

A Promise Too Dear?

The Right to Reparations for Victims of International Crimes Under the Malabo Protocol of the African Criminal Court

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1. INTRODUCTION

The inclusion of the right of victims of international crimes to participate and to reparations in the Rome Statute of the International Criminal Court (Rome Statute) constituted one of the most important developments in international criminal justice. It introduced a victim-centered approach into international criminal justice, affirming that victims of international crimes have broader interests than those entailed in the prosecution of perpetrators. Departing as it did from practice at the ad hoc international criminal tribunals in which victims played no part other than that of witness when selected, the Rome Statute traced the future trajectory of international criminal law by affirming the central position that victims of international crimes should play in judicial processes in which the guilt of their tormentors is determined.¹ The Malabo Protocol that amends the 2008 Protocol on the Statute of the African Court of Justice and Human Rights (African CJ & HR) recognizes victims' right to reparations.² It also adopts the Rome Statute formula in terms of which – in relation to reparations – a trust fund to be used for the benefit of victims is to be established within the African Court, which is comprised of three chambers: General Affairs Section; Human Rights Section and the Criminal Law Section (African Criminal Court). There are significant divergences, however, in terms of how the founding documents of the International Criminal Court (ICC) and the proposed

¹ On the Rome Statute regime on victims' rights, see generally G.M. Musila, *Rethinking International Criminal Justice: Restorative Justice and the Rights of Victims in the International Criminal Court* (Lap Lambert Academic Publishing; 2010).

² Art. 20 Malabo Protocol, replaced Article 45 of the Statute on the African Court of Justice and Human Rights (Protocol on Merged Court).

section of the African Court (African Criminal Court) deal with the question of reparations.

This chapter attempts to identify gaps in the legal and institutional framework for giving effect the right to reparations and proposes a preferred reading of the text as well as legal reforms that best serve the protected interests while giving effect to the stated objectives of the African Criminal Court (ACC) of ending impunity and protecting the right of the defense to a fair trial. To this end, the chapter conducts a review of the relevant text in the Malabo Protocol in the context of the ICC's law and practice pertaining to reparations. This is by no means an easy task, primarily because the Rules of Procedure and Evidence as well as regulations that should govern the internal aspects of the organs of the ACC were not adopted alongside the main treaty and statute of the Criminal Law Section. Large parts of the analysis focus on what the idealized state of affairs should be, rather than the state of the art.

2. THE MALABO PROTOCOL IN HISTORICAL REFERENCE TO VICTIMS' RIGHTS IN AFRICA

The debate relating to the establishment of an African court with jurisdiction to try core international crimes in Africa emerged out of Africa's fallout with the ICC over its indictment of, and subsequent issuance of arrest warrants against, President Omar Al Bashir of Sudan for crimes of genocide, war crimes and crimes against humanity committed during the armed in Darfur. The African Union's unhappiness with the ICC was expressed in a series of resolutions urging states to withhold their cooperation from the ICC in the case of President Al Bashir,³ and later, their membership from the court.⁴ In the AU's view, the Court's indictment of Al Bashir and issuance of arrest warrants undermined its [AU's] efforts to negotiate a peace settlement between the Government of Sudan and rebels based in Darfur. The AU's relations with the court soured, and the regional body

³ Resolution not to cooperate with the ICC: for a discussion, see G.M. Musila, "The Role of the African Union in International Criminal Justice: Force for Good or Bad?", in E. Ankumah (ed), *The International Criminal Court and Africa: One Decade On* (Cambridge: Intersentia, 2016) 299.

⁴ See African Union, *Report of the Meeting of African States Parties to the Rome Statute of the ICC*, 8–9, June 2009, Addis Ababa, Ethiopia, MinICC/Legal/3; AU Peace and Security Council Communiqué PSC/Min/Comm(CXLII) July 21, 2008, 142 Meeting, resolution 11 (i); AU PSC Communiqué PSC/PR/Comm.(CLXXV) Rev.1, March 4, 2009 Addis Ababa, 175 meeting.

dragged its feet or refused to accede by some accounts, when asked to respond to the ICC's request to establish a liaison office at the AU's seat in Addis Ababa.

