
Reparations and the politics of recognition

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Introduction

There is an enduring tension in the distribution of international criminal reparations. On the one hand, awards for reparations are at heart a form of recognition that entails including certain people and excluding others. On the other hand, this is very hard to do in contexts of mass atrocity with a system limited to individual criminal responsibility. With its reparations award in *The Prosecutor v. Thomas Lubanga Dyilo (Lubanga)*, Trial Chamber I of the International Criminal Court (ICC) acknowledged this tightrope and attempted to walk it through principles of flexibility and inclusivity.¹ These principles alone, however, are not sufficient, as was underlined by the Appeals Chamber's judgment of March 2015.² The provision of international criminal reparations is an inherently political act through which the ICC will necessarily become a player in local power relations. In this chapter, I seek to unpack one key dimension of these relations – the 'politics of recognition' – and offer strategies to navigate them.

Unlike the politics of distribution, which entail struggles over the allocation of goods, recognition entails interpreting, representing and rendering visible (and invisible) categories of people.³ Reparations

¹ Decision establishing the principles and procedures to be applied to reparations, *The Prosecutor v. Thomas Lubanga Dyilo ('Lubanga')*, ICC-01/04-01/06, Trial Chamber I, ICC, 7 August 2012 ('Reparations Decision, *Lubanga*, 7 August 2012').

² 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, *Lubanga*, Appeals Chamber, ICC, 3 March 2015 ('Reparations Judgment, *Lubanga*, 3 March 2015').

³ On the politics of recognition and its relationship to the politics of distribution, see N. Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation', in L. Ray and A. Sayer (eds.), *Culture and Economy after the Cultural Turn* (London: Sage, 1999), 25–52.

involve both, which makes them an authoritative form of recognition in international criminal justice, and an especially political process. My argument in this chapter is as follows: compared to assistance or development or humanitarian aid, reparations are particularly marked by the politics of recognition, which manifest themselves on the ground in affected communities in at least two ways. One was partly acknowledged in the Trial Chamber's reparations decision: the risk of subjecting already vulnerable groups to forms of interpretation that are foreign or even hostile. This is particularly dangerous for reparations to victims of grave crimes, for whom the stigma attached to a crime can be as harmful as the original act itself, or even more harmful.⁴ Second, there is a risk that the reparations process will be captured by elites and subsumed to local power struggles as communities contest the right to legitimately claim particular identities and characterisations of the conflict. While the way an award is designed can help ameliorate these tensions, I focus here on the importance of project implementation and the process through which an award's ultimate beneficiaries are targeted. The targeting process, I argue, is integral to how victims and affected communities experience the reparations process and therefore deserves careful consideration by the ICC.

To illustrate, this chapter draws on experiences from some of international criminal justice's neighbouring fields – development, assistance and reconstruction – and on personal research conducted in the Ituri region of the eastern Democratic Republic of the Congo (DRC), where the *Lubanga* reparations will be distributed. This research suggests that the politics of recognition demands more than combining individual and collective reparations, as the Trial Chamber proposed, and more than field-based expertise, which it believes will enable the ICC's Trust Fund for Victims (Trust Fund or TFV) to successfully manage the process.⁵ Rather, these politics demand one or both of the following: (1) a participatory approach to defining the criteria by which reparations will be distributed and identifying those who will benefit – what practitioners call 'targeting'; and/or (2) close involvement by the Trial Chamber throughout the targeting

⁴ 'Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights', United Nations High Commissioner for Human Rights (2011) (OHCHR, 'Report of the Panel on Remedies and Reparations').

⁵ Reparations Decision, *Lubanga*, 7 August 2012, para. 266.

process.⁶ The Appeals Chamber's judgment, which scaled back several of the Trial Chamber's attempts at flexibility and inclusivity, underscores the importance of such strategies,

Targeting is among the most powerful mechanisms through which the individuals and communities to whom goods are distributed (and not distributed) experience the meaning attached to them. This is particularly important for reparations because they are at heart a symbolic good. Targeting should therefore not be relegated to a seemingly apolitical, technical phase of project 'implementation'. Yet, by relinquishing to the Trust Fund its authority over these details, Trial Chamber I (as well as subsequent chambers) risks diminishing the potential significance of reparations and increasing the risk that the process may be captured by local politics. This not only risks causing further injury to communities and individuals harmed by grave crimes, but it also risks compromising the ICC's legitimacy. At the same time, I propose, the politics of recognition can also be leveraged to repair grave harms, a claim to which I return in the chapter's conclusion.

