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ORIGINAL ARTICLE

INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

To divide or not to divide: Innovations on liability for reparations in the *Ntaganda* case

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Abstract

In 2021, the *Ntaganda* case introduced a new approach to evaluating the monetary liability for reparations in the International Criminal Court (ICC) by explicitly recognizing joint and several liability and centring the determination of the quantum of reparations on the harm suffered by the victims and the costs to repair it. As suggested by the *Ntaganda* Trial Chamber, these two innovations promote a stronger separation between the reparation process and the criminal trial, in order to consolidate a compensatory and victim-centred approach to reparations awarded by the ICC. This article critically appraises the innovations in *Ntaganda* through the lens of Article 21 of the Rome Statute, focussing on three elements: (i) the evolving jurisprudence on monetary liability in the ICC prior to the *Ntaganda* case; (ii) the case law on reparations of hybrid criminal courts; and (iii) the notion of general principles of law derived from the national legal systems of the world, in the sense of Article 21(1)(c) of the Statute. The article argues that, despite its victim friendly veneer, the approach introduced in *Ntaganda* should not be taken for granted. Besides the fact that multiple important aspects and ramifications of this approach remain unaddressed, those two innovations may have serious implications for the victims, the convicted persons, and the ICC's reparations process as a whole.

Keywords: International Criminal Court; joint and several liability; liability for reparations; *Ntaganda* case; reparations

1. Introduction

The International Criminal Court (ICC or the Court) is the first international(ized) penal jurisdiction with the authority to award reparations to victims.[1] This competence, set down in Article 75(1) of the Rome Statute,[2] is one of the most praised features of the ICC system.[3] Despite its significance, the statutory framework of the Court on reparations is very rudimentary[4] and the practice of the ICC in this area remains scarce,[5] with only five reparation orders issued in

[1]C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (2012), at 99; W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2016), at 1138.

[2]1998 Rome Statute of the International Criminal Court, 2187 UNTS 3, Art. 75(1).

[3]See Evans, *supra* note 1, at 99.

[4]M. Åberg, *The Reparations Regime of the International Criminal Court: Reparations or General Assistance?* (2014), at 18; C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (2012), at 131.

[5]See Schabas, *supra* note 1, at 1139.

approximately two decades: in the *Lubanga*,[6] *Katanga*,[7] *Al Mahdi*,[8] *Ntaganda*,[9] and *Ongwen*[10] cases. As Luke Moffett claimed, 'there has yet to be a shared understanding on how reparations should look at the ICC'.[11]

Arguably, the most consequential of those five cases in the realm of reparations was *Lubanga*, in which, in March 2015, the Appeals Chamber established the general principles on reparations that the Court has been using ever since (*Lubanga* principles).[12] Although some developments were introduced in *Katanga*[13] and *Al Mahdi*[14] to adapt and expand the framework put in place by the Appeals Chamber, the reparations order issued in *Ntaganda* stands out as the ruling in which for the first time, the *Lubanga* principles were expanded more substantially.[15] Besides other innovations,[16] the *Ntaganda* Trial Chamber may have instituted a shift in the ICC towards seeing financial liability for reparations solely through compensatory lenses. This shift materialized in two main aspects. First, the Trial Chamber determined that the primary factors in determining the convicted person's monetary liability are the harm caused to victims and the costs to repair it, excluding from the analysis factors pertaining to the convicted person's degree of participation and culpability in the crimes that gave rise to the harm and the potential monetary liability of others for the same offenses.[17] Second, if there is a plurality of perpetrators, all of them are jointly and severally responsible *in solidum* for the damages,[18] meaning that 'the victim can recover the full amount of reparations from one of the responsible actors, which can, in turn, require compensation from the other responsible actors that may have contributed to the damage'.[19]

[6]*Prosecutor v. Thomas Lubanga Dyilo*, Corrected Version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', ICC-01/04-01/06-3379-Red-Corr-tENG, T.Ch., 21 December 2017; *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', ICC-01/04-01/06-3466-Red, A.Ch., 18 July 2019.

[7]*Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, ICC-01/04-01/07-3728-tENG, T.Ch., 24 March 2017; *Prosecutor v. Germain Katanga*, Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute', ICC-01/04-01/07-3778-Red, A.Ch., 8 March 2018.

[8]*Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, ICC-01/12-01/15-236, T.Ch., 17 August 2017; *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public Redacted Judgment on the Appeal of the Victims against the 'Reparations Order', ICC-01/12-01/15-259-Red2, A.Ch., 8 March 2018.

[9]*Prosecutor v. Bosco Ntaganda*, Reparations Order, ICC-01/04-02/06-2659, T.Ch., 8 March 2021; *Prosecutor v. Bosco Ntaganda*, Judgment on the Appeals against the Decision of Trial Chamber VI of 8 March 2021 Entitled 'Reparations Order', ICC-01/04-02/06-2782, A.Ch., 12 September 2022; *Prosecutor v. Bosco Ntaganda*, Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659, ICC-01/04-02/06-2858-Red, T.Ch., 14 July 2023.

[10]*Prosecutor v. Dominic Ongwen*, Reparations Order, ICC-02/04-01/15-2074, T.Ch., 28 February 2024.

[11]L. Moffett, 'Reparations for Victims at the International Criminal Court: A New Way Forward?', (2017) 21(9) IJHR 1204, at 1204.

[12]*Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to Be Applied to Reparations' of 7 August 2012 with AMENDED Order for Reparations (Annex A) and Public Annexes 1 and 2, ICC-01/04-01/06-3129-AnxA, A.Ch., 3 March 2015.

[13]For example, the *Katanga* Trial Chamber innovated by recognizing the concept of transgenerational harm (see *Katanga* Reparations Order, *supra* note 7, para. 132).

[14]F. Capone, 'An Appraisal of the Al Mahdi Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes against Cultural Heritage', (2018) 16(3) JICJ 645.

[15]L. Moffett and C. Sandoval, 'Tilting at Windmills: Reparations and the International Criminal Court', (2021) 34(3) LJIL 749, at 751; T. Hamilton and G. Sluiter, 'Principles of Reparations at the International Criminal Court: Assessing Alternative Approaches', (2022) 25(1) MaxPlanckUNYB 272, at 289.

[16]See M. Lostal, 'The Ntaganda Reparations Order: A Marked Step towards a Victim-Centred Reparations Legal Framework at the ICC', *EJIL:Talk!*, 24 May 2021, available at www.ejiltalk.org/the-ntaganda-reparations-order-a-marked-step-towards-a-victim-centred-reparations-legal-framework-at-the-icc/.

[17]See *Ntaganda* Reparations Order, *supra* note 9, paras. 96, 217.

[18]Ibid., para. 219.

[19]A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', (2013) 34 *Michigan Journal of International Law* 359, at 422.

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This article evaluates the new approach to financial liability for reparations asserted in *Ntaganda*, presenting a critical analysis of those two main aspects the case introduced. As the methodological setting for this evaluation, the present piece ratifies the assertion by Tomas Hamilton and Göran Sluiter that the legal regime on reparations at the ICC has been developed mostly on the basis of 'shaky doctrinal foundations' instead of a rigorous assessment of legal sources.[20] As they argued, while Article 75(1) of the Rome Statute provided the judges of the Court with significant latitude to establish principles relating to reparations, this provision should not be interpreted as granting the Court *carte blanche* to exercise this competence.[21] Rather, Article 75(1) should be applied with due deference to Article 21 of the Statute,[22] the provision listing the sources of law the Court must rely on.[23]

After presenting in more detail the two innovations on monetary liability for reparations the *Ntaganda* case brought (Section 2), the article will assess this new approach in three steps. First, in line with Article 21(2) of the Rome Statute, it will discuss how these innovations should be seen in light of the ICC's case law prior to the *Ntaganda* reparations order (Section 3). Second, taking a systemic perspective, the article will compare the developments in *Ntaganda* with the jurisprudence of the hybrid criminal courts with competence to grant reparations[24] (Section 4). Third, it will evaluate whether those two innovations could be considered general principles of law derived from the national legal systems of the world, in the sense of Article 21(1)(c) of the Rome Statute (Section 5).

2. The *Ntaganda* reparations order: A new approach on financial liability for reparations in the ICC

On 8 March 2021, the *Ntaganda* Trial Chamber issued its reparations order, finding Bosco Ntaganda (Ntaganda) liable for USD 30,000,000.[25] After the Appeals Chamber partially reversed the decision,[26] the Trial Chamber published an addendum to its original order on 14 July 2023, enhancing parts of its reasoning and increasing Ntaganda's liability to USD 31,300,000.[27] The Appeals Chamber upheld the addendum on 1 November 2024.[28] This section aims at presenting the innovative method the *Ntaganda* Trial Chamber laid down to determine the monetary liability for reparations in the ICC, with focus on two aspects: (Section 2.1) the exclusion of

[20]See Hamilton and Sluiter, *supra* note 15, at 272.

[21]Ibid., at 276.

[22]Ibid., at 276–84.

[23]*Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, P.T.Ch., 4 March 2009, para. 126.

[24]The ICC noted that 'the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute', to the effect that the judicial decisions of other bodies are 'in no sense binding' or 'automatically applicable' to the Court (*Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T.Ch., 14 March 2012, para. 603; *Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, T.Ch., 30 November 2007, para. 44). In any case, pursuant to the goal of delivering solid legal reasoning, the ICC often relies on the case law of other courts depending on the persuasive value of these decisions (A. Z. Borda, 'The Direct and Indirect Approaches to Precedent in International Criminal Courts and Tribunals', (2013) 14 *Melbourne Journal of International Law* 1, at 7). Therefore, an assessment based on external judicial decisions is warranted, even though they are not mentioned in Art. 21 of the Rome Statute.

[25]See *Ntaganda* Reparations Order, *supra* note 9, para. 247.

[26]For a list of errors identified by the Appeals Chamber see *Ntaganda* Addendum to the Reparations Order, *supra* note 9, para. 7.

[27]Ibid., para. 360.

[28]*Prosecutor v. Bosco Ntaganda*, Judgment on the appeals against the decision of Trial Chamber II of 14 July 2023 entitled "Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659", ICC-01/04-02/06-2908-Red, A.Ch., 1 November 2024.

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factors other than the harm suffered by the victims and the costs to repair it; and (Section 2.2) the explicit recognition of joint and several liability.

2.1 The exclusion of factors other than the extent of the harm and the costs to repair it

According to the *Ntaganda* Trial Chamber, to ascertain the quantum of reparations to which a convicted person is liable, 'the primary consideration should be the extent of the harm and the costs to repair it. Other criteria, such as modes of liability, gravity of the crimes, or mitigating factors are not relevant to this determination'.[29] The amount of liability 'must be proportionate to the harm caused, in the specific circumstances of the case. The responsibility of other persons, organizations, or State responsibility is irrelevant to this determination'.[30] The convicted person's financial situation, including their destitution, and the availability of funds of the Trust Fund for Victims (TFV) are also immaterial.[31]

The *Ntaganda* Trial Chamber replicated the *Lubanga* principle which states that '[r]eparation orders are intrinsically linked to the individual whose criminal liability is established in the conviction and whose culpability for the criminal acts is determined in a sentence'.[32] Yet, the sole focus on the harm caused and the cost to repair it entails an important resignification of this principle. In this new paradigm, the conviction and sentence operate exclusively as the factual boundaries for identifying the crimes covered by the conviction and the resulting harm, as a person continues to be liable exclusively for the damage derived from the crimes for which they were found guilty.