Ten years before, international criminal justice had become a reality in Africa with the establishment of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone in response to major atrocities committed in Rwanda and Sierra Leone respectively. Experience from those tribunals shows that the international community aimed for minimalist justice: prosecution of major war criminals that masterminded mass atrocities with the hope that sending a message that impunity would not be countenanced could yield dividends for stability in respective countries and restore international peace and security. In these trials, victims and survivors of horrendous maiming, rapes, torture and mass murders would have no role greater than that reserved for witnesses. As the call for a permanent criminal court picked pace in their wake, more than 50 years after the International Military Tribunal at Nuremberg closed its doors, its legacy loomed large over the revival of international criminal justice: victims' interests were still not adequately protected.⁵

In Africa, the AU wrestled with calls for justice against former Chadian strongman Hissène Habré for over a decade, eventually supporting the establishment, within the Senegalese judiciary, of the Extraordinary African Chambers that convicted Habré a decade later in 2016 for several crimes against humanity, torture and war crimes.⁶ The campaign to bring Habré to justice was waged doggedly by victims and human rights organizations, who would eventually secure a historic conviction and an order against Habré to pay reparations to victims amounting to €34,000 each.⁷

⁵ See G.M. Musila, *supra* note 2, at 34–59; V. Morris and M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (Leiden: Martinus Nijhoff Publishers, 1995) at 167, 286–7; A. Rydberg, 'Victims in the International Criminal Tribunal for the Former Yugoslavia' in H. Kaptein and M. Malsch (eds), *Crime Victims and Justice: Essays on Principles and Justice* (Abingdon: Routledge, 2004) 126–40, at 131; G. Mekjian & M. Varughese, 'Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court' 17 *Pace University School of Law Journal* (2005) 1–46.

⁶ On the decades' long efforts to bring Habré to trial and an overview of the judgement, see generally S.A Høgestøl 'The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight against Impunity,' 34 *Nordic Journal of Human Rights* (2016) 147–56. Available at <http://dx.doi.org/10.1080/18918131.2016.1233374> (accessed on 10 December 2017).

⁷ On reparations, see the Appeals Chamber Decision, available at www.chambresafriaines.org/pdf/Arr%C3%AAt_int%C3%Aggral.pdf (accessed on 10 December 2017).

Since the ICC opened its first investigations in Uganda in 2004,⁸ the large number of victims that have applied to participate in cases from different situation countries and the absence of national reparations initiatives speak to the overwhelming hope among many that the ICC will secure them a measure of reparative justice that most are unable to obtain in their home countries. Opposition by victims and civil society groups to calls made by the AU to the 3 African States parties to the ICC⁹ to withdraw from the court is an expression of their determination to preserve an institution that, for many, is effectively the only avenue to obtain justice. Equally, the voices that were ranged against the adoption of the Malabo Protocol on the ACC mirrored reservations in large swathes of the African population with several aspects of that proposal, questioning whether the AU's expressed desire to fight impunity for mass atrocities was genuine given the inclusion of several problematic provisions such as the immunity clause, a litany of institutional design problems, and the lack of resources that would likely bedevil the court once established.¹⁰ If the adoption of the Malabo Protocol is not borne out of a genuine expression of intent to complement, in the broadest sense, the work of the ICC and that of national courts, then it stymies the efforts that victims from many of Africa's conflict zones have made to obtain justice. It is upon this background – one depicting the constant struggles to expand access to justice for victims of international crimes – that the proposed ACC and, in particular, its framework on the right to reparations, is assessed.

3. THE LEGAL FRAMEWORK ON VICTIMS' RIGHTS

In keeping with the increasing evidence of the acceptance of the right to reparations as integral to international criminal justice, the Malabo Protocol provides for the right of victims to reparations, which includes restitution, compensation and rehabilitation. Article 20 of the Protocol that amends

⁸ See ICC case information Sheet, available at, Decision on Victims' Applications for Participation Applications for Participation, *Situation in Uganda, In the case of the Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, (ICC-02/04) Pre-Trial Chamber II, 10 August 2007.

⁹ For the list of African States Parties, see: https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx (accessed 20 December 2017).

¹⁰ Amnesty International, *Malabo Protocol: legal and institutional implications of the merged and expanded African Court* available at www.amnesty.org/en/documents/afro1/3063/2016/en/ (accessed on 9 December 2017); A. Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' 24 *European Journal of International Law* (2013) 933–46.

Article 45 of the 2008 Protocol and Statute on the African Court of Justice and Human Rights (African CJ & HR) constitutes the core legal framework on the right to reparations. It reproduces large portions of Article 75 of the Rome Statute but omits or writes in additional language that is consequential in terms import for the court and the benefits that redound to victims.