This argument is divided into five sections. The first explains why the politics of recognition matters for reparations in general, and for international criminal reparations in particular. The second briefly reviews the Ituri conflict and the Trial and Appeals Chambers' reparations decisions in *Lubanga*, including their approach to targeting and the potential role given to the TFV. The third section draws on the experiences of international criminal justice's neighbouring fields – development, assistance and reconstruction – to reflect on the risks that reparations pose to vulnerable groups and communities if targeting is not handled carefully. In the fourth section I use my personal research in the DRC to analyse what these risks could mean for Ituri specifically. The fifth and concluding section proposes a potential resolution, drawing on promising work in the area of community-driven reconstruction and arguing for a targeting process that is closely linked to the judicial process.

My research in Ituri involved several trips to the region, the last of which spanned eight months in 2013.⁷ This was a significant time for Ituri, ten years after Luis Moreno-Ocampo first announced his interest in

⁶ There is currently a debate over the precise nature of the legal relationship between the ICC and the TFV, which I do not enter into here. For more, see C. McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory', *International Journal of Transitional Justice*, 3 (2009), 250–271.

⁷ This research was conducted with Maria Elena Vignoli and the Ituri-based NGO, Réseau Haki na Amani, supported by PAX. See P. Dixon and M.E. Vignoli, *Le Droit De Connaître: Vérité Et Réconciliation En Ituri* (Amsterdam: PAX, 2014).

the region and his intention to begin investigations there.⁸ My arrival followed Lubanga's guilty verdict and the subsequent reparations decision; the acquittal of one of his alleged enemies, Mathew Ngudjolo; and the arrest and transfer to The Hague of Lubanga's alleged partner in Ituri, Bosco Ntaganda.⁹ In collaboration with the Ituri-based NGO, Réseau Haki na Amani, we interviewed a broad selection of Ituri's traditional leadership, including village and regional chiefs (*chefs des villages, chefs des collectivités*); 'notables', who are considered representatives of the different ethnic groups; and leaders from civil society groups, including the directors of non-governmental peace, justice and development organisations. In total, we spoke to 182 individuals in fifty-five interviews across three of Ituri's five territories: Djugu (where the capital Bunia is located), Irumu and Mahagi. These interviews involved the two main ethnic groups in Ituri – the Hema and Lendu – as well as the Bira, Alur and others.¹⁰ We also conducted a randomised, representative survey of Djugu and Irumu on attitudes about possibilities for truth and reconciliation in Ituri.

My observations in this chapter draw mostly on our qualitative data. While these data are not representative of all Iturians, they serve to illustrate and elaborate on Ituri's contemporary political climate. Finally, this chapter also draws on policy reports, case studies and evaluations from international organisations and agencies. These are useful to illustrate the practical challenges to implementing reparations, particularly around issues of targeting and the stigmatisation of victims.

Reparations and the politics of recognition

According to the ICC's registrar, 'victims have indicated they want to be recognized'.¹¹ To that end, I seek to unpack the discretion, idiosyncrasies, assumptions, politics and power dynamics that make certain forms of

⁸ International Criminal Court, 'Press Release: Communications Received by the Office of the Prosecutor of the ICC', No. pids.009.2003-EN (The Hague: International Criminal Court, 16 July 2003) ('ICC Press Release, 16 July 2003').

⁹ Reparations Decision, *Lubanga*, 7 August 2012; Judgment pursuant to Article 74 of the Statute, *The Prosecutor v. Mathew Ngudjolo Chui*, ICC-01/04-02/12, Trial Chamber II, ICC, 18 December 2012; Decision on the Prosecutor's Application under Article 58, *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Pre-Trial Chamber II, ICC, 13 July 2012.

¹⁰ The interviews were conducted in French or in local languages with the help of a translator. The translations provided in this chapter are my own from French.

¹¹ 'Turning the Lens: Victims and Affected Communities on the Court and the Rome Statute System', RC/ST/V/INF.2 (The Hague: Registry, International Criminal Court, 2010).

victimisation recognisable and others less so. These issues are not unique to reparations. Development initiatives, humanitarian assistance and reconstruction projects all entail particular methods of targeting through which they define, measure and act upon the world, often obscuring the politics behind them.¹² Simply analogising ICC reparations to the politics of development assistance and humanitarian aid, however, misses what is 'legal' about the Court and Court-ordered reparations. Where the politics of development, assistance and reconstruction might tend more towards struggles over distribution, Court-ordered reparations distinguish themselves through the very act of recognition – a 'technology of truth' through which the truth is identified, measured, represented and, ultimately, objectified.¹³ This makes ICC reparations political not in the sense of interest groups politics, but through their introduction of such a technology into the social relations and power struggles of the places where the Court intervenes – in other words, into the politics of recognition.