The conviction and sentence should have no other impact on how the monetary responsibility of the convicted person is determined. In particular, the mode of liability that the conviction was based on and the degree of culpability that informed the sentence have no bearing on the monetary quantum of reparations to be imposed. This approach is consistent with the understanding that 'the goal of reparations is not to punish the person but indeed to repair the harm caused to others, the objective of reparation proceedings being remedial and not punitive'.[33] It is also more in line with the rationale that causation for reparations refers to the causal link between the crime and the harm suffered by the victims rather than between the individual conduct of the convicted person in the commission of the crimes and the harm resulting from this conduct.[34] Accordingly, Ntaganda was found liable for the totality of the harm caused by the crimes he was convicted of, with the Trial Chamber making no inquiry or reference to Ntaganda's personal degree of contribution and participation in the harm.

Nevertheless, the conclusion that a person's culpability is inconsequential to determining their monetary liability does not mean that factors taken into account to mitigate or aggravate their sentence will necessarily be irrelevant in the context of reparations as a whole.[35] These factors could be given weight in the reparations proceedings when they reduce or increase the level of harm suffered by the victims.[36] Therefore, pursuant to the *Ntaganda* case, these elements may play a role in the Trial Chamber's factual assessment of the victims' harm but not in determining the

[29]See *Ntaganda* Reparations Order, *supra* note 9, para. 98.

[30]Ibid., para. 96.

[31]Ibid., paras. 97, 223.

[32]Ibid., para. 96; see *Lubanga* Principles, *supra* note 12, para. 20.

[33]See *Ntaganda* Reparations Order, *supra* note 9, para. 224; Lostal, *supra* note 16.

[34]See *Ntaganda* Reparations Order, ibid., paras. 131–135, 217; *Katanga* Appeal Reparations Order, *supra* note 7, paras. 179–180, 182. For a different assessment of the causal link, with more focus on the conduct of the convicted person see McCarthy, *supra* note 4, at 134–56; see *Lubanga* Appeal Reparations Order, *supra* note 6 (Judge Ibáñez Carranza, Separate Opinion), para. 301.

[35]See *Lubanga* Appeal Reparations Order, *supra* note 6, para. 311.

[36]Ibid.

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convicted person's financial liability for the totality of such harm.[37] The same could be said about the gravity of the crime: although this factor shall not impact the person's liability for reparations as such,[38] the *Ntaganda* Trial Chamber stated that the severity of the offences could be considered to assess the harm suffered, especially when the latter is unquantifiable in financial terms.[39]

The Appeals Chamber found no error in the Trial Chamber's reasoning and conclusions concerning monetary liability.[40] Accordingly, this matter was not addressed in detail in the addendum to the *Ntaganda* reparations order, with the Trial Chamber simply ratifying its previous legal findings.[41]

2.2 Joint and several liability

The applicability of joint and several liability became a pressing issue in the *Ntaganda* case due to the overlapping victims for crimes regarding child soldiers between this case and the *Lubanga* case, as Ntaganda and Lubanga, both members of the same armed group, were found guilty of these same crimes, referring to some of the same victims.[42] It was, thus, necessary to determine the relationship between the monetary liability of the two convicted persons, in particular whether the previously established liability of Lubanga and the ongoing implementation of his reparations order regarding some of the same victims and harm could reduce Ntaganda's amount of liability.[43]

In response to this legal question, the *Ntaganda* Trial Chamber ruled that, if two or more offenders committed the same crimes, they have a shared responsibility for the harm derived from their common offences.[44] All co-offenders are jointly responsible *in solidum* to pay reparations for the full extent of the victims' harm.[45] Therefore, one co-perpetrator could be found liable for the total amount necessary to repair the harm caused by the crimes they were convicted of, regardless of whether others persons contributed to the harm or were already convicted for the same crimes at the ICC or elsewhere.[46] Similarly, the ongoing implementation of a reparations order previously issued against one of the co-perpetrators and encompassing the same harm and victims is immaterial in the determination of the financial liability of the other co-perpetrators.[47] At most, a future Trial Chamber could consider the reasoning and the amounts in such a prior reparations order only for the sake of consistency and to avoid

[37]For instance, in *Lubanga*, the Appeals Chamber determined that, in principle, the Trial Chamber could have considered Lubanga's efforts to demobilize child soldiers in order to reduce the level of harm suffered by these victims (see *Lubanga* Appeal Reparations Order, *supra* note 6, para. 311).

[38]See *Ntaganda* Reparations Order, *supra* note 9, paras. 98, 224.

[39]Ibid., para. 85. See also E. Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (2010), at 183.

[40]See *Ntaganda* Appeal Reparations Order, *supra* note 9, paras. 267–274.

[41]See *Ntaganda* Addendum to the Reparations Order, *supra* note 9, paras. 324, 337.

[42]*Prosecutor v. Bosco Ntaganda*, Registry's Second Report on Reparations, ICC-01/04-02/06-2639-AnxI-Red, Registry, 10 February 2021, paras. 29–31.

[43]This issue would likely have returned in the *Al Hassan* case, because Al Hassan and Al Mahdi were allegedly involved in identical crimes pertaining to the destruction of protected buildings in Timbuktu, Mali. However, in June 2024, the Trial Chamber acquitted Al Hassan of this particular charge (*Prosecutor v. Al Hassan*, Trial Judgment, ICC-01/12-01/18-2594-Red, T.Ch., 26 June 2024, paras. 1055, 1181). It remains to be seen whether the Prosecution will appeal the verdict and, if yes, whether the Appeals Chamber will reverse the acquittal.

[44]See *Ntaganda* Reparations Order, *supra* note 9, para. 219.

[45]Ibid. Experts on reparation had already supported the application of joint and several liability in the ICC (*Prosecutor v. Bosco Ntaganda*, Expert Report on Reparation by Karine Bonneau, Eric Mongo Malolo and Norbert Wühler, ICC-01/04-02/06-2623-Anx1-Red2, Registrar, 3 November 2020, para. 260; *Prosecutor v. Jean-Pierre Bemba Gombo*, Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules, ICC-01/05-01/08-3448, T.Ch., 17 October 2016, para. 26).

[46]See *Ntaganda* Reparations Order, *supra* note 9, para. 218.

[47]Ibid., para. 221.

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confusion among the victims, despite not being bound by the previous award.[48] In conclusion, the previously established financial liability of Lubanga for some of the same victims and harm is immaterial in the subsequent determination of Ntaganda's liability.[49]

As a corollary to the application of joint and several liability, any co-perpetrator who repairs, in whole or in part, the harm caused to the victims may seek to recover from the other co-perpetrators their proportionate share.[50] In addition, all co-perpetrators 'remain liable to reimburse the funds that the TFV may eventually use to complement the reparation awards for their shared victims'.[51] The above-mentioned right of recovery also applies to reimbursement to the TFV.

Even though the convicted person is responsible for the total harm caused to all victims of the crimes for which they were found guilty,[52] according to the 'no over-compensation' principle, when numerous persons are jointly liable *in solidum*, victims are not allowed to be financially compensated multiple times for the same harm.[53] However, the *Ntaganda* Trial Chamber stressed that this principle is relevant only during the implementation phase of the reparations order, having no bearing on the quantification of the award.[54]

The Appeals Chamber confirmed the application of joint and several liability,[55] but instructed the Trial Chamber to clarify two points.[56] The first one was how the imposition of this type of liability impacts the overall amount of reparations. The addendum to the *Ntaganda* reparations order elucidated that, as a result of Ntaganda and Lubanga being jointly and severally liable *in solidum* for the harm from the crimes pertaining to the same child soldiers, 'both individuals are liable for the full amount of reparations owed to the victims of the crimes for which they were convicted'.[57] Thus, to determine the liability of Ntaganda, the Trial Chamber had to calculate the total damage of his crimes and the costs to repair such harm. The fact that Lubanga was convicted of some of the same offenses, impacting some of the same victims, had no bearing in the determination of the quantum of reparations for which Ntaganda was liable. The allotment of the proportional cut of monetary liability between Ntaganda and Lubanga for their shared harm is immaterial and does not need to be specified in the context of reparation determination, as this issue will become relevant only eventually, if one of the paying co-perpetrators intends to claim reimbursement from the other co-perpetrator(s).[58] This recovery between the multiple persons responsible for their shared harm 'is an issue to be dealt with by the co-perpetrators among themselves and does not impact on the liability to be imposed by the Court'.[59] In summary, the imposition of joint and several liability implies that the overall amount of reparations in one specific case must represent the total sum of costs to repair all harm derived from the crimes of the conviction in question, regardless of the eventual recovery of the proportional shares of liability between the multiple co-perpetrators.

The second point the Appeals Chamber flagged up was how liability *in solidum* impacts the apportionment of the award of reparations between the victims. The addendum to the reparations order divided the victims in the *Ntaganda* case into four groups: (i) overlapping victims of crimes against child soldiers between the *Ntaganda* and the *Lubanga* cases;[60] (ii) additional Ntaganda-only

[48]See *Ntaganda* Addendum to the Reparations Order, *supra* note 9, paras. 338–339.
[49]See *Ntaganda* Reparations Order, *supra* note 9, para. 221.
[50]Ibid., para. 219.
[51]Ibid., para. 221.
[52]Ibid., para. 215.
[53]Ibid., paras. 99–100.
[54]Ibid., para. 221.
[55]See *Ntaganda* Appeal Reparations Order, *supra* note 9, para. 271.
[56]Ibid., paras. 253–256, 274.
[57]See *Ntaganda* Addendum to the Reparations Order, *supra* note 9, para. 337.
[58]Ibid.
[59]Ibid., para. 337.
[60]Ibid., paras. 337–339.

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victims of crimes against child soldiers;[61] (iii) victims of the attacks;[62] and (iv) victims of the attack on the Sayo health centre.[63] The Trial Chamber separately calculated the costs to repair the total harm suffered by the victims of each of these groups, and subsequently, it summed up all the per-group amounts.[64] Therefore, other than the understanding that Ntaganda is liable for the totality of harm endured by the victims of each of these groups, the application of liability *in solidum* had no bearing in the determination of the overall quantum of reparations imposed on Ntaganda. Regarding the overlapping victims of Ntaganda and Lubanga in specific, they were both found liable for USD 10,000,000, an amount that, as indicated above, reflects the total harm suffered by their shared victims. There was no apportionment between Ntaganda and Lubanga concerning their overlapping victims.[65]

3. The ICC's case law prior to the *Ntaganda* case

3.1 The evolving jurisprudence on monetary liability in the ICC

This section will assess the development of the ICC's case law on liability for reparations before the *Ntaganda* case. It evaluates the jurisprudence in three parts: (Section 3.1.1) the *Lubanga* principles of 2015; (Section 3.1.2) the reparations orders issued by the Trial Chambers in the *Katanga*, *Al Mahdi*, and *Lubanga* cases; and (Section 3.1.3) the appeal judgments regarding the orders in *Katanga* and *Lubanga*.

3.1.1 The Lubanga principles

The *Lubanga* principles dictated that the amount for which the convicted person is liable should be 'proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case'.[66] The Appeals Chamber added that 'the scope of a convicted person's liability for reparations may differ depending on, for example, the mode of individual criminal responsibility established with respect to that person and on the specific elements of that responsibility'.[67]

In contrast to the *Ntaganda* case, the *Lubanga* principles tied the assessment of the quantum of reparations to the personal degree of participation and culpability of the defendant in the crimes, to the effect that the harm to the victims and the costs to repair it are not the sole factors to be considered in determining the convicted person's financial liability. Furthermore, apart from the conclusion that the reparations orders issued by the Court 'do not interfere with the responsibility of States to award reparations to victims under other treaties or national law',[68] the *Lubanga* principles did not address the possibility of multiple persons being concurrently liable for the same crimes and harm, including the application of joint and several liability.