First, significantly, the court is called upon to develop principles on the right of victims to reparations, including those pertaining to aspects such as damage, loss and injury. In terms of Article 45(1) Malabo Protocol, the court is called upon to ‘establish Rules of Court principles relating to reparations’. From the practice of human rights tribunals and the ICC, other aspects in respect of which principles should be developed include: causation, standard of proof, the scope of a convicted persons liability, quantum of reparations, the role of the court and Trust Fund for Victims (TFV), how to implement reparations awards, as well as ‘underlying philosophical questions pertaining to the right’.¹¹ The introduction of ‘Rules of Court’ in the language of Article 45(1) can be interpreted to mean that the court is to develop and publish principles on reparations in *its regulations*, which is judge-made law that covers mostly procedural issues,¹² and serve as subsidiary legislation to the Statute and Rules of Procedure and Evidence, which are promulgated by the States Parties as part of the legal framework that constitutes the primary sources of law for the court. Should AU member states include principles pertaining to reparations in the Rules of Procedure and Evidence (RPE), or even Regulations of the Court, this approach would be different than that adopted by the ICC, where judges of the Trial Chamber developed those principles after the conviction in *Lubanga*, the first case to be tried by the ICC. The judges of the future African court would have to abstract principles should they decide to include these in the regulations of the court that govern its work, and while there is enough to draw on from the ICC’s jurisprudence, national courts and international human rights bodies, it might be ideal to build from a factual basis that a real case offers and to adapt the standards when needed in subsequent cases.

¹¹ See generally, *The Prosecutor v. Thomas Lubanga Dyilo, Situation: Situation in the Democratic Republic of the Congo*, 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 available online at www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/06-3129&ln=en (accessed on 2 February 2018); Musila *supra* note 2, chapter six.

¹² See ICC, ‘Regulations of the Court’, adopted by the judges of the Court on May 26, 2004 pursuant to Art. 52 Rome Statute. Available online at www.icc-cpi.int/NR/rdonlyres/B020AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf (accessed 19 December 2017).

Second, the ACC has the discretion under Article 45(3) Malabo Protocol, to ‘take account of representations from or in behalf of the convicted person, victims, other interested persons or interested states’ before making an order. The omission of ‘under this article’ that one finds in Article 75(3) Rome Statute from the Article 45(3) appears to establish, at first blush, a general right of those named therein to make representations to the court. This provision should not be read as inferring a general right to participation by victims, states and the undefined category of ‘other interested persons’. It is not clear why states and ‘other interested parties’ would have an interest in reparations proceedings and why the court would consult them during proceedings. At the ICC, the Court – through the TFV – generally consults states on the implementation of reparations orders. This said, the ACC may request states to take measures to preserve or convey the proceeds of property subject to forfeiture orders located on its territory to the court for use toward reparations or to be returned to its lawful owner as foreseen under Article 43A of the Malabo Protocol. Obligations of states relating to enforcement of fines and forfeiture orders are detailed in Article 46J *bis* Malabo Protocol. The cooperation framework – one of the key pillars of the ACC – and the specific circumstances under which states parties are obliged to cooperate with the court are detailed in Article 46L under the rubric ‘cooperation and judicial assistance’. Under this provision, which is an abridged version of Article 93 of the Rome Statute that enumerates areas of cooperation and assistance to the ICC, the ‘identification, tracing and freezing or seizure of proceeds of property and assets and instrumentalities of crime’ feature prominently on the list of issues in respect of which cooperation and assistance by states parties is mandated and the court has made such requests in the past, notably in the *Bemba* and *Kenyatta*¹³ cases.

Third, Article 43 empowers the court to order a convict to pay reparations to or in respect of victims, and as the ICC Appeals Chamber has held in *Lubanga*, the court is to affirm the ‘civil liability’ of a convict even in case of indigence.¹⁴ To be eligible, victims must prove harm, injury or loss occasioned by criminal conduct for which the accused has been convicted. Such victims would have made an application by way of prescribed forms for reparations, which application is assessed based on criteria established in the Statute and RPE. In the first place, an applicant must be victim and the harm,

¹³ *The Prosecutor v. Uhuru Muigai Kenyatta*, Situation: Situation in the Republic of Kenya, Decision on the implementation of the request to freeze assets ICC-01/09-02/11-931, available online at www.icc-cpi.int/CourtRecords/CR2014_06208.PDF (accessed on 2 February 2018).