For the ICC, whose Trust Fund is already distributing goods to victims in Ituri under the label of 'assistance', distinguishing reparations from assistance is particularly important. This section analyses the similarities between reparations and development and reflects on how international criminal reparations are entangled in such politics.

Distinguishing reparations from assistance

The ICC has thus far worked primarily in resource-deprived contexts, where many people live in need of food, shelter, health care and security.¹⁴ Not surprisingly, these immediate needs often take priority.¹⁵ In these contexts, reparations can be seen as a means of satisfying basic ends,

¹² J. Ferguson, *The Anti-Politics Machine: 'Development', Depoliticization, and Bureaucratic Power in Lesotho* (Cambridge: Cambridge University Press, 1990).

¹³ See S. Engle Merry, 'Anthropology and International Law', *Annual Review of Anthropology*, 35 (2006), 99–116; S. Engle Merry and S. Bibler Coutin, 'Technologies of Truth in the Anthropology of Conflict: Aes/Apla Presidential Address, 2013', *American Ethnologist*, 41 (2014), 1–16.

¹⁴ The following description fits the ICC's situation countries well: 'poverty, huge inequalities, weak institutions, broken physical infrastructure, poor governance, high levels of insecurity, and low levels of social capital.' P. de Greiff, 'Articulating the Links between Transitional Justice and Development: Justice and Social Integration', in R. Duthie and P. de Greiff (eds.), *Transitional Justice and Development: Making Connections* (New York: International Center for Transitional Justice, 2009), 28–75, 29.

¹⁵ Patrick Vinck, Phuong Pham and colleagues have conducted representative surveys in a number of conflict and post-conflict settings, all of which underscore the diversity of people's priorities and the importance of basic needs.

no matter the reasoning behind them. Equally importantly, the awarding of reparations will rarely go unnoticed by a recipient's broader community, even in the case of individual reparations. Lawyers and transitional justice scholars are well aware of these similarities. In more than one case, prosecution witnesses have been accused of providing their testimony only in exchange for assistance. In such contexts, distinguishing reparations and assistance through the former's symbolic element is particularly important, both for the court issuing them and for the affected communities. Indeed, reparations can look very similar in form to development, assistance and reconstruction projects, particularly when the organisational provenance of the two does not necessarily distinguish them.

This is the case in Ituri, as it will likely be for many of the situations when and if ICC trials reach the reparations phase. The TFV is mandated by the Rome Statute system to provide both 'reparations' and 'assistance' and has been providing the latter in northern Uganda and eastern DRC since 2009.¹⁶ This assistance can only be given to victims of crimes under the jurisdiction of the ICC, as they are defined in the Rome Statute, but it is provided prior to and separate from any particular criminal proceedings. In practice, however, the line between reparations and assistance can be unclear. In Ituri, for instance, the Trust Fund is providing assistance to former child soldiers, some of whom may have participated in the war under the leadership of Thomas Lubanga. What, then, distinguishes reparations from assistance when the same Court can provide both to the same group of beneficiaries?

To answer this, lawyers and scholars stress the symbolic element of reparations. In the words of two commentators, 'What distinguishes reparations from assistance is the moral and political content of the former, positing that victims are entitled to reparations because their rights have been violated.'¹⁷ This then implies that, 'those receiving reparations are by definition rights holders'.¹⁸ Morally, reparations are given to a recipient because she has been *wronged*, not because she is in need or is vulnerable. Politically, reparations are awarded because a

¹⁶ Rule 98, ICC Rules of Procedure and Evidence. For more on the TFV's legal basis, see www.trustfundforvictims.org/legal-basis.

¹⁷ N. Roht-Arriaza and K. Orlovsky, 'A Complementary Relationship: Reparations and Development', in P. de Greiff and R. Duthie (eds.), *Transitional Justice and Development: Making Connections* (New York: International Center for Transitional Justice, 2009), 170–213, 179.

¹⁸ *Ibid.*

recipient's *rights* have been violated. Together, both dimensions are meant to (re)establish what Pablo de Greiff has called 'inclusive citizenship' and what Brandon Hamber calls 'social recognition'.¹⁹ Both terms denote the social and political integration of victims back into society. In theory, the intended symbolism of a reparations award is thus potentially far more valuable than the particular good or service actually being distributed.