3.1.2 The Trial Chambers in the Katanga, Al Mahdi, and Lubanga cases

The year 2017 was particularly enriching for the ICC's case law on reparations, as it was the year in which the Trial Chambers issued the awards in the three cases before *Ntaganda* (*Katanga*, *Al Mahdi*, and *Lubanga*). In March 2017, the *Katanga* Trial Chamber released its reparations order,

[61]The victims in this group were child soldiers exceeding the temporal scope of the *Lubanga* case, former child soldiers who are also victims of rape and sexual slavery and children born out of these crimes, as well as the indirect victims of all of them (ibid., paras. 340–341).

[62]Ibid., paras. 342–343.

[63]Ibid., paras. 356-357.

[64]Ibid., para. 358.

[65]Ibid., paras. 338-339.

[66]See *Lubanga* Principles, *supra* note 12, para. 21.

[67]Ibid.

[68]Ibid., para. 50.

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which followed the *Lubanga* principles regarding financial liability. Although the total monetary amount of the extent of the harm was USD 3,752,620,[69] Katanga's conviction as an accessory,[70] and the fact that many other persons contributed to the crimes[71] led the Trial Chamber to set his liability at USD 1,000,000.[72] The Chamber expressly stated that, if the crimes had multiple perpetrators, the convicted person should not be liable for the totality of the harm suffered by the victims, as joint responsibility 'cannot be imported into the particular context of cases before this Court'.[73] Deciding otherwise would require a Trial Chamber to go beyond the confirmed charges and the evidence submitted by the parties during the trial.[74] Thus, liability *in solidum* was unequivocally rejected in *Katanga*.[75]

In August 2017, the *Al Mahdi* Trial Chamber also ratified the *Lubanga* principles in its reparations order. In determining Al Mahdi's financial liability, the Chamber stressed that he was convicted as a co-perpetrator and personally organized and participated in the attack against the protected buildings in Timbuktu.[76] He was found liable for EUR 2,700,000.[77] Yet, different from the *Katanga* case, the *Al Mahdi* Trial Chamber did not consider it necessary to specify whether this figure constituted the sum-total of the harm caused by the crimes.[78] The Chamber stated that this amount 'is specific to Mr Al Mahdi and what [the Chamber] considers to be a fair assessment of his liability alone'.[79]

Although no explicit or specific determination was made in the *Al Mahdi* case on whether the quantum of reparations reflected the totality of harm from the crimes or only a part of it, the reasoning of the decision provides some insights. Although other persons contributed to the crimes, Al Mahdi was found liable for the totality of the costs the United Nations Educational, Scientific and Cultural Organization (UNESCO) incurred in the restoration of the ten protected buildings for whose destruction he was convicted.[80] This finding has been interpreted as an implicit endorsement of liability *in solidum*,[81] even though the Chamber did not explicitly state so. Lastly, the calculation of economic loss and moral harm derived from Al Mahdi's crimes was not spelt out in specific terms in the decision,[82] preventing any conclusion for this study.

In December 2017, the Trial Chamber published the award of reparations against Lubanga, the ICC's first convicted person. The Chamber endorsed the *Lubanga* principles by stating that 'the scope of liability for reparations may differ depending on the mode of individual criminal responsibility established *vis-à-vis* the convicted person and on the specific elements of that responsibility'.[83] The Chamber proceeded to examine Lubanga's degree of responsibility in the criminal enterprise and other factors, in particular his role as the military and political leader of his armed group, his conviction as a co-perpetrator, his essential contributions in implementing the common plan shared with other co-perpetrators, and the severe and widespread nature of the crimes.[84] The *Lubanga* Trial Chamber clarified that its findings were 'confined to determining

[69]See *Katanga* Reparations Order, *supra* note 7, para. 239.
[70]Ibid., para. 254.
[71]Ibid., para. 261.
[72]Ibid., para. 264. For a critical analysis: A. Balta, M. Bax and R. Letschert, 'Trial and (Potential) Error: Conflicting Visions on Reparations within the ICC System', 2019 29(3) ICJR 221, at 230.
[73]See *Katanga* Reparations Order, *supra* note 7, para. 263.
[74]Ibid. See also M. Henzelin, V. Heiskanen and G. Mettraux, 'Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes', (2006) 17(3–4) *Criminal Law Forum* 317, at 325.
[75]See Expert Report by Bonneau, Malolo and Wühler, *supra* note 45, para. 259.
[76]See *Al Mahdi* Reparations Order, *supra* note 8, para. 110.
[77]Ibid., para. 134.
[78]Ibid., para. 111.
[79]Ibid.
[80]Ibid., paras. 116–118; see Expert Report by Bonneau, Malolo and Wühler, *supra* note 45, para. 257.
[81]See Expert Report, ibid., para. 259.
[82]See *Al Mahdi* Reparations Order, *supra* note 8, paras. 119–133.
[83]See *Lubanga* Reparations Order, *supra* note 6, para. 269.
[84]Ibid., paras. 269–281.

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Mr Lubanga's individual liability for reparations'.[85] Accordingly, similar to *Al Mahdi* and different from *Katanga*, the Chamber did not stipulate the global amount of damages suffered by all victims eligible for reparations in the case and then apportion Lubanga's share of liability from this global amount in light of the multiplicity of co-perpetrators and his personal degree of participation.

Notwithstanding the lack of specific and explicit findings on the quantum of total harm and the apportionment of liability, the reasoning of the *Lubanga* reparations order indicates that, despite the plurality of co-perpetrators, the Trial Chamber found Lubanga liable for the totality of the harm, at least with regard to the damage suffered by the 425 identified victims.[86] It seems that the Chamber adopted this approach due to Lubanga's leadership position, his conviction as a co-perpetrator, and the gravity of the crimes. This conclusion derives from the Chamber's indication that it took 'into account the above considerations and factors pertaining to Mr Lubanga's individual responsibility' in determining the award.[87] This finding is also corroborated by the fact that, previously, Katanga's accessorial mode of liability was considered to mitigate his financial liability.[88] As a co-perpetrator, Lubanga was convicted as a principal,[89] which could justify his greater responsibility for reparations in comparison to Katanga. Similar to Lubanga, Al Mahdi was also convicted as a principal.[90] It appears that, according to the Trial Chamber, Lubanga's central role in the criminal enterprise and the gravity of his offences justified his full financial liability for reparations. Analogous to the *Al Mahdi* case, this outcome in *Lubanga* has been interpreted as an application of liability *in solidum*,[91] irrespective of the fact that the *Lubanga* Trial Chamber did not explicitly state so.

In conclusion, the scarce case law in the first instance prior to the *Ntaganda* case considered that the convicted person's degree of culpability and participation, including the mode of criminal liability and its elements, remained an important component of financial liability for reparations, alongside causation and the costs to repair the harm suffered. However, the *Al Mahdi* and *Lubanga* Trial Chambers (and the Appeals Chamber[92]) rejected the initial position from the *Katanga* case that the existence of a multiplicity of persons responsible for the crimes necessarily prevents finding one of them liable for the total quantum of reparations required to fully repair the harm derived from all the crimes of the conviction. The *Al Mahdi* and *Lubanga* reparations orders indicate that if the defendant is convicted as a perpetrator and had a prominent role in the criminal enterprise, the Trial Chambers seem willing to find that person liable for the totality of the harm resulting from the crimes, notwithstanding the plurality of persons who had jointly or separately contributed to such offences. An *a contrario* reading of the *Al Mahdi* and *Lubanga* reparations orders also seems to endorse the *Katanga* Trial Chamber's reliance on Katanga's accessorial contribution to the crimes as a basis for reducing his financial liability for reparations, given that other persons had a much greater degree of culpability than Katanga for the crimes in question.

Lastly, despite the explicit rejection of liability *in solidum* in *Katanga*, subsequent decisions in *Al Mahdi* and *Lubanga* seem more inclined to accept this modality of responsibility, even though joint and several liability was never explicitly acknowledged. One could speculate that the Trial Chambers' willingness to categorically affirm the irrelevance of the existence of multiple perpetrators but, at the same time, their reluctance to openly embrace joint and several liability could be a strategy to avoid the difficulties pertaining to the scope of application of this modality of responsibility and the implementation of recovery among the co-perpetrators. Unlike its predecessors, the *Ntaganda* Trial Chamber rose to the occasion and addressed some of these issues, although not fully.[93]

[85]Ibid., para. 277.
[86]Ibid., paras. 259, 279–181; see *Lubanga* Appeal Reparations Order, *supra* note 6, para. 301.
[87]See *Lubanga* Reparations Order, ibid., paras. 279–180.
[88]See *Katanga* Reparations Order, *supra* note 7, para. 254.
[89]See *Lubanga* Reparations Order, *supra* note 6, para. 273.
[90]See *Al Mahdi* Reparations Order, *supra* note 8, para. 110.
[91]See Expert Report by Bonneau, Malolo and Wühler, *supra* note 45, para. 259.
[92]Cf. Section 3.1.3, *infra*.
[93]Cf. Sections 2.2, *supra*, and 5.2, *infra*.

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3.1.3 The Appeals Chamber in the Katanga and Lubanga cases

The Appeals Chamber issued judgments on the three reparations orders prior to the *Ntaganda* case (*Katanga*,[94] *Al Mahdi*,[95] and *Lubanga*[96]). Considering that the financial liability of the convicted person was not addressed in the *Al Mahdi* appeal judgment, the latter will not be assessed in this article.

The 2018 appeal judgment regarding the *Katanga* reparations order could be seen as an endeavour to shift the ICC's jurisprudence on liability for reparations, even though the Appeals Chamber arguably adopted a conflicting position.[97] On the one hand, the Appeals Chamber reaffirmed the understanding from the *Lubanga* principles that financial liability for reparations should be proportionate to the harm caused and, *inter alia*, the convicted person's degree of participation and culpability.[98] On the other hand, the Chamber innovated by adding that this legal finding 'does not mean … that the amount of reparations for which a convicted person is held liable must reflect his or her relative responsibility for the harm in question *vis-à-vis* others who may also have contributed to that harm'.[99] Different from the *Katanga* Trial Chamber,[100] the Appeals Chamber deemed as 'irrelevant' the question of whether other individuals may also have contributed to the harm,[101] establishing that 'it is not, per se, inappropriate to hold the person liable for the full amount necessary to repair the harm'.[102] The Chamber concluded that 'the focus in all cases should be the extent of the harm and cost to repair such harm, rather than the role of the convicted person'.[103]

The appeal judgment could be read as an endorsement of joint and several liability, and a reversal of the *Katanga* Trial Chamber's rejection of this notion. Yet, the legal significance of the convicted person's degree of participation and culpability in this new paradigm brought by the Appeals Chamber in *Katanga*, seemingly centred on the harm and the cost to repair it, remained unclear. The Appeals Chamber avoided openly overturning its previous findings on financial liability in the *Lubanga* principles, which had been used in all three reparations orders up until that point (*Katanga*, *Al Mahdi*, and *Lubanga*). Instead, the Appeals Chamber attempted to re-signify its principle on financial liability via a new understanding but without setting aside its original wording. To quote Marina Lostal, the result was a contradictory reasoning, in which 'the Appeals Chamber both endorsed and rejected the principle'.[104]

The legal position of the Appeals Chamber became clearer the following year, in its 2019 judgment on the award of reparations in the *Lubanga* case. The Appeals Chamber replicated its legal findings from *Katanga*,[105] concluding that Lubanga could be found liable for the victims' total harm, notwithstanding the existence of other co-perpetrators who contributed to such harm.[106] However, the Appeals Chamber saw no error in the fact that the Trial Chamber took Lubanga's criminal responsibility and the gravity of the crimes into account to determine the sum of reparations for which he was liable.[107] Thus, the same apparent contradiction that Lostal identified in the *Katanga* appeal judgment was replicated in the *Lubanga* judgment.

