trust Fund for Victims, claimed that reparations should not necessarily be limited by the charges, since reparations pursue different objectives than the trial, namely to provide meaningful compensation to victims. The Appeals Chamber rejected such an approach and linked the scope of reparations under article 75 to the crimes for which the person has been convicted. The Chamber justified this interpretation by two main considerations: (i) its reliance on offender accountability as

²¹ *Idem*, paras. 99–101.

²² *Ibidem*, para. 65.

“main” purpose of reparations; and (ii) the application of standards of fairness towards the convicted person.

While the judgment avoids a specific legal characterization of the ICC reparation system, the Order for Reparation specifies that the causal link between crimes and harm can be based on “*but/for*” causation and “*proximate cause*” which leaves considerable flexibility. Similarly, standards of proofs are more relaxed than at trial, due to the fundamentally different nature of reparation proceedings and the potential difficulty victims may face in obtaining evidence. Causality does not have to be established “beyond reasonable doubt”, it merely requires sufficient proof of the causal link between the crime and harm suffered, which needs to be assessed in light of the specific circumstances of the case.

The Appeals Chamber stressed the need for legal certainty and held that a judicial reparation order must contain at least five “essential elements”:

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

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the harm suffered by the victims and the crimes for which the person was convicted.²³

This approach reconciles the idea of accountability towards victims with the need for specificity and protection of the rights of the convicted persons and it seeks to distinguish the different mandates of the Trust Fund for Victims, namely the “assistance mandate” which is not linked to conviction, and the mandate to implement reparation orders issued by the Chambers.

Moreover, the Appeals Chamber specifically reversed the generic use of the concept of “community” reparations by the Trial Chamber. It clarified that collective reparations to a community require the establishment of a sufficient link between the harm suffered by community members and the crimes for which the person has been convicted.

Considering the way in which the Appeals Chamber has construed the order for reparation, the judgment provides a strong incentive for victims to request the right to lead evidence already in the course of the trial regarding the underlying crimes and localities in which the events occurred, in order to broaden the potential basis for reparations. In this regard, it also might be necessary in the future to reflect upon a possible clearer differentiation at trial between evidence related to the guilty of the accused and aiming at his or her conviction and sentencing, and evidence presented for the purpose of reparations to be heard in accordance with regulation 56 of the Regulations of the Court.

The main implication for the rights of victims is that the Appeals Chamber’s decision makes it clear that the establishment of accountability towards victims through reparation proceedings may be an asset *per se*. It sends a clear message that the Court should not rush over reparation decisions, but listen to victims and pay greater attention to their harm. It also increases the modalities of participatory justice, and options of consultation of victims in designing the reparations scheme which fits their needs.

²³ *Ibidem*, para. 1.

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How the ICC would be able to handle this new type of litigation is unclear. Reparation proceedings may require expertise and skills that differ partly from criminal adjudication of the facts. Moreover, adjudication on reparations may entail longer judicial proceedings, triggering, therefore, the question of the actual benefit for victims. Indeed, lengthy reparation proceedings may have negative effects because of continuous traumatization or re-traumatization, increasing victims' fatigue and causing new grievances.

Moreover, there is a more fundamental question whether and how the perpetrator-centred reparation regime at the ICC can redress damages in situation countries, without creating further harm and societal division. Some authors argue that ICC proceedings may create new dividing lines or hierarchies among victims, through their selectivity, abstraction and processes of inclusion and exclusion.²⁴ The allocation of reparations to victims can be a way for the ICC to bring former enemy communities closer. However, it remains difficult to find a proper balance in the distribution of damages between the groups concerned.

These tensions are even more apparent in proceedings where patterns of victimization reflected in crimes and charges may privilege harm of one group and sideline victimization of others.