Recognition and targeting

That such subtlety is effectively communicated to, and understood by, the recipient herself and by her broader community is central to the intended mission of reparations. In this context, outreach is clearly crucial. The judgment from which a reparations award stems must be effectively explained to an award's ultimate beneficiaries. Furthermore, the particular targeting strategy through which reparations are distributed will influence their meaning on the ground. As de Greiff writes, 'the element of recognition that is part and parcel of reparations ... will typically require targeting victims for special treatment'.²⁰

Targeting has been of particular concern to fields like international development for several decades, particularly since development scholars like Amartya Sen began to examine the importance of participation, consultation and dialogue in the development process.²¹ One problem with traditional, criteria-based methods of targeting is that beneficiaries 'do not share the same targeting concerns as the national level or donor agencies'.²² This is of particular concern for international criminal reparations.

Compared to reparations from domestic and international human rights courts, international criminal reparations will tend to communicate the meaning attached to them more exclusively via the particular targeting

¹⁹ de Greiff, 'Articulating the Links', 62. Hamber writes, 'without social recognition, their suffering runs the risk of continuing to exist only in their internal world where it can be acute and isolating'. B. Hamber, 'Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition', in P. de Greiff (ed.), *The Handbook of Reparations* (New York: Oxford University Press, 2006), 560–589.

²⁰ P. de Greiff, 'Establishing Links between DDR and Reparations', in A. Cutter Patel et al. (eds.), *Disarming the Past* (New York: International Center for Transitional Justice, 2009), 132–159, 151.

²¹ A. Sen, *Development as Freedom* (New York: Anchor, 2000). See also J. Van Domelen, 'Reaching the Poor and Vulnerable: Targeting Strategies for Social Funds and Other Community-Driven Programs', The World Bank (2007); G. Mansuri and V. Rao, 'Community-Based and -Driven Development: A Critical Review', *The World Bank Research Observer*, 19 (2004), 1–39.

²² J. Van Domelen, *ibid.*

strategy through which they are distributed. In domestic criminal proceedings, which are likely to play out closer to the victims themselves than international proceedings, outreach by itself may go a long way. In cases where the state is ordered by an international human rights court to pay for and implement awards, the state can directly manage communication, for better or worse. In either case, it is easier to communicate 'the seriousness of the state and their fellow citizens [to] re-establish relations of equality and respect', which reparations are meant to convey.²³

But international criminal reparations face a more daunting task. They come from the ICC, a court that is far removed from the local context and which has little authority over the state in question. Furthermore the simultaneous reliance of international criminal reparations on symbolism and targeting makes them vulnerable to the local politics of recognition in significant ways. Here, I am concerned with two aspects of these politics in particular: (1) the subjection of victimised groups to forms of interpretation that may do them harm, or which they may reject, and (2) the struggle over interpretations and characterisations of the conflict and its victims.

I do not argue that domestic or international human rights reparations are immune from such struggles over recognition, but they are on average better equipped to manage them. State-based reparations, for example, can coordinate with other programmes to fill in the gaps that reparations will miss, thus ameliorating some of the distributive tensions that can exacerbate the politics of recognition. De Greiff explicitly supports such coordination.²⁴ But the ICC cannot count on states or other international agencies to complement or coordinate with its plans for reparations, and the Trust Fund's assistance resources are limited. The politics of distribution are also a concern for reparations; indeed, the two can never be completely separated. But because recognition is fundamental to what makes reparations meaningful, the politics of recognition are of particular concern.

To briefly illustrate, the ICC's Office of the Prosecutor (OTP) has thus far characterised the Ituri war as a fundamentally ethnic conflict played out between two ethnic groups: the Lendu and the Hema.²⁵ In the OTP's four Ituri-based cases, both the alleged crimes and the categories of

²³ de Greiff, 'Articulating the Links', 145. ²⁴ *Ibid.*

²⁵ For example, Smith writes, '[Bosco Ntaganda] persecuted civilians on ethnic grounds, through deliberate attacks, forced displacement, murder, rape, sexual enslavement and pillaging.' David Smith, 'Congo Warlord Bosco Ntaganda Led Ethnically Motivated Murder, ICC Told', *The Guardian*, 10 February 2014.

victimisation are thus structured accordingly. In my own research, however, both Lendu and Hema often rejected this characterisation. This was not because they denied either the legitimacy of Lendu and Hema as categories of identity or that there was significant conflict between them, but because they tended to see the conflict in more fluid terms, where violence was also economically, politically and geo-politically motivated.

The next section describes the Iturian context and reviews prior and ongoing debates over the characterisation of the Ituri war in *Lubanga*. These debates highlight that the ICC is aware of the challenges that reparations are likely to encounter in the field, which the Trial Chamber has tended to cast in terms of a tension between inclusivity and exclusivity. I agree with such a characterisation, but see this tension as fundamentally political in nature. In later sections, I draw on the targeting experiences of development, assistance and reconstruction projects and on my personal research to illustrate what these politics of recognition look like in practice.