[94]See *Katanga* Appeal Reparations Order, *supra* note 7.
[95]See *Al Mahdi* Appeal Reparations Order, *supra* note 8.
[96]See *Lubanga* Appeal Reparations Order, *supra* note 6.
[97]See Lostal, *supra* note 16.
[98]See *Katanga* Appeal Reparations Order, *supra* note 7, para. 175.
[99]Ibid.
[100]See *Katanga* Reparations Order, *supra* note 7, para. 263.
[101]See *Katanga* Appeal Reparations Order, *supra* note 7, para. 178.
[102]Ibid.
[103]Ibid., para. 180.
[104]See Lostal, *supra* note 16.
[105]See *Lubanga* Appeal Reparations Order, *supra* note 6, paras. 302–304.
[106]Ibid., para. 308.
[107]Ibid., para. 309.

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The critical difference in the *Lubanga* appeal judgment, however, was that the Appeals Chamber qualified in more detail the meaning of its previous legal findings in *Katanga*. The Chamber explained that its *Katanga* judgment should not be interpreted as restricting the flexibility of trial judges in deciding their methodology to fix the award of reparations.[108] The Appeals Chamber's conclusion in *Katanga* that it is correct for a Trial Chamber to centre its assessment primarily on the cost to repair the harm, simply means that:

> it is *appropriate* for the trial chamber to *focus* on the cost to repair. How much the trial chamber is able to focus on the cost of repair will depend on the circumstances of a given case. Importantly, a trial chamber's failure to do so does not necessarily constitute an error.[109]

The Appeals Chamber added that, in setting the quantum of reparations:

> the trial chamber must also ensure that it takes into account the convicted person's rights and interests. The goal is to set an amount that is fair and properly reflects the rights of the victims, bearing in mind the rights of the convicted person.[110]

Seen together, the *Katanga* and *Lubanga* appeal judgments indicate that the Appeals Chamber's current position is that both approaches are legally valid: (i) focusing exclusively on the harm and the costs to repair it, setting aside as immaterial any other factor; and (ii) materially considering, in the determination of the quantum of reparations, the convicted person's degree of participation and additional factors besides the costs to repair the harm. In the eyes of the Appeals Chamber, permitting these two approaches does not entail an unwarranted contradiction. Instead, it arguably reflects a deliberate legal position aimed at ensuring the appropriate degree of discretion to the Trial Chambers in establishing the financial quantum of reparations for which a convicted person is liable in light of the concrete circumstances of each case. Accordingly, the Trial Chambers can choose, depending on the specific facts of the case, either of the two approaches described above. The Appeals Chamber will *a priori* not interfere with these choices because, as far as this Chamber is concerned, they do not constitute legal errors that should be corrected via appellate review.

In conclusion, although the Appeals Chamber highlighted the importance of not losing sight of the compensatory function of the ICC's reparations process, stressing that the Trial Chambers should have due regard to the extent of the harm and the cost to repair it, this was not presented in absolute terms by the Appeals Chamber. The latter's ambivalent position, granting margin for the Trial Chambers to continue relying on the convicted person's degree of contribution or culpability, may lead to discrepancies and uncertainties in the ICC's jurisprudence. Persons convicted of similar crimes, perhaps even in the same situation, may be found liable for different amounts of reparations because of the distinct legal approaches on monetary liability adopted by their respective Trial Chambers. Consequently, the Appeals Chamber could have relied on the law-ascertaining powers granted by Article 75 of the Rome Statute and its inherent role as the ultimate umpire of the law at the ICC, to settle the applicable principle on financial liability, similar to what it had originally done in the *Lubanga* principles. In fact, the distinctive approach to liability that emerged in the *Ntaganda* case is evidence of the disparities that may emerge in the Court's case law to the detriment of both the convicted person and the victims.[111]

[108] Ibid., para. 107.
[109] Ibid.
[110] Ibid., para. 108.
[111] See Hamilton and Sluiter, *supra* note 15, at 292.

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3.2 Assessment considering the Ntaganda case

Different from the previous jurisprudence in the first instance, the *Ntaganda* case explicitly indicated that the primary factors in determining monetary liability should be the harm caused and the costs to repair it,[112] excluding other elements that Trial Chambers had considered in the past, such as the modes of liability, the responsibility of other persons, and the gravity of the offences.[113] In one sense, the *Ntaganda* case could be seen as unoriginal, as its rationale on monetary liability had already been introduced, to some extent, by the Appeals Chamber in the *Katanga* case three years earlier.[114] However, the most important contribution of *Ntaganda* was the affirmation of such rationale in unequivocal terms, bringing about an explicit amendment to the *Lubanga* principles with regard to financial liability for reparations.[115] The same could be said about the pioneering explicit recognition of joint and several liability in *Ntaganda*.

The *Al Mahdi* and *Lubanga* Trial Chambers had imposed, at least to a certain extent, full financial liability in their respective cases, having the same outcome as that espoused in *Ntaganda*. The key difference in those two cases, however, was that the degree of participation by the defendants, among other factors, substantiated the Trial Chambers' decision to apply full monetary liability, at least to part of the harm. Al Mahdi's and Lubanga's leading role in their respective criminal enterprises was one of the main grounds that their full liability was based upon. The legal approach proposed in the *Ntaganda* case is fundamentally different, centring the determination of the award of reparations on the harm caused and the cost to repair it. Any other factor, including the mode of liability and degree of participation, should not be part of a Trial Chamber's assessment in determining the award.

For instance, the application of the approach from *Ntaganda* to the *Katanga* case would likely lead to the conclusion that Katanga should be responsible for the full extent of the harm caused by all crimes in his verdict, notwithstanding his conviction as an accessory.[116] In addition, the *Al Mahdi* and *Lubanga* Trial Chambers refused to make explicit findings on whether the award of reparations they imposed reflected the totality of harm caused by the crimes.[117] This would be inadequate under the approach from the *Ntaganda* case since a Trial Chamber must set the convicted person's liability at no less than the total harm derived from all crimes of the conviction.

4. External jurisprudence

4.1 Comparative jurisprudential review

Besides the ICC, the Extraordinary Chambers in the Courts of Cambodia (ECCC),[118] the Extraordinary African Chambers (EAC),[119] the Kosovo Specialist Chambers (KSC),[120] and the Special Criminal Court in the Central African Republic (SCC)[121] also have jurisdiction to award reparations. The present section compares the case law on financial liability of these four hybrid courts. As a preliminary disclaimer, their jurisprudence on reparations is very scarce, with a body of decisions even smaller than that of the ICC: except for the ECCC, which issued rulings on

[112]See *Ntaganda* Reparations Order, *supra* note 9, para. 98.

[113]Ibid., paras. 96, 98, 218.

[114]Cf. Section 3.1.3, *supra*.

[115]Compare *Lubanga* Principles, supra note 12, para. 21, with *Ntaganda* Reparations Order, *supra* note 9, para. 96.

[116]For a discussion on the appropriateness of this outcome cf. Section 5.1.2, *infra*.

[117]See *Al Mahdi* Reparations Order, *supra* note 8, para. 111; see also *Lubanga* Reparations Order, *supra* note 6, para. 277.

[118]ECCC Internal Rules (Rev.10) (2022), Rule 23*quinquies*.

[119]Statute of the Extraordinary African Chambers (2012), Art. 27.

[120]Law on Specialist Chambers and Specialist Prosecutor's Office, 05/L-053 (2015), Art. 22(8).

[121]Loi No 18.010 du 2 juillet 2018, portant règlement de procédure et de preuve devant la Cour Pénale Spéciale de la République Centrafricaine (2018), Art. 129.

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reparations in three separate cases,[122] the other three assessed courts had only one case each that reached the reparations phase.[123] Unlike the KSC and the SCC, which continue in operation and will likely issue new reparation orders, the EAC and the ECCC have already delivered their final judgments. Therefore, the findings in this section must be seen accordingly.

4.1.1 Extraordinary Chambers in the Courts of Cambodia

The ECCC had a unique reparations regime.[124] First, the Chambers recognized 'a severely limited right to reparations',[125] confined to collective and moral reparations only.[126] Although the Civil Parties could be granted benefits that addressed their harm,[127] individual awards, whether or not of a financial nature, and monetary payments regarding material damages were not allowed.[128] Second, the determination of reparations at the ECCC was intrinsically linked to the availability of funds, whether of the convicted person or of external sources.[129] Given that all three convictions by the ECCC referred to indigent persons (Kaing Guek Eav, Nuon Chea, and Khieu Samphan),[130] the Chambers did not find any of them personally liable for reparations. All reparations were awarded through projects externally funded by third parties.[131]

4.1.2 Extraordinary African Chambers

On 30 May 2016, the EAC Trial Chamber convicted Hissein Habré, former President of Chad, for war crimes, torture, and crimes against humanity.[132] On 29 July 2016, the same Chamber issued its decision on reparations, indicating that, to determine the quantum of reparations, it should consider the totality of harm suffered by the victims in order to award no less than full

[122] *Prosecutor v. Kaing (Case 001)*, Judgement, 001/18-07-2007/ECCC/TC, T.Ch., 26 July 2010; *Prosecutor v. Nuon and Khieu (Case 002/01)*, Judgement, 002/19-09-2007/ECCC/TC, T.Ch., 7 August 2014; *Prosecutor v. Nuon and Khieu (Case 002/02)*, Judgement, 002/19-09-2007/ECCC/TC, T.Ch., 16 November 2018.

[123] *Ministère Public c. Hissein Habré*, Jugement, T.Ch., 30 May 2016 (EAC); *Specialist Prosecutor v. Salih Mustafa*, Reparation Order against Salih Mustafa, KSC-BC-2020-05/F00517/RED/COR/3 of 98, T.Pa., 6 April 2023 (KSC); *Parquet Special c. Issa Sallet Adoum et Consorts*, Jugement N° 001-2023 sur les Interets Civils, CPS/CA/PSA/22-001, T.Ch., 16 June 2023 (SCC).

[124] *Prosecutor v. Kaing (Case 001)*, Appeal Judgement, 001/18-07-2007-ECCC/SC, SCC, 3 February 2012, at para. 667; C. Sperfeldt and R. Hughes, 'Symposium on the ECCC: Extraordinary Experiments in Reparation', *Opinio Juris*, 1 November 2022, available at opiniojuris.org/2022/11/01/symposium-on-the-eccc-extraordinary-experiments-in-reparation/ ('On the whole, the ECCC's more pragmatic approach to reparations provides a notable counterpoint to the more legalistic approach pursued at the ICC').

[125] H. Jarvis, 'Trials and Tribulations: The Long Quest for Justice for the Cambodian Genocide', in S. M. Meisenberg and I. Stegmiller (eds.), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (2016), 13, at 32. See also A. Balta, M. Bax and R. Letschert, 'Between Idealism and Realism: A Comparative Analysis of the Reparations Regimes of the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia', (2021) 45(1) *International Journal of Comparative and Applied Criminal Justice* 15.

[126] ECCC Internal Rules (Rev.10) (2022), Rule 23*quinquies*(1).

[127] Ibid., Rule 23*quinquies*(1)(b).

[128] Ibid., Rule 23*quinquies*(1); see *Case 001* Trial Judgement, *supra* note 122, para. 670; *Case 001* Appeal Judgement, *supra* note 124, paras. 658–659; *Case 002/01* Trial Judgement, *supra* note 122, para. 1115.