¹⁴ *Lubanga* (Reparations) Appeals Chamber, *supra* note 11, at para 65.

loss or injury they complain of is causally connected to one or more of the charges for which an accused is convicted.¹⁵ If the RPE to be adopted by the AU includes a rule analogous to Rule 85 of the ICC RPE, ‘victim’ would connote both a natural person that has suffered harm directly or indirectly (such as surviving family members) and legal persons defined in the rule as ‘organizations or institutions that suffer direct harm to any of their property dedicated to religious, education, art, science or charitable purposes as well as other places such as hospitals dedicated to humanitarian purposes.’¹⁶

The identification of victims of core international crimes and piracy should be a straightforward task. The inclusion of new crimes in the Statute of the ACC – unconstitutional change of government, mercenarism, corruption as well as several transnational crimes which may lack clarity in terms of nature and scope of proscribed conduct as shown in separate chapters in this volume – throws up interesting definitional challenges that have to be considered in the RPE and which the ACC is likely to be called to grapple with. Take for instance the crime of unconstitutional change of government (UCG). This crime consists of the unconstitutional change of government through coups (by military, mercenaries or rebels) or overstaying in power by an elected government past the expiration of a mandated term. In this case, who are the victims? The president and his/her government that are forced out? The vendors that lose property through looting? Demonstrators (those pro or against the change) that are killed or maimed? Many other pertinent questions flow from the definition, and deserve close attention from the drafters of the RPE, the judges and the Trust Fund.

Given the trajectory of developments pertaining to victims’ rights detailed above, and the fact that the Malabo Protocol was adopted 16 years after the Rome Statute, it is not clear why the Malabo Protocol does not make provision for victims’ right to participate at all stages of proceedings. This aspect constitutes one of the most transformative innovations of the Rome Statute that should be considered as an affirmation of norms as they stood in 1998.¹⁷ The right of victims to participate in their capacity as victims in criminal

¹⁵ See the Decision on Requests Regarding Reparations in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* Situation: Situation in the Republic of Kenya ICC-01/09-01/11, Trial Chamber V(A), 1 July 2016 (the court rejected an application for reparations following the withdrawal of charges against the accused). Available online at www.icc-cpi.int/CourtRecords/CR2016_04798.PDF (accessed on 19 December 2017).

¹⁶ Rule 85 (b) ICC RPE.

¹⁷ On the right to participation at the ICC, see generally, Musila, *supra* note 1, at chapter 5; M. Pena and G. Carayon, ‘Is the ICC Making the Most of Victim Participation?’, 7 *International Journal of Transitional Justice* (2013) 518–35.

proceedings was one of the key gains of the victims' rights movement, and a transformative innovation of the Rome Statute. It gives victims a voice, and affirms the idea that victims' rights are wider than the right to justice and limited judicial truth about crimes that is revealed by trials. The right to participate in at all stages of the proceedings is closely tied to the right to reparations. Victims' pursuit of reparations has been adjudged on several occasions as a vital interests for purposes of Article 68(3) Rome Statute, which is the general clause on participation, and requires proof of an interest in the trial for one to be admitted.¹⁸ The instrumental value of the right to participate for victims may have been lost to the promoters of the Malabo Protocol, but it is telling that standing for victims before the Human Rights Section – the second of three chambers in the African Court of Justice and Human and Peoples Rights of which the ACC forms part – is conditioned on a mandatory declaration by State parties accepting the receipt of petitions from individuals and Non-Governmental Organizations.¹⁹ However, one need not have been admitted to participate in trial proceedings to be eligible to receive reparations. In *Lubanga*, the Appeals Chamber and Trial Chamber concurred that victims that were not admitted to participate in the trial could receive reparations implemented through the Trust Fund for Victims from resources obtained from sources other than an indigent convict.²⁰ ICC chambers have held that for victims to be admitted to participate in the proceedings, they have to demonstrate an interest that they seek to protect, and their desire to receive

¹⁸ Prosecution's Observations on the Applications for Participation of Applicants a/0001/06 to a/0003/06, *Situation in the Democratic Republic of the Congo, In the case of the Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06), Pre-Trial Chamber I, 6 June 2006, at ¶ 63. The Court noted with respect to participation at the investigation stage that "The personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators and to solicit reparations". See also Separate Opinion of Judge Sang-Hyun Song, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decisions of the Appeals Chamber" of 2 February 2007, *Lubanga* (ICC-01/04-01/06-925), Appeals Chamber, 13 June 2007, at ¶10 noting that victims have at least two interest-to obtain reparations and to receive justice.