The Ituri war and *The Prosecutor v. Thomas Lubanga Dyilo*

In its reparations decision, the Trial Chamber embraced reparations as a path to include those who were not recognised during the trial process, due to the idiosyncrasies of the OTP's case strategy and/or the limits of international criminal law. The chamber's proposed solutions call for flexibility and a combination of collective and individual awards. These are a good start, but more is needed to realise the Court's restorative potential. Measures of inclusivity can still rely on top-down targeting strategies and can still ignore, rather than manage, the politics of recognition. The Appeals Chamber's judgment also scaled back several of the Trial Chamber's attempts at inclusivity, underscoring that reparations cannot necessarily be used to fill in the gaps left by the trial process. Rather, a more participatory approach to targeting and/or closer involvement by the chamber will help.

The Ituri war

Ituri is a relatively small and picturesque district in northeastern DRC, bordering Uganda and South Sudan. Like much of eastern DRC, it is particularly rich in natural resources, including gold, diamonds, timber and oil. It is also home to numerous ethnic groups, although the two largest are by far the Lendu, who are mostly farmers, and the Hema, more

often pastoralists. The Lendu and Hema have lived together since before colonial times, but Belgian policy favoured the Hema and exacerbated tensions. Henry Morton Stanley, an Englishman working for the Belgian King Leopold, described the Hema as ‘amiable, quiet and friendly neighbours . . . with whom we have never exchanged angry words’ and the Lendu as ‘abrasive and violent’.²⁶ Nevertheless, the two groups lived together relatively peacefully until 1999, when a series of small land conflicts led to some of the bloodiest fighting of the DRC’s many conflicts. Through 2004, it was the scene of massacres, rapes, mass child abductions and other serious crimes, in which an estimated 60,000 people were killed. At the conflict’s peak, between 20,000 and 25,000 children and adults were involved in the fighting.²⁷

On the radio, Lendu leaders accused the Hema of orchestrating the war to complete their subjugation of the Lendu people. Hema leaders accused the Lendu of attempting genocide against them, fuelled by bitterness and jealousy. Allusions to the Hutu and Tutsi of Rwanda were occasionally made.²⁸ On the surface, it seemed an apt comparison – a group subjugated by the Belgians and then relegated to poverty, finally reaching the breaking point. But the comparisons were not accurate. The chain of events that ignited such conflicts cannot be boiled down to ethnic hatred; rather, the full causes are simultaneously economic, political, geo-political and ethnic.²⁹ Many Iturians, in fact, believe that Uganda, Rwanda and Kinshasa manipulated and took advantage of ethnic grievances.³⁰ Subjects we interviewed in 2013 would ask, rhetorically, ‘Where did the guns come from?’, referring to the thousands of weapons believed to have been brought into Ituri from outside to arm both Hema and Lendu militias. Both sides thus claim victim status, but as I will return to below, the notion of outsider manipulation is central to Ituri’s local politics of recognition.

Despite these complexities, the OTP pursued an essentially ethnic framing of the Ituri war. In 2003, the prosecutor saw Ituri as ‘the most urgent situation to be followed’.³¹ Following President Joseph Kabila’s

²⁶ D. Fahey, *Ituri: Gold, Land, and Ethnicity in North-Eastern Congo* (London: Rift Valley Institute, 2013), 17.

²⁷ Dixon and Vignoli, *Le Droit De Connaître*.

²⁸ ‘DRC: Special Report on Ituri District, Northeastern DRC’, UN Integrated Regional Information Network (18 December 2002).

²⁹ D. Fahey, ‘The Trouble with Ituri’, *African Security Review*, 20 (2011), 108–113; K. Vlassenroot and T. Raeymaekers, ‘The Politics of Rebellion and Intervention in Ituri: The Emergence of a New Political Complex?’, *African Affairs*, 103 (2004), 385–412.

³⁰ Personal interviews with local leaders (Ituri, 2013).

³¹ ICC Press Release, 16 July 2003.

referral of the DRC situation to the Court, the OTP has since charged four of the conflict's alleged leaders, two from the Hema side and two from the Lendu side. Three are originally from Ituri, including Thomas Lubanga Dyilo (who is Hema), while one, Bosco Ntaganda, is a Tutsi from Rwanda. In all four trials, the OTP has repeatedly focused more on the ethnic nature of Ituri's violence than on its economic or geo-political dimensions.³² While the Trial Chamber in *Lubanga* acknowledged the observation that Ituri's ethnic tensions would not have 'turned into massive slaughter' without the involvement of Kinshasa, Rwanda or Uganda, it fundamentally agreed with the OTP's characterisation.³³