[129] ECCC Internal Rules (Rev.10) (2022), Rule 23*quinquies*(3); N. H. B. Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (2018), at 132. The ECCC determined that indigent convicted persons should not be found liable for reparations, under the argument that the Chambers lacked an externally subsidized funding mechanism that could give effect to orders issued against indigent persons – a mechanism analogous to the Trust Fund for Victims (TFV) in the ICC. See *Case 001* Trial Judgement, ibid., para. 666; *Case 001* Appeal Judgement, ibid., para. 668; *Case 002/01* Trial Judgement, ibid., para. 1112.

[130] See *Case 001* Trial Judgement, ibid., para. 666; *Case 002/01* Trial Judgement, ibid., para. 1124; *Case 002/02* Trial Judgement, ibid., para. 4416.

[131] See *Case 001* Trial Judgement, ibid., para. 683; *Case 002/01* Trial Judgement, ibid., para. 1124; *Case 002/02* Trial Judgement, ibid., para. 4416.

[132] See *Habré* Trial Judgement, *supra* note 123.

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reparations.[133] No other factor than the harm and the costs to repair it was mentioned in the ruling.[134] Habré was found liable for the totality of these costs,[135] with his degree of participation in the crimes, the existence of other responsible persons, and the gravity of the offences not being discussed. On 27 April 2017, the EAC Appeals Chamber confirmed the Trial Chamber's approach.[136]

4.1.3 Kosovo Specialist Chambers

On 6 April 2023, a Trial Panel of the KSC pronounced the reparation decision in *Specialist Prosecutor v Mustafa*.[137] Similar to the *Ntaganda* reparations order in the ICC, issued two years earlier, the Panel explicitly stated that, '[i]n determining the amount of the convicted person's liability for reparations, the primary consideration should be the scope and extent of the harm suffered by the victims'.[138] It also ruled that the convicted person is liable to repair the whole amount of harm caused by all crimes they were found guilty, 'regardless of the different modes of liability relied on in the conviction, and regardless of whether others may have also contributed to the harm'.[139] The convicted person's indigence was also considered irrelevant, for being an issue pertaining solely to the subsequent enforcement of the award.[140] Mustafa was found financially liable for the totality of the harm caused by the crimes for which he was convicted.[141]

4.1.4 Special Criminal Court in the Central African Republic

On 31 October 2022, in *Special Prosecutor* v. *Issa Sallet, Yahouba and Mahamat*, the Trial Chamber of the SCC issued its first judgment, convicting the three defendants as perpetrators of war crimes and crimes against humanity.[142] Additionally, Issa Sallet was found guilty as a military commander of acts of rape carried out by his subordinates.[143] On 16 June 2023, the same Chamber issued the decision on reparations.[144]

Regarding the assessment of monetary liability, the ruling determined that 'the reparation must be proportionate to the harm as far as possible. Reparations for such a harm must be full, without loss or profit for any of the parties'.[145] Yet, the Trial Chamber qualified the duty to impose full reparations. Reparative measures whose implementation would require state involvement were not included in the award for lack of jurisdiction, as the Central African government was not a party in the proceedings.[146] Although the Chamber did not address the degree of participation of the defendants and the existence of a plurality of perpetrators, the decision indicated that the availability of funds to implement the reparations, whether by the convicted persons or by external

[133]Ibid., para. 58.
[134]Ibid., paras. 59–72.
[135]Ibid., para. 82.
[136]*Procureur Général c. Hissein Habré*, Arrêt, A.Ch., 27 April 2017, paras. 926–941.
[137]See *Mustafa* Reparations Order, *supra* note 123.
[138]Ibid., para. 115.
[139]Ibid., para. 209.
[140]Ibid., para. 117.
[141]Ibid., para. 247–248.
[142]See *Issa Sallet et al.* Reparations Order, *supra* note 123, para. 3.
[143]Ibid.
[144]Ibid.
[145]Ibid., para. 162 ('la Section estime que la réparation se doit d'être à la mesure de ces préjudices, dans la mesure du possible. La réparation du préjudice doit être intégrale, sans perte ni profit pour aucune des parties').
[146]Ibid., para. 165.

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funders,[147] should be considered to determine the award. The Trial Chamber ruled that 'the monetary amounts requested [by the victims were] excessive in view of the financial capabilities of the institutions or bodies responsible for compensating the victims instead of the defendants, who are in a situation of total indigence'.[148] As a result, 'these amounts should be reduced to a more reasonable proportion'.[149]

Regarding the concurrent financial responsibility of the three co-defendants, the Trial Chamber followed the same approach as the *Ntaganda* case. It ruled that '[the defendants] are jointly and severally liable to repair the harm caused to the direct and indirect victims of [their] crimes, regardless of the different modes of liability used to conclude that they are guilty'.[150] Each defendant was found liable for the total sum of the harm caused by the common crimes all three of them were convicted of.[151] However, given that only Issa Sallet was found guilty of the crime of rape committed by his subordinates, he was solely responsible for bearing the costs to repair the harm resulting from this specific offence.[152]

On 23 October 2023, the Appeals Chamber of the SCC confirmed the approach of the Trial Chamber on financial liability, emphasizing two particular points. First, although specific issues of participation and culpability were not discussed, the Appeals Chamber stressed the general assumption that the monetary liability for reparations of a person is limited to the specific crimes in their conviction.[153] Second, while the indigence of a convicted person will not necessarily prevent the awarding of reparations,[154] the appeal judgment highlighted that the Trial Chamber was correct to consider the financial situation of the convicted person and the availability of funds by third parties to enforce the award.[155] These are necessary factors to be taken into account, the Appeals Chamber noted, due to the need to grant effective rather than hypothetical reparations to the victims.[156] The Chamber stressed that awarding remedies that likely will never be implemented 'would run counter to the objective of imposing reparations that are effective and would be a source of confusion and frustration for the victims'.[157] Hence, the Trial Chambers must pay due regard to the availability of funds in order to award only reparations whose enforcement is 'probable'.[158] Lastly, the Appeals Chamber ratified the application of liability *in solidum*.[159]

[147]The Registry of the SCC contains a unit responsible for providing assistance to victims and the Defence. One of its tasks is seeking external funding for the implementation of reparations orders issued against indigent convicted persons (see Loi No 18.010, *supra* note 121, Arts. 47(B)(d) and 129(D)).

[148]See *Issa Sallet et al.* Reparations Order, *supra* note 123, paras. 163, 177 ('Elle estime cependant que les montants sollicités sont excessifs au regard des capacités contributives des institutions ou organismes chargés d'indemniser les victimes en lieu et place des accusés, lesquels sont dans une situation d'impécuniosité totale').

[149]Ibid., para. 163 ('il y a lieu de ramener ces montants à leur plus juste proportion en allouant aux victimes').

[150]Ibid., para. 174 ('la Section … conclut qu'ils sont responsables *in solidum* de la réparation du préjudice causés aux victimes directes et indirectes de ces crimes indépendamment des différents modes de responsabilité retenus pour conclure à leur culpabilité').

[151]Ibid.

[152]Ibid., para. 175.

[153]*Parquet Special c. Issa Sallet Adoum et Consorts*, Arrêt no 13 relatif à l'appel interjeté contre le jugement no 001-2023 du 16 juin 2023 de la Première Section d'Assises, No 13-2023, SCC A.Ch., 23 October 2023, paras. 101–103.

[154]Ibid., para. 104.

[155]Ibid., para. 100.

[156]Ibid., paras. 98–100.

[157]Ibid., para. 99 ('qu'une réparation qui, selon toute probabilité, ne pourra jamais être mise en oeuvre, c'est-à-dire qui est de fait fictive, irait à l'encontre de l'objectif voulant que la réparation soit effective et serait source de confusion et de frustration pour les victimes').

[158]Ibid., at para. 100 ('la réalisation des mesures de réparations doit être probable').

[159]Ibid., 52.

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4.2 Assessment considering the Ntaganda case

Although limited, the judicial practice on reparations by the ECCC, EAC, KSC, and the SCC gave rise to diverse outcomes in determining financial liability. While the availability of funds to implement the reparation decision impacted the awards in the ECCC and the SCC, this factor was not addressed or was explicitly declared irrelevant in the EAC and KSC, establishing a clear separation between the assessment of the monetary liability of a convicted person and the subsequent enforcement of the reparation decision. The *Ntaganda* reparations order[160] and the ICC's jurisprudence as a whole[161] align with that of the EAC and KSC.[162]

Concerning the elements to be considered in determining the amount of monetary liability besides the availability of funds, in particular the degree of contribution or fault of the convicted person and the existence of multiple contributors to the harm, the ECCC's case law is of no significance to this inquiry, as the Chambers did not address the individual financial liability of any of their convicted persons. In line with the *Ntaganda* case, the EAC, KSC, and SCC considered solely the costs to repair the harm caused to the victims of the crimes, rendering inconsequential the convicted person's mode of liability and individual contribution to the offences. The KSC and the SCC made explicit statements to this effect in their decisions.[163] While the EAC did not enter a similar explicit assertion in their judgments, their reasoning appears to affirm the irrelevance of these other factors.

The SCC was the only court to unequivocally recognize the application of liability *in solidum*. The use of joint and several liability by this tribunal could be explained by the fact that the *Issa Sallet, Yahouba and Mahamat* case had three co-defendants, making it necessary to determine whether proportionate liability or liability *in solidum* should apply. The latter was the chosen approach, although the SCC gave no specific reason for selecting this alternative. As for the EAC and the KSC, while they did not mention the principle of joint and several liability explicitly, both courts found the defendants liable for the totality of the harm. Therefore, it was in the *Ntaganda* case that liability *in solidum* was for the first time explicitly recognized in international criminal justice, soon followed by the SCC in *Issa Sallet, Yahouba and Mahamat*.

5. General principles of law derived from national legal systems of the world

The law-ascertaining methodology in Article 21(1)(c) of the Rome Statute replicated, *mutatis mutandis*, the traditional two-step analysis for the identification of general principles of law derived from the domestic jurisdiction of states.[164] First, it is necessary to evaluate whether the principle may be 'derived … from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime'.[165] It is not required, under this step, to consult every single national legal system in the world, being rather sufficient to carry out a 'wide and representative comparative analys[i]s,

[160]See *Ntaganda* Reparations Order, *supra* note 9, paras. 97, 223.

[161]Originally, the *Lubanga* Trial Chamber determined that indigent convicted persons are only liable for non-monetary reparations (*Prosecutor v. Thomas Lubanga Dyilo*, Decision Establishing the Principles and Procedures to be Applied to Reparations, ICC-01/04-01/06-2904, T.Ch., 7 August 2012, para. 269). This conclusion was overturned by the Appeals Chamber, an outcome reaffirmed in subsequent decisions: see *Lubanga* Principles, *supra* note 12, paras. 102–105; *Al Mahdi* Reparations Order, *supra* note 8, para. 114; *Katanga* Reparations Order, *supra* note 7, para. 246.

[162]Although the availability of funds was deemed immaterial to determine the amount of liability, the *Ongwen* Trial Chamber recently relied on this element to award exclusively collective community-based reparations, to the detriment of collective reparations with individualized components and individual reparations (see *Ongwen* Reparations Order, *supra* note 10, para. 579). Thus, even at the ICC, the availability of funds is not an element completely external to the determination of reparations as a whole.

[163]See *Mustafa* Reparations Order, *supra* note 123, para. 209; *Issa Sallet et al.* Reparations Order, *supra* note 123, para. 174.

[164]See International Law Commission (ILC), Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur, A/CN.4/741 (9 April 2020), paras. 16–112.

[165]See Rome Statute, *supra* note 2, Art. 21(1)(c).