The *Lubanga* case already poses this issue since it involved predominantly perpetration and victimization within one group, the Hema population. The Order for Reparations refers at this possible tension where it acknowledges that selectivity "could

²⁴ See, KENDALL S. AND NOUWEN S., Representational practices at the International Criminal Court: the gap between juridified and abstract victimhood, in *Law and Contemporary Problems*, No. 3 and 4, 2013, 235–262.

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give rise to a risk of resentment on the part of other victims and re-stigmatization of former child soldiers within their communities”.²⁵

However, in prioritizing accountability over other societal concerns, such as well-being, security, reconciliation or peace, the Order for Reparations has not solved the dilemma connected to the objectives of reparations. Indeed, relief of suffering, deterrence of future violations, societal reintegration or reconciliation are either not included in the Order or considered as secondary objectives that should be pursued to the extent possible.²⁶

Yet reparations are about more than just responding to victims’ basic needs; reparations must respond to the real impact of violations in victims’ lives and at the same time be received as sincere efforts on the part of the larger society to acknowledge what happened and to provide some real measure of justice to those harmed. Moreover, reparations in restoring the dignity of the victims can help to create the conditions necessary for reconciliation. The community dialogue provides an opportunity for victims and their families to discuss the underlying causes of the conflict, and to address community understandings and perception that can prevent or fuel conflict. This process will help to rebuild trust within and between communities, and foster reconciliation.

In this regard, as indicated above, the Appeals Chamber confirmed the possibility of “collective reparations”, directed to communities, within the limit of a sufficient link between the harm caused to the members of that community and the crimes committed by the convicted person. It recognized the benefits of such a “community-based approach” for prevention and reconciliation, considering that in some specific cases these two purposes among others may justify that all members of a community benefit from collective reparations despite the eligibility criteria.

²⁵ See *The Prosecutor v. Thomas Lubanga Dyilo* , Amended Order for Reparations, Annex A to the “Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations”, *supra* note 20, footnote 44 p. 18.

²⁶ *Ibidem.*, paras. 71 and 72.

In this context an important role can be played by the Trust Fund for Victims. Indeed, peace-building, including reconciliation and reintegration, constitute important components of assistance activities already put in place by the Fund in DRC, such as projects aiming to promote a culture of peaceful coexistence, forgiveness and reconciliation.²⁷

4. *The Lubanga proceedings and its implications for reconciliation in the DRC*

Reparations, however, is not the only way of contributing to reconciliation and restoring peace in a post-conflict society. Sentencing and review of sentence are processes which may certainly impact, positively or negatively, on reconciliation and restoration of peace.

The contribution to promote peace and reconciliation are factors that can be taken into account by the judges when deciding on sentence. In the *Katanga* case, a proceedings dealing with crimes against humanity committed in the Bogoro village, in the Ituri region, in February 2003, in the sentencing decision, the Trial Chamber held that “the efforts undertaken [by the Accused] to promote peace and reconciliation can and must be taken into account in the sentencing and could potentially mitigate the sentence”²⁸, if said efforts are “palpable and genuine, without the need to demand result.”²⁹

²⁷ For an overview of the activities of the ICC Trust Fund for Victims, see at the link <http://www.trustfundforvictims.org/>

²⁸ See, *The Prosecutor v. Germain Katanga*, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07-3484, Trial Chamber II, 23 May 2014, para. 91. See also paras. 114 and 115. For a similar approach, see ICTY, *The Prosecutor v. Plavšić*, Case No. IT-00-39&40/1-S, “Sentencing Judgement”, 27 February 2003, para. 85-94 and 110 where the Trial Chamber stated that the accused played a major role in the conclusion and implementation of the Dayton Agreement, thus facilitating greatly the achievement of peace in the region and deserving a reduction of her sentence.

²⁹ *Ibidem*.

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In the *Lubanga* proceedings, said factors were not mentioned in the sentencing decision; however, some issues in relation to reconciliation and peace in DRC have recently arose in the framework of the discussions for the review of the sentence of the convicted person.