The definition of 'victims' in The Prosecutor v. Thomas Lubanga Dyilo

The OTP's framing of the conflict also influenced the definition of 'victims' in *Lubanga*, for both participation and reparations. As the first of the ICC's trials, participation was a vexed issue since the Rome Statute system defines 'victims' quite generally.³⁴ In the beginning, attempts were made to define 'eligibility for participation' in rather inclusive terms, but these were ultimately unsuccessful. This left the definition of 'victims' quite narrow during Lubanga's trial. In its first ruling on victim participation, for example, the chamber determined that victims of any crime under the Court's jurisdiction could theoretically participate.³⁵ The Appeals Chamber disagreed, however, noting that, 'the purpose of trial proceedings is the determination of the guilt or innocence of the accused person of the crimes charged'.³⁶

In *Lubanga*, the only confirmed charge was that of enlisting and conscripting child soldiers, so only victims of this particular charge could participate in the Appeals Chamber's view. The Rome Statute, however, allows for both direct and indirect harm. Were, then, the

³² On the ethnic dimensions of the OTP's investigations in the DRC, see further Chapter 7 by Kambale in this volume.

³³ Judgment pursuant to Article 74 of the Statute, *Lubanga*, ICC-01/04-01/06, Trial Chamber I, ICC, 14 March 2012 ('Article 74 Judgment, *Lubanga*, 14 March 2012').

³⁴ Rule 85 (a) of the Rules of Procedure and Evidence states that the term "'Victims'" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.'

³⁵ Decision on victims' participation, *Lubanga*, ICC-01/04-01/06, Trial Chamber I, ICC, 18 January 2008, para. 95 [emphasis added].

³⁶ Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Lubanga*, ICC-01/04-01/06, The Appeals Chamber, ICC, 11 July 2008, para. 62 [emphasis added].

victims of crimes committed by child soldiers the indirect victims of Thomas Lubanga?³⁷ Again, the definition was left quite narrow. Drawing on the Appeals Chamber, the Trial Chamber ruled that, to count as an indirect victim, a person must have a close personal relationship to a direct victim, such as that between parent and child. Those harmed by the child soldiers, it followed, could not count as indirect victims.³⁸

Three years later, similar questions about the definition of ‘victims’ emerged for the purposes of reparations. Again, the prosecutor and the Trial Chamber favoured inclusivity. The OTP had already noted that it ‘must necessarily limit the incidents selected in its investigation and prosecution’, and that the reparations phase should therefore take a broader approach.³⁹ In its reparations decision, the Trial Chamber wrote that reparations require a ‘broad and flexible’ approach, which can ‘avoid further stigmatisation of the victims and discrimination by their families and communities’.⁴⁰ It underlined the value of a collective award and later introduced for these purposes a distinction between ‘victims’ and the ‘beneficiaries’ who reside in the communities where collective reparations programmes will be developed but who will not be granted ‘victim status’.⁴¹ Victims of crimes for which Lubanga was not convicted (including victims of sexual violence) could thus theoretically benefit from a reparations award.

This distinction, and the Trial Chamber’s endorsement of collective reparations, reflects an attempt to manage the inherent tension between inclusivity and exclusivity that is attached to reparations. As described in the reparations decision, such an award could seemingly impart the meaning that makes reparations symbolically valuable, while simultaneously filling in the gaps left by the selective recognition of forms of victimisation. Yet this says nothing of the actual targeting strategy needed

³⁷ Because Rule 85 (a) makes no mention of ‘direct’ harm to natural persons (as 85 (b) does for organisations and institutions), the Trial Chamber found, and the Appeals Chamber confirmed, that people can suffer either ‘direct’ or ‘indirect’ harm and thus stand as either ‘direct’ or ‘indirect’ victims before the Court.

³⁸ Redacted version of ‘Decision on “indirect victims”’, *Lubanga*, ICC-01/04-01/06, Trial Chamber I, ICC, 8 April 2009, para. 52.

³⁹ Office of the Prosecutor, ‘Policy Paper on Victims’ Participation’ (The Hague: International Criminal Court, 2010), 9.

⁴⁰ Reparations Decision, *Lubanga*, 7 August 2012, paras. 180, 192.

⁴¹ Such a distinction was not introduced outright in the original 7 August decision but clarified later in reply to the defence’s request for leave to appeal. Decision on the defence request for leave to appeal the decision establishing the principles and procedures to be applied to reparations, *Lubanga*, ICC-01/04-01/06, Trial Chamber I, ICC, 29 August 2012, para. 29.

to strike such a balance. Both individual and collective reparations, for instance, can still rely on bureaucratic, top-down targeting measures.