¹⁹ See Art. 30 (f) Statute of the African Court of Justice and Human Rights (as amended by Art 16 Malabo Protocol). This provision is a carry-over from the Protocol Establishing the African Court on Human and Peoples' Rights (Art 34(6)).

²⁰ Appeal Chamber Reparations Decision, *Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06 A A 2 A 3), Appeals Chamber, March 3, 2015, available online at www.icc-cpi.int/CourtRecords/CR2015_02631.PDF (accessed on 12 December 2017); Decision Establishing the Principles and Procedures to be Applied to Reparations, *Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 7 August 2012, available online at www.icc-cpi.int/CourtRecords/CR2012_07872.PDF (accessed on 12 December 2017).

reparations is one such interest.²¹ In terms of Article 19A *bis*, the Malabo Protocol also includes the rights of victims to protection, stipulating in part that ‘the Pre-Trial chamber may issue such orders as may be required to provide for the protection and privacy of witnesses and victims...’ Unlike the Rome Statute, however, a general obligation that mandates all organs of the court to protect victims and witnesses is absent in the Malabo Protocol, but could be legislated through RPE to be adopted in future.²²

4. INSTITUTIONAL FRAMEWORK SUPPORTIVE OF REPARATIONS

A Trust Fund, ‘for legal aid and assistance and for the benefit of victims of crimes or human rights violations and their families’ is foreseen in Article 46M of the Malabo Protocol, but its actual establishment is conditioned on a decision of the Assembly of Heads of State and Government of the AU. It is unclear why this decision is postponed and reserved for the Heads of States, including those from non-state parties, once the Protocol Establishing the African Court is in force. In the absence of a trust fund for victims, the African Court would fall short of international standards and constitute regression insofar as the protection of the rights of victims is concerned. Although the TFV at the ICC has fallen short in significant ways, the fact that victims’ right to reparation forms part of international criminal justice is not in doubt. As the Trial Chamber has stated in *Lubanga*, reparations constitute a vital interest of victims of crimes and serve multiple functions: they relieve the suffering caused by commission of crime, afford victims justice by alleviating the consequences of crime, deter future violations, promote reintegration of victims into society and foster reconciliation.²³ Once the decision to create the fund is made, consideration should be given to several critical aspects.

First, the Trust Fund, as envisioned in the Malabo Protocol, is not dedicated solely to reparations for victims; it is proposed that it will finance legal aid as well as assistance to indigent suspects, accused and victims. This has institutional design, financial and capacity implications for the ACC as the expanded mandate of the Fund presupposes that appropriate levels of funding as well as institutional capacity to administer the three strands of work. Since many accused are likely to be indigent, and witnesses will require support to

²¹ Art. 68(3) Rome Statute; see for instance *Kony et al.*, *supra*, note 8.

²² Art. 68(1) Rome Statute

²³ Decision establishing the principles and procedures to be applied to reparations, *The Prosecutor v. Thomas Lubanga Dyilo, Situation: Situation in the Democratic Republic of the Congo* (ICC-01/04-01/06) (Reparations), at para 179 available online at www.icc-cpi.int/CourtRecords/CR2012_07872.PDF (accessed on 2 February 2018).

testify at the court, a significant amount of resources have to be raised to pay for legal fees and investigations for defendants as well as travel costs and related expenses for witness for the prosecution and defense. For comparison, the ICC's budget for 2017 makes provision for 12 defense teams and up to five teams of legal representatives of victims.²⁴ The TFV also runs assistance programs for victims in Northern Uganda and Democratic Republic of Congo (DRC). They equip victims with skills, provide startup capital for small income generating activities as well as medical assistance and rehabilitation for victims of sexual and gender based violence.²⁵