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covering different legal families and regions of the world'.[166] It is also important to measure the degree of worldwide uniformity and coherence of the principle in question.[167] The second step under Article 21(1)(c) of the Statute, as informed by the methodology used by other international tribunals,[168] is determining the viability of transposing the principle *in foro domestico* to the ICC. This step usually encompasses a two-prong evaluation: (i) whether the principle is compatible with the legal and institutional framework of international law in general and of the ICC in specific;[169] and (ii) whether the Court contains the procedural framework for the proper application of the transplanted principle.[170] The present section will apply these two general steps under Article 21(1)(c) of the Rome Statute to the two main innovations on financial liability brought by the *Ntaganda* case.

5.1 Exclusion of factors other than the extent of the harm and the costs to repair it

5.1.1 A principle common to the legal systems of the world

The methodology for determining the amount of financial liability under national tort laws varies worldwide. Some states uphold the *Ntaganda* Trial Chamber's approach, adopting a form of objective basis of quantification that excludes all elements other than the harm and the costs to repair it.[171] In contrast, other states espouse a different method, based on an equitable assessment that often takes into account, particularly when dealing with non-material damages, the individual degree of culpability and contribution of the offender as well as the social and economic situation of the victims and the offender.[172] This cursory comparative analysis indicates that the determination whether the *Ntaganda* Trial Chamber's approach to establish financial liability for reparations constitutes a principle common to the legal systems of the world is not a simple undertaking. Further scrutiny is necessary to assess the degree of worldwide acceptance and uniformity of such an approach.

5.1.2 Transposition to the international legal system and the ICC

Although *a priori* there is support for the compatibility between the fundamental principles of international law and the claim that the determination of the quantum of reparations should be limited to the harm suffered and the costs to repair it,[173] the application of such claim to the specific

[166]See ILC Report on General Principles of Law, *supra* note 164, para. 28; Decision on Witness Preparation, *supra* note 24, para. 41.

[167]*Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, A.Ch., 13 July 2006, paras. 26–32.

[168]See ILC Report on General Principles of Law, *supra* note 164, para. 74.

[169]Ibid., paras. 75–84; Rome Statute, *supra* note 2, Art. 21(1)(c).

[170]See ILC Report on General Principles of Law, *supra* note 164, paras. 85–96.

[171]For example: G. Spindler and O. Rieckers, *Tort Law in Germany* (2019), at 122; Regio decreto 16 marzo 1942, n. 262 - Codice Civile, Italy (1942), Arts. 1223, 1226, 2056, 2058; P. Trimarchi, *La responsabilità civile: atti illeciti, rischio, danno* (2021), at 634. Relatedly, the tort laws of some states make no distinction between principals, accomplices, and accessories in the commission of the tortious act for the application of joint and several liability; they are all equally liable: Act n. 89 of April 27, 1896 - Civil Code, Japan (1896), Art. 719(2); Act n. 471 - Civil Code, Republic of Korea (1958), Art. 760(3).

[172]For example: Decreto Lei n. 47 344 - Código Civil, Angola (1966), Arts. 494, 496(3); Civil Code, Armenia (1998), Art. 1087.2(5)-(6); Lei n. 10.406 - Código Civil, Brazil (2002), Art. 944; A. Ferrante, *Tort Law in Chile* (2022), at 235-238; Civil Code, China (2020), Arts. 1172, 1182; Civil Code, Eritrea (2015), Arts. 1658, 1698; Proclamation n. 165 of 1960 - Civil Code, Ethiopia (1960), Art. 2100; Act V of 2013 on the Civil Code, Hungary (2013), Secs. 2:52(3), 6:522(4), 6:524(2); Código Civil Federal, Mexico (1928), Art. 1916; Civil Code, Mongolia (2002), Art. 514.2; Civil Code, The Netherlands (1992), Book 6, Art. 109; Decreto Legislativo n. 295 - Código Civil, Peru (1984), Art. 1978; Republic Act n. 386 - Civil Code, Philippines (1949), Art. 2204; Act of 23 April 1964 - Civil Code, Poland (1964), Art. 440; Decreto-Lei n. 47.344 - Código Civil, Portugal (1966), Arts. 494, 496(3); Civil Code, Russia (1994), Art. 1083(3); Act n. 471 - Civil Code, Republic of Korea (1958), Art. 765.

[173]For instance, the legal regime of state responsibility proposed by the ILC is centred on the attribution of the act or omission to the state and the illegality under international law of such act or omission. The ILC explicitly excluded from such

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context of the ICC is particularly intricate. The issue is as theoretically complex as practically relevant due to the apparent 'mismatch'[174] between, on the one hand, the elements and logic inherent to the criminal nature of the Court, such as accountability and punishment, and, on the other hand, the goal of delivering restorative justice to the victims via meaningful and timely reparations. This internal tension within the procedural framework of the Court triggered an intense and ongoing scholarly debate on the degree of detachment that the reparations process should have from the criminal prosecution.[175] More specifically, the discussion has been whether monetary liability for reparations should lean more towards the criminal nature of the ICC, taking into account the convicted person's degree of culpability and individual contribution to the harm,[176] or more towards a victim-centred compensatory function, focused exclusively on the determination of the harm suffered by the victims and the costs to repair it.[177] Luke Moffett and Clara Sandoval contented that this fundamental disagreement on how reparations should be perceived and calculated has led to an 'existential crisis'[178] within the restorative framework of the ICC.

It was with this backdrop that the *Ntaganda* Trial Chamber decided that the financial liability of the convicted persons should be determined considering primarily the extent of the harm and the costs to repair it. The decision could be viewed as an attempt by the Chamber to overcome the existential crisis diagnosed by Moffett and Sandoval by unequivocally turning to the compensatory perspective. This is evinced by the Chamber's apparent goal of expunging any criminal law mindset from the reparations process in the ICC and defining such process as a victim-centred and reparative function.[179]

While the resolve of the *Ntaganda* Trial Chamber to meaningfully incorporate the interests of the victims is commendable, one could question the legal strength of the resulting approach to determine monetary liability.[180] Hamilton and Sluiter indicated that the proposed primary focus on the harm and the costs to repair it, as articulated by the *Ntaganda* Trial Chamber, 'is based too much on doing justice to victims as a normative objective in itself, [running the risk of] being detached from a proper legal construct of individual liability for damages'.[181] Allowing the Trial Chambers to enforce, in each individual case, their own subjective view of what they perceive is best for the victims, without reference to a solid legal basis for financial liability, might trivialize the reparations process, transforming it into a charitable endeavour.[182] The open-ended wording of Article 75(1) of the Rome Statute should not be interpreted as a justification for the ICC to free itself from the responsibility to approach its reparations process as a legal and judicial system.[183]

In this regard, there is support in state practice[184] and other sources[185] for the claim, somehow casually rejected in *Ntaganda*, that financial liability for reparations should be linked to the

general regime standards such as culpability, degree of fault, negligence or want of due diligence (ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001 YILC, vol. II (Part Two) 31, at 34).

[174]See Balta, Bax and Letschert, *supra* note 72, at 236.

[175]For a discussion on the *procedural* detachment of the reparations process from the criminal trial see L. Zegveld, 'Victims' Reparations Claims and International Criminal Courts: Incompatible Values?', (2010) 8(1) JICJ 79.

[176]In support of this position see *Lubanga* Appeal Reparations Order, *supra* note 6 (Judge Ibáñez Carranza, Separate Opinion), at 128 and paras. 300–301; Expert Report by Bonneau, Malolo and Wühler, *supra* note 45, paras. 255(e), 261(a), 262–265, 272–273; Åberg, *supra* note 4, at 21–2; McCarthy, *supra* note 4, at 135, 145–58; Schabas, *supra* note 1, at 1142; Henzelin, Heiskanen and Mettraux, *supra* note 74, at 325.

[177]In support of this position see Dwertmann, *supra* note 39, at 181–3; Balta, Bax and Letschert, *supra* note 72, at 230, 236; Lostal, *supra* note 16.

[178]See Moffett and Sandoval, *supra* note 15, at 754.

[179]Ibid.; see Lostal, *supra* note 16.

[180]See Hamilton and Sluiter, *supra* note 15, at 291.

[181]Ibid., at 311.

[182]Ibid., at 274, 311.

[183]Ibid., at 275–84.

[184]Cf. note 172, *supra*.

[185]Cf. note 176, *supra*.

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convicted person's degree of culpability and participation in the commission of the harm. Accordingly, in its attempt to eradicate the remnants of a criminal law mentality from the reparation proceedings at the ICC, pursuant to the ultimate goal of ensuring a victim-driven system, the *Ntaganda* Trial Chamber may have set aside a component of civil liability that is important for the fairness of the reparations process, that is, the calibration of the quantum of reparations to the convicted person's individual fault and contribution to the harm. In fact, the approach in the *Ntaganda* case is arguably more defendable in the context of convicted persons such as Ntaganda, who occupied key positions of leadership, offered a fundamental contribution to the criminal enterprise as a whole, and were convicted as perpetrators under Article 25(3)(a) of the Rome Statute.[186] On the other hand, the appropriateness of disregarding the convicted person's degree of fault and participation becomes more questionable if they were convicted under accessorial modes of liability encompassing weaker control over the crimes and less instrumental forms of contribution to the harm.

In addition, some commentators have expressed doubts about the utility and appropriateness of imposing huge monetary awards upon single individuals who will likely never be able to pay or reimburse the TFV. Haydee Dijkstal argued that, besides making the social reintegration of former detainees more difficult,[187]

> [a] convicted person who continues to have a large reparations award due for repayment, with no ability to repay that debt, might be fixed into a position which prevents any ability for the convicted person and the victims to work towards reconciliation.[188]

Dijkstal concluded that, if reparations are truly intended to constitute a balance between the rights of the convicted person and victims[189] as well as not to punish the former,[190] 'a more practical approach' that meaningfully considers the legitimate interests of the convicted person is necessary in the determination of their monetary liability.[191] Indeed, references to the rights of the convicted person in the reparations orders at the ICC are often *en passant* and abstract, with no clear indication of which rights were considered and how they concretely impacted the final award.[192]

Moffett turned to the perspective of the victims, noting that the challenges and frustrations of translating reparations orders into meaningful redress 'stem from loading reparations for numerous victims on the back of the conviction of a single person'.[193] Marieke Wierda also cautioned that '[t]he Court's processes on participation and reparations, as currently being implemented, risk constituting only a nominal recognition of victims' rights'.[194] The experience in the Democratic Republic of the Congo (DRC) may offer some insights to the ICC. In the context of trials for international crimes at the domestic military courts in that state, numerous reparation awards were issued, often with the application of liability *in solidum* vis-à-vis the Congolese

[186]Similar to the Trial Chambers in the *Al Mahdi* and *Lubanga* cases and different from the *Ntaganda* Trial Chamber (cf. Sections 3.1.2 and 2.1, *supra*), some experts referred to Ntaganda's leadership position in his armed group as well as his crucial contribution to the crimes as one the main reasons for the conclusion that his financial liability should encompass the totality of the harm (see Expert Report by Bonneau, Malolo and Wühler, *supra* note 45, paras. 262–273).

[187]H. J. Dijkstal, 'Destruction of Cultural Heritage before the ICC: The Influence of Human Rights on Reparations Proceedings for Victims and the Accused', (2019) 17(2) JICJ 391, at 410.

[188]Ibid.

[189]See *Katanga* Reparations Order, *supra* note 7, para. 18.

[190]See *Ntaganda* Reparations Order, *supra* note 9, para. 100.

[191]See Dijkstal, *supra* note 187, at 410. See also Hamilton and Sluiter, *supra* note 15, at 291.