Furthermore, the Appeals Chamber eventually determined that, while ‘an award of collective reparations to a community is not necessarily an error, . . . the scope of the convicted person’s liability for reparations in respect of a community must be specified’.⁴² In other words, collective reparations can only make a reparations order more inclusive to the extent that the convicted person is found to be specifically liable for the crimes addressed by the award. Victims of crimes of which Lubanga was not found guilty – notably crimes of sexual violence – can thus only benefit from assistance in the Appeals Chamber’s view, not reparations.⁴³

The Appeals Chamber’s decision underscores that efforts at inclusivity are not sufficient to manage the delicate politics of recognition. Rather, the particular targeting strategies through which victims are identified, selected and verified are integral to the process. The Trial Chamber left such responsibilities to the field-based expertise of the TFV.⁴⁴ Yet relegating these details to a ‘technical’ phase of implementation, in place of managing them through the Court’s legal processes, leaves the reparations process particularly vulnerable to Ituri’s politics of recognition, regardless of how inclusive the process might be. At the same time, it risks relegating reparations to little more than long-delayed assistance.

The recognition of vulnerable groups

There is much that the ICC can learn about the politics of recognition, both from the experiences of neighbouring fields and from first-hand research in the contexts where Court-ordered reparations will be distributed. The next two sections draw on these to unpack two key dimensions of these politics: the subjection of vulnerable populations to forms of recognition that are foreign or hostile and local power struggles over claims to certain forms of identity and characterisations of violence.

⁴² Reparations Judgment, *Lubanga*, 3 March 2015, para. 212.

⁴³ *Ibid.*, para. 198–199. This, however, would not disqualify victims of sexual violence from benefitting from ‘assistance’.

⁴⁴ On appeal, however, the Appeals Chamber ruled that the decision did indeed count as an ‘order for reparations’. Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings, *Lubanga*, ICC-01/04-01/06, The Appeals Chamber, ICC, 14 December 2012, para. 64 (‘Appeal Decision on Reparations, *Lubanga*, 14 December 2012’).

To the first point, the Trial Chamber in *Lubanga* recognised the risk of stigma and discrimination for vulnerable groups. Such risk is well established in academic and policy literature on two groups to whom the ICC will likely be distributing reparations, if not in *Lubanga* then likely in other trials: child soldiers, or children associated with armed forces, and victims of sexual and/or gender-based violence (SGBV). But the risk of discrimination also runs deeper. Here, I draw on case studies from a variety of countries and contexts to show that while the ‘best practices’ and ‘lessons learned’ around stigma are important, they do not necessarily capture the political nature of representation that underlies stigmatisation. What is at stake in the recognition of certain forms of victimisation is the right to legitimately name and objectify particular categories of identity. For those who belong to the more vulnerable of these groups, sometimes *not* recognising them, or letting them define the terms of their recognition, is best.

Children associated with armed forces

As the sole crime charged in *Lubanga*, the enlistment of children associated with armed forces (CAAF) has received considerable attention. There is already an extensive body of literature on the challenges of defining, identifying, rehabilitating and reintegrating such children and young adults.⁴⁵ For the ICC, one of the greatest challenges will be deciding how to identify and target them in ways that reflect their reality and do not risk further stigmatisation. Many CAAF, for instance, do not self-identify as ‘child soldiers’; many are no longer children; many were not abducted, but volunteered themselves or were volunteered by their families; and females, especially, may avoid the label because they are more often harmed by sexual violence and the resulting stigma than males. Moreover, there are many other ways young people can be made vulnerable by war. They can be orphaned, displaced, forced into camps, forced into prostitution, seriously injured and more. CAAF can be in better economic situations than their peers precisely *because* of their association with armed groups, which is often an incentive behind enlisting in the first place.

⁴⁵ M.A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (New York: Oxford University Press, 2012); L. Stark, N. Boothby, and A. Ager, ‘Children and Fighting Forces: 10 Years on from Cape Town’, *Disasters*, 33 (2009), 522–547 (Stark et al., ‘Children and Fighting Forces’).