Second, it is unclear whether the Fund will draw its budget from members' assessed contributions to the African Court or whether, as is the case of the ICC's TFV, it will rely on voluntary contributions and donations. The experience of the ICC's TFV and the Court's overall perceptions in the eyes of victims should be instructive. Until now, three cases, that of *Lubanga* and *Germain Katanga*, both from DRC, and *Al Mahdi* from Mali, have been completed by the court, including the determination of the legal responsibility for payment of reparations and the institutional arrangements for implementing reparations. Lubanga's indigence, as is the case for Katanga and Al Mahdi, meant that the 14 victims in his case could not claim reparations from him, although the Appeals Chamber, in agreeing with the Trial Chamber (Reparations) held that his obligation to pay reparations was not extinguished by his lack of means. The 14 victims, together with other victims that did not participate in the trial – or those that could not prove that the harm, loss or injury they suffered – were causally connected to the crimes for which Lubanga was convicted and could benefit from collective reparations to be implemented by the TFV using voluntary contributions. A similar situation obtains in *Katanga*, where 297 victims out of 341 that applied for reparations were awarded a symbolic €250 each as individual reparations and will also benefit from collective reparations amounting €1 million to be implemented for the benefit of the larger community from which they hail.²⁶ Additionally, reparations were allocated for *Al Mahdi*, where the destruction of cultural artifacts implicates the rights of the immediate community in Timbuktu for

²⁴ Assembly of States Parties, *Proposed program budget for 2017 of the International Criminal Court* (2016) available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-10-ENG.pdf (accessed on 12 October 2017), at ¶ 42.

²⁵ *Ibid.*, at ¶ 693.

²⁶ Ordonnance de réparation en vertu de l'article 75 du Statut, *The Prosecutor v. Germain Katanga*, (ICC-01/04-01/07-3728), La Chambre de Première Instance II, 24 March 2017, available online at www.icc-cpi.int/CourtRecords/CR2017_01525.PDF (accessed 19 December 2017).

damage to buildings of cultural value and attendant economic loss, as well as moral harm to the entire humanity that are invested in the cultural property's unique and intangible value.²⁷ The TFV was ordered to submit an implementation plan for the implementation of collective reparations amounting to €2.7 million in February 2018.

The fact that the reparations scheme in the Rome Statute can be said to be inadequately responds to the multiple needs of victims as intended negates the purposes for which it was enacted. The lack of adequate funds available to implement reparations is limiting in terms of potential beneficiaries of mostly collective reparations. Equally, liability-free assistance programs operated by the Fund in Northern Uganda and DRC (with potential for extension to Central African Republic, Cote d'Ivoire and Kenya, subject to funds) secure medical treatment, rehabilitation and skills to some victims with and are important but inadequate. It is fair to conclude that the ICC has turned out to be disappointing for victims, a majority of whom are from the eight African states currently the subject of investigations or preliminary examination at the court. It is thus imperative that the AU prioritizes funding modalities for the Trust Fund to be established in the ACC.

The Registry, which serves as the neutral administrative organ of the court, is established under Article 22B of the Malabo Protocol. It is a critical linkage institution that services other organs within the court, including the Judiciary and Office of the Prosecutor. It facilitates communication between and among organs of court as well as between the organs and victims and witnesses. If the ICC serves as a model, the Registry should host the Victims and Witnesses Unit. It is mandated to provide 'protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses.'²⁸ Adequate provision should be made to assemble in adequate quantities expertise that enables the court to respond to multiple protection and assistance needs. In addition victims and witnesses, the ICC's experience shows that the inadequacy of the legal and institutional mechanisms for implementing protective measures in respect of intermediaries – individuals on whom various organs of the court came to rely on to access victims and witnesses – not only compromised their security but also impacted the court operationally. It is unlikely that the ACC will find

²⁷ Reparations Order, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, (ICC-01/12-01/15-236), Trial Chamber VII, 17 August 2017, available online at www.icc-cpi.int/CourtRecords/CR2017_05117.PDF (accessed on 19 December 2017).

²⁸ Art. 22B(9)(a) Malabo Protocol.

it unnecessary to work with intermediaries, given the finite nature of resources available to it and the diversity of victim and witness communities in situation countries.

5. CHALLENGES IN IMPLEMENTING REPARATIONS: AREAS FOR REFORMS

Proponents of the Malabo Protocol and supporters of the ACC face an uphill task in convincing African States to ratify and commit funds to establish the African Court. Once these milestones are reached, numerous structural problems are likely to undermine how the court functions, and whether it can deliver justice for victims have to be addressed. These challenges, which are discussed in turn include: immunities for senior political leaders, gaps in the legal and institutional framework, substantive jurisdiction of the ACC, financial and human resource.