[192]See *Ntaganda* Appeal Reparations Order, *supra* note 9, paras. 258–259. For an attempt to have further clarity and specificity in this regard, see *Ongwen* Reparations Order, *supra* note 10, para. 18 and note 55.

[193]See Moffett, *supra* note 11, at 1204.

[194]M. Wierda, *The Local Impact of the International Criminal Court: From Law to Justice* (2023), at 269.

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government.[195] Yet, the widespread non-implementation of these awards has led to questions about the concrete utility of having the reparation process as well as whether the risk of reprisals and stigmatization that the victims were exposed to after engaging with such process were worth it.[196] In the same vein, some recent rulings at the ICC and SCC have shown greater sensitivity towards the practical enforcement of the reparations orders, tailoring their content accordingly.[197] This outcome aligns with the understanding that judges should adopt 'a holistic and integrated approach which views the reparations proceedings in their entirety, including the post-reparations order implementation stage'.[198]

Despite these significant considerations, the *Ongwen* reparations order, issued in February 2024, unceremoniously replicated the approach on monetary liability from the *Ntaganda* case.[199] The *Ongwen* Trial Chamber added no significant development or specification to the reasoning previously introduced in *Ntaganda*.

5.2 Joint and several liability

5.2.1 A principle common to the legal systems of the world

The domestic laws of numerous states, across different regions and legal systems, apply joint and several liability to deal with collective tortious conduct.[200] In addition, as noted above,[201] the SCC and military courts of the DRC have applied liability *in solidum* in trials dealing with international crimes. Roger Alford concluded that 'joint and several liability is the accepted standard for apportioning liability, at least when the defendants act in concert', to the effect that such standard can be described 'as a general principle of law, embodied in the major systems of the world'.[202]

[195]J. Mbokani, *La jurisprudence congolaise en matière de crimes de droit international : Une analyse des décisions des juridictions militaires congolaises en application du Statut de Rome* (2016), at 116, 129, 147, 157, 169.

[196]Ibid., at 401.

[197]See *Ongwen* Reparations Order, *supra* note 10, para. 579 (regarding the type of reparations to award in the case); *Issa Sallet et al.* Appeal Reparations Order, *supra* note 153, paras. 98–100.

[198]*Prosecutor v. Bosco Ntaganda*, First Decision on Reparations Process, ICC-01/04-02/06-2547, T.Ch., 26 June 2020, para. 23.

[199]See *Ongwen* Reparations Order, *supra* note 10, paras. 667, 769. Interestingly, two judges in the *Ongwen* Trial Chamber had previously sat on the bench of the *Ntaganda* case during the reparations phase. Judge Chang-ho Chung was the Presiding Judge of the Chambers that issued the *Ntaganda* reparations order and the subsequent addendum. Judge Péter Kovács was a member of the Trial Chamber that issued the addendum. The Presiding Judge of the *Ongwen* Trial Chamber, Bertram Schmitt, never acted in the *Ntaganda* case.

[200]For example, Ordonnance n. 75-58 du 26 septembre 1975 portant Code Civil, Algeria (1975), Art. 126; Decreto Lei n. 47 344 - Código Civil, Angola (1966), Art. 497; Lei n. 10.406 - Código Civil, Brazil (2002), Arts. 264-285; Negligence Act of British Columbia, Canada (1996), Sec. 4; Civil Code of Quebec, Canada (1994), Art. 1480; Civil Code, China (2020), Arts. 1168-1171; Civil Code, Germany (2002), Sec. 840; Act V of 2013 on the Civil Code, Hungary (2013), Sec. 6:524; Regio decreto 16 marzo 1942, n. 262 - Codice Civile, Italy (1942), Art. 2055; Act n. 89 of April 27, 1896 - Civil Code, Japan (1896), Art. 719; Código Civil Federal, Mexico (1928), Art. 1917; Civil Code, The Netherlands (1992), Book 6, Arts. 102, 166; Decreto Legislativo 295 - Código Civil, Peru (1984), Art. 1983; Act of 23 April 1964 - Civil Code, Poland (1964), Art. 441; Decreto-Lei n. 47.344 - Código Civil, Portugal (1966), Art. 497; Civil Code, Russia (1994), Art. 1080; Code des obligations civiles et commerciales, Senegal (1976), Art. 136; Act n. 471 - Civil Code, Republic of Korea (1958), Art. 760; Civil Liability (Contribution) Act, United Kingdom (1978).

[201]Cf. Sections 4.1.4 and 5.1.2, *supra.*

[202]R. P. Alford, 'Apportioning Responsibility Among Joint Tortfeasors for International Law Violations', (2011) 38 *Pepperdine Law Review* 233, at 241. See also Redress Trust, *supra* note 45, para. 28; *Oil Platforms (Iran v. United States)*, Merits, Judgment of 6 November 2003, [2003] ICJ Rep. 161 (Judge Simma, Separate Opinion), para. 66; *The Eurotunnel Arbitration (Channel Tunnel Group Limited and France-Manche S.A. v. United Kingdom and France)*, Case No. 2003-06 (2007), para. 177; McCarthy, *supra* note 4, at 145; Nollkaemper and Jacobs, *supra* note 19, at 422; Schabas, *supra* note 1, at 1142; J. E. Noyes and B. D. Smith, 'State Responsibility and the Principle of Joint and Several Liability', (1988) 13(2) *Yale Journal of International Law* 225, at 251–4; O. Murray, 'Liability *In Solidum* in the Law of International Responsibility: A Comment on Guiding Principle 7', (2020) 31(4) EJIL 1249, at 1250; C. Ahlborn, 'To Share or Not to Share? The Allocation of Responsibility between International Organizations and their Member States', SHARES Research Paper 28 (2013), ACIL 2013-26, at 20.

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5.2.2 Transposition to the international legal system and the ICC

Joint and several liability *a priori* seems compatible with both international law and the ICC. As for the former, although the recognition of liability *in solidum* in international law, particularly for state responsibility, has been the object of resistance and extreme caution,[203] one can find decisions (although only a few),[204] treaties,[205] individual judges,[206] and scholars[207] supporting such recognition. Thus, joint and several liability appears compatible with the fundamental principles of international law.

Regarding the compatibility with the ICC's system, especially its reparation proceedings, liability *in solidum* seems suitable for this process. Some features of international criminal justice favour the application of this type of liability,[208] in particular the fact that the jurisdiction of international penal courts is generally limited to the most responsible persons and that international crimes are often committed jointly by a vast number of individuals through the activities and infrastructure of a collective organization or group. In this context, '[a]ttempting to assess the individual liability of a perpetrator for a mass crime in which many bear responsibility may become a quagmire for the Court'.[209] It is unreasonable to expect that a Trial Chamber will be able to have a global view of all concurrent offenders of the large-scale crimes under its jurisdiction, as a necessary step to accurately determine the convicted person's proportionate share of liability for reparations vis-à-vis all these other offenders.[210] Even if feasible, it would be problematic to require a Trial Chamber to speculate about or presume the concurrent criminal and monetary responsibility of others, including persons not even charged by the Court.[211]

The use of liability *in solidum* is also consistent with the remedial function of the reparation process and with the victim-centred approach promoted by the Court, in particular the effectiveness of the victims' right to receive reparations.[212] In the context of international criminality, in which hundreds or thousands of individuals often contribute to the offenses, the application of several or proportionate liability could severely hinder the prospects of the victims receiving full redress, as they would have the enormous burden of judicially pursuing all of these numerous offenders, some of them unknown or residing outside their country, in order to claim full reparation for their harm.[213] Joint and several liability may provide an adequate tool to overcome this challenge, as any one of the offenders may be ordered to pay the entire amount of damages for which they are liable, even when the other offenders are not parties in the proceedings, were not convicted by the ICC, or are unable to pay the award.[214] Thus, the shared

[203]See ILC Draft Articles on State Responsibility, *supra* note 173, at 124–5; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment of 26 June 1992, [1992] ICJ Rep. 240, paras. 48, 56; Murray, *supra* note 202, at 1250.

[204]See *The Eurotunnel Arbitration*, *supra* note 202, para. 177; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, [2011] ITLOS Rep. 10, para. 201.

[205]1992 United Nations Convention on the Law of the Sea, 1833 UNTS 3, Art. 139(2); 1972 Convention on International Liability for Damage Caused by Space Objects, 961 UNTS 187, Arts. IV, V, and XXII(3); 1969 International Convention on Civil Liability for Oil Pollution Damage, 973 UNTS 3, Art. IV; 1992 Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969, 1956 UNTS 285, Art. 5.

[206]See Simma, *supra* note 202, para. 73; *Nauru*, *supra* note 203 (Judge Shahabuddeen, Separate Opinion), at 283–6; *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment of 9 April 1949, [1949] ICJ Rep. 4 (Judge Azevedo, Dissenting Opinion), at 92.

[207]See Noyes and Smith, *supra* note 202; Murray, *supra* note 202; A. Nollkaemper et al., 'Guiding Principles on Shared Responsibility in International Law', (2020) 31(1) EJIL 15; C. M. Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control', in P. Shiner and A. Williams (eds.), *The Iraq War and International Law* (2008), 161.

[208]*Prosecutor v. Jean-Pierre Bemba Gombo*, Submission by QUB Human Rights Centre on Reparations Issues, ICC-01/05-01/08-3444, T.Ch., 17 October 2016, paras. 100–101.

[209]See Schabas, *supra* note 1, at 1142.

[210]See Redress Trust, *supra* note 45, para. 24.

[211]Ibid.

[212]Ibid., para. 23; see Expert Report by Bonneau, Malolo and Wühler, *supra* note 45, para. 260.

[213]See Expert Report, ibid., paras. 260–261; Redress Trust, *supra* note 45, para. 23.

[214]K. N. Hylton, *Tort Law: A Modern Perspective* (2016), at 180.

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responsibility of each of the offenders to provide full reparation may maximize the prospects of the victims receiving redress.[215] Juan Pablo Calderón Meza pointed to another factor: in the case of indigent convicted persons, a common occurrence at the ICC, liability *in solidum* would allow the TFV to subrogate and recoup its expenditures in the implementation of the reparations orders, including from responsible actors outside the Court's jurisdiction, such as corporations.[216]

However, even in domestic jurisdictions, finding defendants jointly and severally liable remains a complex technical endeavour. Such complexity was not duly acknowledged or tackled in *Ntaganda*.[217] In some jurisdictions, this type of liability is limited to cases of indivisible damages,[218] the impossibility to identify the particular offender who caused the harm,[219] or damages arising from a concerted or joint action among a multiplicity of offenders.[220] Although in the context of mass atrocity crimes some of these limitations may *a priori* not be difficult to demonstrate, they may become pertinent at the ICC, especially if the defendant was convicted under a mode of liability in which at least part of their individual conduct is severable from the collective criminal enterprise of the group and, thus, from the whole body of harm. Commission as an individual pursuant to Article 25(3)(a) of the Rome Statute could be an example, since this mode of liability requires that the perpetrators 'personally carry out the material elements of the crime'.[221]

It is precisely due to the novel nature of using joint and several liability in international criminal justice[222] that the Trial and Appeals Chambers could have offered more detailed reasoning in the *Ntaganda* case to justify and explain the scope of application of this type of civil liability at the ICC. Future case law could elucidate and add further finesse to the matter. It is regrettable that the *Ongwen* Trial Chamber merely recognized joint and several liability without offering any additional explanation or guidance, simply replicating the general statements from *Ntaganda*.[223]

As for the second requirement for the transposition of joint and several liability to the ICC – the existence of the procedure for the application of the transplanted principle – Conor McCarthy argued that the practical realities of the Court prevent the application of liability *in solidum*, in

[215]See Nollkaemper et al., *supra* note 207, at 54–5; Noyes and Smith, *supra* note 202, at 254.