On 21 August 2015, a panel of three judges heard arguments about whether or not to release Lubanga in accordance with article 110 of the Rome Statute which provides that the Court shall review the sentence of a convicted person after he or she has served two-thirds of his or her sentence.

The factors to be taken into account for said review included whether or not Lubanga has demonstrated good behaviour, whether he has expressed remorse or taken action on behalf of victims, as well as the impact that his release might have on the community.

In this regard, the Defence argued that Lubanga should be released because of his good behaviour, because his family connections suggest he will reintegrate easily, and because his return will not destabilize the situation in the Ituri region, area of origin of the convicted person and where the crimes were committed. The Defence further alleged that the situation in the Ituri region is now quiet and that any potential threat presented by Lubanga would be undercut by his intention to continue his studies at the University of Kisangani, rather than returning to Bunia.

Victims on the contrary argued that as long as Lubanga maintains his current attitude, his release and return to the region could reignite tension between the communities, and even within his own community.

The Prosecution similarly argued that the situation on the ground remains sensitive and that Lubanga could destabilize the situation, further claiming that it has evidence that Lubanga may be involved with witness tampering in the on-going case against Bosco Ntaganda, his former chief of staff.

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On 22 September 2015, the panel of three judges unanimously decided that it is not appropriate to reduce Lubanga's sentence.³⁰ Although the judges found that there was a prospect for Lubanga's resocialization and successful resettlement in the DRC, they nevertheless concluded that a reduction of the sentence could not be justified in the absence of any other factors in favor of said reduction. Indeed, the judges determined that there was no indication that Lubanga's conduct while in detention showed a genuine dissociation from his crimes; nor there was indication of any significant action taken by Lubanga for the benefit of victims. In this regard, the panel observed that Lubanga has not responded to the victims' suggestion regarding his involvement in, *inter alia*, the reparation process or a demonstration of regret, which could be acts considered to be of relevance for the reduction of the sentence.³¹

For the purposes of this article, what is important to stress is that the prospect of Lubanga's release has been met with reactions ranging from despair and frustration by victims to satisfaction by the still active UPC network, showing that in post-conflict societies and in societies still menaced by violence achieving reconciliation via a judicial process may still be difficult.

An *excursus* of some of the opinions collected on the ground during the consultation process with victims and local and international stakeholders, such as NGOs, community leaders and activists, shows that there was significant disagreement about the extent to which a possible Lubanga's return would affect security and reconciliation in the region.

Some expressed fear that his return may destabilise the situation, while others indicated that his return could actually reinforce peace and reconciliation. For those fearing Lubanga's return, there is concern that this will inflame the communities that

³⁰ See, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-3173, Appeals Chamber, 22 September 2015.

³¹ *Ibidem*, para. 69.

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fought against the Hema and that it will make victims, witnesses, and intermediaries more vulnerable. Some NGOs expressed the view that the proposed liberation of Lubanga risks undermining the peace process in Ituri, creating other sources of tension and risking reprisals for the victims and intermediaries. Others expressed concern that the upcoming elections, anticipated in November this year, will cause tensions which could be exacerbated by Lubanga's presence in the region.

Not everybody agrees with this assessment and argues that the situation in Ituri is now relatively stable and calm; that the context on the ground has changed and no one wants war and conflicts again. Some even argue that Lubanga's return could actually help consolidate peace. In particular, the *Fondation Vérité, Pardon et Réconciliation* has called on the ICC to "take into account that there is now a dynamic of reconciliation in Ituri among all the communities; the release of Thomas Lubanga would be a detonator that could reinforce this dynamic."³² Justice, Democracy and Development argued that bringing "together around a table of reconciliation Thomas Lubanga, Mathew Ngudjolo, Yves Kahwa and all the other fighters who have been held in prolonged detention without trial in Kinshasa would be a strong signal to the population, to the youth and to the victims to disarm spirits and consolidate mutual pardon."³³