First, the grant of immunity to heads of states and an undefined category of 'other senior officials' from investigation and prosecution by the ACC has elicited sharp criticism, particularly from victims, civil society and academic commentators.²⁹ Article 46A *bis*³⁰ provides that: 'No charges *shall be commenced or continued before the Court* against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.' For purposes of this chapter, the effect of this clause is to suspend the court's jurisdiction in respect of a category of senior political leaders that tend to sit beyond the reach of national courts, either because of immunities in national law or their influence on criminal justice. This is a group of individuals for whom international courts are most well suited, particularly in relation to the prosecution of core international crimes of genocide, war crimes, crimes against humanity and aggression. If the grant of immunity to public officials is indicative of reticence of African leaders to submit themselves to regional criminal justice, it also sends the message – as illustrated in the Al Bashir and Kenyatta cases – that they would be reluctant to submit themselves to and cooperate with the ICC, where a suspect's official capacity does not

²⁹ See for instance, Amnesty International, *supra* note 10; Africog, *Seeking Justice or Shielding Suspects?: An analysis of the Malabo Protocol on the African Court* available online at <http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf> (accessed on 2 November 2017); A. Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' 24 *European Journal of International Law* (2013) 933–46.

³⁰ Chapter 29 in this volume treats the subject of immunities in greater detail.

constitute a bar to the exercise of jurisdiction by the Court.³¹ In addition, it is unlikely that they would only be amenable to having other less significant actors tried, if at all, when called upon to cooperate with the ACC. While it is not suggested here that the trial of say, third tier perpetrators does not advance the cause of justice, this class of perpetrators are likely to be indigent and would lack the means to pay for their own legal fees let alone reparations to victims when they are convicted. With respect to subject matter jurisdiction, there are numerous concerns that could pose challenges for the prosecution of non-core international crimes proscribed in the Malabo Protocol.³² For these reasons, it is likely that when established, the court is unlikely to be the forum of choice for victims of *any* international crime who seek a real opportunity to receive reparations for harm, injury and loss suffered.

Second, valid concern has been expressed by commentators on whether the African Union can marshal the resources needed on a sustained basis to fund a court with three chambers – General Affairs Section (that exercises jurisdiction similar to the International Court of Justice), Human Rights Section and Criminal Law Section. The General Affairs Section also serves as the Administrative or Labor Court for the Union. It has been argued that the AU's dependence on cooperation assistance to fund its human rights bodies does not bode well for the ACC in which one trial could cost €20 million. As opposed to the ICC which has 18 judges, the Protocol of the African Court of Justice and Human and Peoples Rights makes provision for 16 judges,³³ with only four assigned to the ACC. This will pose serious capacity challenges, particularly when the scope of substantive criminal jurisdiction pertains not just to the core international crimes over which the ICC has jurisdiction, but includes 10 new crimes.³⁴ Of the four assigned to the Criminal Law Section, only one presides over the Pre-Trial Chamber (PTC) while three serve in the Trial Chamber. The Appellate Chamber hears appeals from all three sections of the court and therefore substantively combines general international law, human rights and international criminal law jurisdiction. This could pose

³¹ See Art. 27 Rome Statute. For interpretation, see for instance, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Situation in Darfur, Sudan (ICC-02/05-01/09-139), Pre-Trial Chamber I, December 12, 2011, available online at www.icc-cpi.int/CourtRecords/CR2011_21722.PDF (accessed on 20 December 2017). See also Chapter 29 in this volume.

³² See various chapters on substantive crimes in this volume.

³³ Art. 3, Statute of the African Court of Justice and Human Rights (2008)

³⁴ Art. 28A–28M Malabo Protocol.

serious challenges for efficiency once the court's uptake of cases picks up. When compared to the ICC, the number of judges falls far short of required capacity.³⁵ One judge on the PTC of the Criminal Law Section, as compared to the ICC's six, is unlikely to effectively perform all the functions normally assigned to the PTC, which includes exercising judicial controls over the Office of the Prosecutor as well as determining questions pertaining to participation and reparations. The process of considering applications for reparations and participation is labor intensive.³⁶