[216]J. P. Calderon Meza, 'ICC Personal Jurisdiction on Corporations for Criminal Liability and/or Civil Liability for Reparations', (13 May 2021) *Harvard International Law Journal Online*, available at journals.law.harvard.edu/ilj/2021/05/icc-personal-jurisdiction-on-corporations-for-criminal-liability-and-or-civil-liability-for-reparations/.

[217]The general assessment of liability *in solidum* by the *Ntaganda* Trial Chamber was limited to one footnote, which contains a definition of joint and several liability from the Supreme Court of the United States and the specification from Article 9:101 of the 2005 Principles of European Tort Law that '(1) [l]iability is solidary where the whole or a distinct part of the damage suffered by the victim is attributable to two or more persons . . .; (2) [w]here persons are subject to solidary liability, the victim may claim full compensation from any one or more of them, provided that the victim may not recover more than the full amount of the damage suffered by him' (see *Ntaganda* Reparations Order, *supra* note 9, at footnote 273). No further explanation was offered.

[218]See Noyes and Smith, *supra* note 202, at 251–2; A Nollkaemper et al., *supra* note 207, at 23–4; ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, with Commentaries, 2006 YILC, Vol. II (Part Two) 59, at 80; E. Adjin-Tettey, 'Multi-Party Disputes: Equities between Concurrent Tortfeasors', (2016) 53(4) *Alberta Law Review* 863, at 863; H.-D. Lee et al., 'How Does Joint and Several Tort Reform Affect the Rate of Tort Filings? Evidence from the State Courts', (1994) 61(2) *Journal of Risk and Insurance* 295, at 297.

[219]*Dickenson v. Tabb*, Supreme Court of Appeals of Virginia, United States, 156 S.E.2d 795 (1967) 208 Va. 184, 8 September 1967; Civil Code, China (2020), Art. 1170; Act n. 471 - Civil Code, Republic of Korea (1958), Art. 760(2); Act V of 2013 on the Civil Code, Hungary (2013), Sec. 6:524(4); Act n. 89 of April 27, 1896 - Civil Code, Japan (1896), Art. 719(1).

[220]L. Pressler and K. V. Schieffer, 'Joint and Several Liability: A Case for Reform', (1988) 64 *Denver Law Review* 651; J. J. Scheske, 'The Reform of Joint and Several Liability Theory: A Survey of State Approaches', (1988) 54 *Journal of Air Law and Commerce* 627, at 633, 642; S. Todd, *Tort Law in New Zealand* (2020), at 494–5; Civil Code, China (2020), Art. 1168; Act n. 471 - Civil Code, Republic of Korea (1958), Art. 760(1); Act V of 2013 on the Civil Code, Hungary (2013), Sec. 6:524(1); Código Civil Federal, Mexico (1928), Art. 1917; Act n. 89 of April 27, 1896 - Civil Code, Japan (1896), Art. 719(1). Joint action seems to be the standard for the application of liability *in solidum* adopted by the *Ntaganda* Trial Chamber (see *Ntaganda* Reparations Order, *supra* note 9, at footnote 273), but further clarification is warranted.

[221]*Prosecutor v. Dominic Ongwen,* Trial Judgment, ICC-02/04-01/15-1762-Red, T.Ch., 4 February 2021, para. 2782.

[222]Cf. Section 4.2, *supra*.

[223]See *Ongwen* Reparations Order, *supra* note 10, para. 667.

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particular, the absence of a 'mechanism that would enable a perpetrator to take action against other perpetrators to recover their share of any joint liability'.[224] McCarthy ultimately concluded that the transposition of liability *in solidum* to the ICC is not viable and '[a]n alternative approach ... is therefore necessary under the Rome Statute'.[225]

However, domestic legal systems contain diverse approaches for recovery among the co-perpetrators in the context of joint and several liability. The laws of some states, in particular those from the common law tradition, prohibit recovery under the argument that all joint perpetrators are equally culpable.[226] In states that recognize such a right, the mechanisms for its enforcement vary significantly.[227] In a more analytical assessment, John Noyes and Brian Smith asserted that the absence of a system for recovery among the co-perpetrators does not necessarily prevent the application of liability *in solidum*.[228] While the latter aims at ensuring the effectiveness of the compensatory function of reparations in favour of the victims, recovery aims at preventing the unjust enrichment of one perpetrator at the expense of another.[229] Due to their unrelated purposes, scopes and procedures, a regime of joint and several liability does not depend on the availability of a legal or procedural framework for recovery.[230] Noyes and Smith concluded that, at most, a system for recovery makes the imposition of responsibility *in solidum* 'more palatable'.[231]

Arguably, the *Ntaganda* Trial Chamber espoused this understanding. Although the Chamber recognized, in the context of joint and several liability, the right of the paying co-perpetrator to recuperate from the other co-perpetrators their proportionate share of damages,[232] the Trial Chamber adopted a hands-off approach concerning the enforcement of such recovery. In response to the Appeals Chamber's call for more clarity on this matter,[233] the Trial Chamber simply stated that recovery is immaterial in determining monetary liability for reparations and this issue should be 'dealt with by the co-perpetrators among themselves'.[234] The Chamber appears to implicitly agree that recovery is fundamentally disconnected from the question whether joint and several liability should be applied in the reparation proceedings before the Court.[235] As a result, the lack of an established procedural framework for implementing recovery at the ICC is not *per se* an obstacle to relying on liability *in solidum* at the Court. In this scheme, recovery among the persons responsible for the crimes will likely be adjudicated by domestic courts,[236] primarily those in the state where the requested person has assets.

The *Ntaganda* Trial Chamber's hands-off approach concerning recovery is appropriate. First, this approach aligns with the tendency in the Court's jurisprudence to refuse to adjudicate patrimonial matters pertaining to the defendants, delegating this competence to the states' domestic authorities.[237] Second, given the Court's limited (criminal) mandate and its scarce budgetary and institutional resources, it is reasonable not to exercise jurisdiction over civil claims

[224]See McCarthy, *supra* note 4, at 145.

[225]Ibid.

[226]See Hylton, *supra* note 214, at 255–6.

[227]See Noyes and Smith, *supra* note 202, at 256.

[228]Ibid., at 255–6.

[229]Ibid.

[230]Ibid; see Redress Trust, *supra* note 45, para. 29.

[231]See Noyes and Smith, *supra* note 202, at 256.

[232]See *Ntaganda* Reparations Order, *supra* note 9, para. 219.

[233]See *Ntaganda* Appeal Reparations Order, *supra* note 9, para. 274.

[234]See *Ntaganda* Addendum to the Reparations Order, *supra* note 9, para. 337.

[235]The fact that all past convicted persons and current defendants at the ICC, as of June 2024, are indigent makes this issue a less urgent matter.

[236]See Redress Trust, *supra* note 45, para. 26.

[237]*Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of 'Decision on Mr Bemba's Preliminary Application for Reclassification of Filings, Disclosure, Accounts, and Partial Unfreezing of Mr Bemba's Assets and the Registry's Request for Guidance', ICC-01/05-01/08-3660-Red2, T.Ch., 20 November 2018, paras. 11–13; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Mr Bemba's Claim for Compensation and Damages, ICC-01/05-01/08-3694, T.Ch., 18 May 2020, paras. 57–58.

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beyond (the statutorily foreseen) reparations to victims and compensation to an arrested or convicted person under Article 85 of the Rome Statute. Third, the possibility of recourse to domestic courts means that the paying co-perpetrators have judicial remedies at their disposal to seek recovery. Thus, deciding that the ICC lacks, and should not have, jurisdiction over this matter does not entail a denial of justice to the offenders.

6. Conclusion

As part of the seemingly perpetual 'state of flux'[238] of the legal framework for reparations at the ICC, the *Ntaganda* case introduced a new approach to the mix, explicitly recognizing joint and several liability and centring the determination of the quantum of reparations primarily on the harm suffered by the victims and the costs to repair it. This approach should not be taken for granted for three main reasons.

First, concerning the victims, the method laid down in *Ntaganda* could be seen as an easy way out for the ICC that might fail to truly consider the interests of the victims, despite being presented as a victim-friendly approach.[239] In its benevolent attempt to foreground the magnitude of the victims' suffering via the imposition of huge monetary awards, the *Ntaganda* Trial Chamber's method may transform the reparations process into a mere game of numbers that overlooks the most pressing challenge of actually ensuring timely and practical (not only symbolic) redress to the victims on the ground.[240] In fact, some recent decisions adopted a more pragmatic and experience-driven approach, focusing on the practical effectiveness of the reparations and the real prospects of the victims receiving timely and concrete redress.[241] Although there is no denying that reparations should have 'a strong principled component',[242] awarding remedies without also taking experience and pragmatism into account, at least to some extent, runs the risk of not serving the victims best[243] or even turning the ICC's reparations process into an end in itself.[244] Any of these two outcomes will challenge the assumption that such process is anchored in the adequate application of appropriate principles.

Second, regarding the convicted person, it seems legitimate to question the fairness of proposing that an individual should be found liable for reparations at the ICC without taking into account their contribution or culpability for the harm.[245] In this respect, the *Ntaganda* case echoes the long-lasting critique of the inherent reductionism of international criminal justice as a project aimed at singling out particular persons to whom individualized responsibility for unimaginable violence and harm is assigned, leaving out of scrutiny the structural and systemic political-social-economic forces implicated in this violence.[246] The approach for financial liability from *Ntaganda* could lead to simplistic representations to the detriment of one or a few individuals, failing to

[238]C. Ferstman, 'Reparations, Assistance and Support', in K. Tibori-Szabó and M. Hirst (eds.), *Victim Participation in International Criminal Justice: Practitioners' Guide* (2017), 385, at 386.

[239]See Hamilton and Sluiter, *supra* note 15, at 288, 291.

[240]Ibid., at 291; see Moffett, *supra* note 11, at 1204. At the ICC, victims often stress their preference for reparations that timely and meaningfully fulfil their practical needs, to the detriment of reparations that are symbolic or lack any tangible practical purpose (see *Ntaganda* Reparations Order, *supra* note 9, paras. 9, 192; *Ongwen* Reparations Order, *supra* note 10, para. 579).

[241]See *Ongwen* Reparations Order, ibid., paras. 578–579; *Issa Sallet et al.* Appeal Reparations Order, *supra* note 153, paras. 98–100. Notably, the ECCC adopted a pragmatic approach to its entire reparation framework (see Sperfeldt and Hughes, *supra* note 124).

[242]F. Megret, 'The Case for Collective Reparations before the International Criminal Court', in J. Wemmers (ed.), *Reparation for Victims of Crimes against Humanity* (2014), 171, at 179.

[243]See *Ongwen* Reparations Order, *supra* note 10, para. 578.

[244]See in general D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004), at 3–35.

[245]See Hamilton and Sluiter, *supra* note 15, at 291.

[246]T. Krever, 'International Criminal Law: An Ideology Critique', (2013) 26(3) LJIL 701.

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express the factual and legal complexity of the circumstances that caused the immense suffering of the victims.[247]

Third, from an institutional and legal perspective, future decisions of the Court could address the issues raised in this article, giving due regard to Article 21 of the Rome Statute, as a means to ensure that monetary liability is determined at the ICC on the basis of a foreseeable and solid legal basis. Otherwise, the credibility and utility of the reparations process as a whole could be questioned, and the victim-centred approaches proposed by the Court would appear weaker than they actually are.

[247]See L. G. Minkova, 'Expressing What? The Stigmatization of the Defendant and the ICC's Institutional Interests in the Ongwen Case', (2021) 34(1) LJIL 223, at 245.

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