This difference in the approach to Lubanga's possible return can be explained by the fact that for his community, Lubanga is still considered a political leader who has fought for the Hema and who could still have a political role in the region. Lubanga seems also to have some support from religious leaders as indicated by the Defence which produces into evidence a letter from a group of pastors from Ituri stating, *inter alia*, that: "Nous avons constaté que la libération de Chef Kahwa a été accueillie avec joie par toutes les communautés. Le retour de M. Thomas Lubanga sera, de la même

³² See "Reconsidering Lubanga's Sentence: Views from Ituri", accessible at <http://www.ijmonitor.org/2015/08/reconsidering-lubangas-sentence-views-from-ituri/>

³³ *Ibidem*.

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manière, une grande joie, et sera en lui-même un important facteur de réconciliation. Son retour contribuera à la stabilisation politique, sociale et économique de l'Ituri. Il ne pourra en rien compromettre l'ordre public, mais au contraire pourra consolider la pacification et renforcer la cohabitation intercommunautaire".³⁴

5. Conclusion

Victims mention a multitude of reasons for claiming justice. The right to the truth seems one of the components of the right to justice. In this regard, the main interest of victims in the establishment of the facts and the identification of the perpetrators is in itself the essence of the right to the truth generally recognised for the benefit of victims of serious violations of human rights. In the process of implementing this right through criminal proceedings, victims have a key interest in the outcome of the proceedings which ought to bring clarity in relation to what really happened, and fill the gaps which might persist between the procedural findings and the truth itself.

Victims wish to contribute to the search and the establishment of the truth. This process entails the speaking out, the sharing of events happened to them, the recognition of the harm suffered from, as well as of the crimes which generated said harm.

The right to reparations is also one of the essential components of the right to justice. Indeed, the process of participation has a cathartic and healthy virtue at an individual level, as well as a restorative virtue at a family, social and community level. If the choice of victims to ask to participate in the proceedings is first and foremost an

³⁴ See, *The Prosecutor v. Thomas Lubanga Dyilo*, Second public redacted version of "Observations of the Defence for Mr Lubanga on a reduction in sentence", referenced ICC-01/04-01/06-3151-Conf-Exp, of 14 July 2015, Annex 3 Redacted, page 4: "We have noted that the release of Chef Kahwa was greeted with joy by all the communities. The return of M. Thomas Lubanga will be, in the same way, a great joy and an important factor for reconciliation. His return will contribute to political, economic and social stabilization." (Not an official translation).

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individual step, which allow each of them, mostly through their counsel, to convey part of their experience and knowledge of the events, said choice also sometimes become a collective step getting together communities, neighbours and families.

Finally, it is also a question for victims to advance the facts so that reconciliation can be achieved through the punishment of the persons responsible for the crimes committed, that justice is done and hoping that their courage will set an example to prevent the commission of crimes “of concerns to the international community”.³⁵

In this context, international criminal prosecutions may be a vehicle to contribute to national reconciliation and to the restoration and maintenance of peace.

The fact that the Rome Statute does not contain any reference to reconciliation and peace does not prevent the ICC from playing a *de facto* role in such processes. Indeed, ICC proceedings may be seen as establishing the judicial truth about relevant contextual and specific aspects of the conflict, defining who the persons responsible for the crimes are and doing justice for the victims. As such, the judicial proceedings and subsequent reparations may have a considerable psychological impact that can encourage reconciliation on the ground. These three *de facto* effects of the ICC’s action may foster reconciliation between those affected by the conflict.

While tensions can exist between peace and justice efforts, it does not necessarily mean that the ICC will constitute a threat to peace and reconciliation. Rather, the ICC can contribute to peace by working within the objective of an encompassing justice, and by following a holistic strategy. Not only political parties and leaders take part in reconciliation processes, entire communities do. It is within the community that people progressively start trusting each other again, and become ready to build a common future. In that sense, reconciliation constitutes both a process and goal for those peoples who have endured gross violations of human rights.

³⁵ See the Preamble of the Rome Statute.