The adequacy or otherwise of funds at the disposal of the Trust Fund for the implementation of reparation is the third key challenge that the victims' reparations regime will face. As the experience of the ICC shows, the exclusion of state responsibility for reparations is a good indicator as to whether victims are taken seriously by the ACC. The fact that the decision as to whether a Trust Fund is to be established or not is conditioned on an affirmative future decision of the Assembly of Heads of State and Government does not speak glowingly about the AU's concern for victims. Yet, reparations are integral to the promise of justice for victims of international crimes in Africa. The voluntary nature of the ICC's TFV has left it chronically underfunded even as more cases reach the reparations stage. As noted, ICC Trial Chambers (sitting as reparation chambers) have, of December 2017, issued reparations orders in three cases from two situations: in *Thomas Lubanga*, *Germain Katanga* (currently on appeal), and *Al Mahdi* (Mali), while orders are awaited in the case of *Bemba* (CAR). According to the President of the TFV, the Fund lacks adequate resources to fund various aspects of its work which is both expansive and complex:

The volume and complexity of work related to reparations mandate are huge and almost overwhelming for the limited resource capacity of the TFV. To name a few, this includes legal submissions to the relevant Chambers; the development and adaptation of a draft implementation plan, requiring frequent missions to the field to consult directly with victims and relevant authorities; competitive bidding procedures to identify the most suitable local implementing partners; and in certain delivery modalities, the direct on-site involvement of the TFV staff. Moreover, the workload arising from the reparations mandate is completely out of control for the TFV and is largely unpredictable both in its volume and pace.³⁷

³⁵ Amnesty International, *supra* note 10.

³⁶ On the role of the PTC in pre-trial proceedings at the ICC, see Musila *supra*, note 2 at 141–143.

³⁷ ICC Trust Fund for Victims, *Report of the Board of Directors of the Trust Fund for Victims to the Sixteenth Session of the Assembly of States Parties*, 4 December 2017, available at <https://trustfundforvictims.org/sites/default/files/reports/ASP-16-BDTFV.pdf> (accessed on 19 December 2017).

While the operational budget of the TFV is primarily funded from the ICC's general budget (assessed contributions), funds are raised periodically from voluntary attributions to mount assistance programs in various situation countries and following the finalization of the cases in *Luganga, Katanga and Al Mahdi*, implementing reparations programs for the benefit of victims (individual and collective). For the year 2017, the allocation for the operational budget of the TFV was € 2.5 million, most of which goes to payment of staff salaries.³⁸ The experience of the ICC should be instructive for African policy makers.

The last major concern that needs a fix is the legal and institutional framework pertaining to victims' rights and reparations in particular. Some of the lacunae in the founding protocols and statutes have been cited above. The legal framework on reparations is to be completed once RPE as well as Regulations of the TFV and Regulations of the Court are adopted. In the analysis in preceding sections, reference has been made to relevant provisions in the ICC's legal framework as well as jurisprudence which should inform the AU's legislative activities as they relate to the ACC and victims' rights in particular. This contribution has also urged the inclusion of victims' right to participation in the statute, coupled with relevant rules and regulations. This would have institutional and resource implications, and a section would have to be designated within the ACC's Registry to facilitate the exercise of this right.

6. FUTURE PROSPECTS: REAL JUSTICE FOR VICTIMS?

The future of the ACC, and whether it will offer a real option to complement the work of the ICC and national courts depends on commitment by states not only to allow the court to function independently, but also to commit the required resources to the enterprise. The experience of the ICC with victims' rights shows that a funding model for the trust fund based on voluntary contributions is grossly inadequate. This experience speaks eloquently of the necessity to adopt a sustainable funding model that ensures that victims' rights to reparations are taken seriously. Yet, with a few exceptions, African states parties have so far not shown themselves to be champions of victims' rights at the ICC and voluntary contributions to the TFV have largely come from non-African states and private sources. Even states that should situation countries that referred situations to the ICC, have tended to step back and hope that the

³⁸ For the year 2017, the allocation for the operational budget was €2.5 million, most of which goes to payment of staff salaries. See Assembly of States Parties, *Proposed Program Budget for 2017 of the International Criminal Court* (2016), available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-10-ENG.pdf (accessed on 12 December 2017) at ¶¶ 699–721.

Court will take on the full burden of ensuring that victims access justice. The future of the ACC, and the fate of victims, will depend on not only on a change in attitudes, but also on appreciable commitment to justice, demonstrable through a willingness to establish an adequate legal and institutional framework and provide required resources.

This contribution has made a forceful case for the inclusion of the right to reparations and the right to participation in the Malabo Protocol on the ACC, given the inadequacies in the current regime. With reference to relevant texts, jurisprudence and relevant ICC practice, the key elements to which reforms should be directed were identified.