There is a wealth of information available from disarmament, demobilisation and reintegration (DDR) programmes around the world, all with significant warnings and lessons. They unanimously reinforce the value of inclusive programming as a method to target child soldiers without stigmatising them.⁴⁶ When applied, though, inclusive programming generally means *not* recognising CAAF. To do so, DDR projects thus blend child soldiers together with other ‘war-affected children’, who, in programming parlance, are often narrowed down to ‘orphans and vulnerable children’ (OVC). Different agencies use different ratios of CAAF to OVC, including the Trust Fund in Ituri.⁴⁷ The key, though, is that ‘community-based programming that applies to a wider group of vulnerable children is more effective than assistance targeted at a specific group identified by one experience alone’.⁴⁸

To this end, integration is considered a major step in the rehabilitation process, if not the most important one.⁴⁹ Many note that girls may not want to participate in projects publicly labelled as DDR because they do not want to self-identify as ‘child soldiers’ or do not self-identify as such in the first place. Instead, girls may ‘perceive themselves as “wives” or “cooks” and prefer these social categories’.⁵⁰ For these girls, integration might mean losing the social label ‘child mother’ and becoming a ‘student’ in the eyes of her peers. These lessons around inclusivity for female CAAF have been significant for the ICC. In one Trust Fund assistance project for female CAAF, for example,

⁴⁶ UNICEF, *Children and DDR: Integrated Disarmament Demobilization and Reintegration Standards* (New York: United Nations Children Fund, 2006); UNICEF, *The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* (Paris: UNICEF, 2007); C. Blattman and J. Annan, ‘The Consequences of Child Soldiering’, *Review of Economics and Statistics*, 92 (2010), 882–898; J. MacVeigh, S. Maguire, and J. Wedge, ‘Stolen Futures: The Reintegration of Children Affected by Armed Conflict’, *Save the Children* (2007).

⁴⁷ TFV, *Learning from the TFV’s Second Mandate: From Implementing Rehabilitation Assistance to Reparations* (The Hague: Trust Fund for Victims, International Criminal Court, 2010).

⁴⁸ MacVeigh et al., ‘Stolen Futures’.

⁴⁹ S. McKay and D. Mazurana, *Where Are the Girls? Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives During and After War* (Montreal: Rights & Democracy – International Centre for Human Rights and Democratic Development, 2004).

⁵⁰ And economically, DDR programmes can often inadvertently discriminate against girls, reducing the economic incentives to present themselves as eligible for the assistance: ‘that community markets can only absorb a limited number of tailors, for instance, often limits livelihoods options for girls’. Stark et al., ‘Children and Fighting Forces’.

providing girls with a school uniform to wear was among its most powerful interventions.⁵¹

Victims of sexual and/or gender-based violence

For victims of sexual violence more generally, lessons about inclusivity are less clear than for CAAF, but are still significant. On the one hand, that victims of SGBV are specifically targeted is itself an accomplishment given the historic lack of public recognition of and resources devoted to sexual violence in and after war. However, experts in the field also recognise the risks of stigmatising through overly restrictive approaches to targeting. In August 2010, for instance, a high-level panel convened to assess existing judicial mechanisms for victims of sexual violence in eastern DRC concluded that targeting reparations to victims of sexual violence can further stigmatise them – a particularly troubling idea, they noted, as ‘the reparation needs of victims of sexual violence may be caused more by the stigmatisation than the sexual violence itself’.⁵² The report quotes the coordinator of a Congolese NGO supporting victims of sexual violence, who herself requested that donors actually stop targeting SGBV exclusively, since ‘much attention given to sexual violence victims is fuelling jealousy and further stigmatisation’.⁵³ Other agencies have come to similar conclusions.⁵⁴

Like the Trial Chamber in *Lubanga*, the panel suggested that both collective and individual reparations are necessary. It found that individual and collective targeting can respond to different needs and demand different screening requirements and burdens of proof, providing the flexibility needed to adapt to different local conditions and needs. As for CAAF, proactively *not* recognising victims of sexual violence for the harm they suffered can be a valuable part of the process. Rehabilitation projects, that is, provide vulnerable groups not only with valuable

⁵¹ TFV, *Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations* (The Hague: Trust Fund for Victims, International Criminal Court, 2011), 26.

⁵² OHCHR, ‘Report of the Panel on Remedies and Reparations’, March 2011.

⁵³ *Ibid.*, 24–25.

⁵⁴ SIDA, for instance, has recently begun to emphasise the value of programmes ‘to empower and expand women’s choices, preferably not only targeting victims of gender-based violence’. Sida, ‘The Democratic Republic of Congo: Country Gender Profile’ (Sida: Department for Conflict and Post-Conflict Cooperation and Gender Equality Team, 2009). See also ‘Sierra Leone: Getting Reparations Right for Survivors of Sexual Violence’, Amnesty International (2007).

material and social services, but also with social identities that are often rooted in projects' eligibility criteria and targeting strategies.

This is not meant to suggest that CAAF, especially female CAAF, or other victims of sexual violence, do not have specific needs that are unique to their experiences. Rather, I draw on these literatures to highlight here that certain needs of vulnerable groups can be met through targeting strategies that do not impose or reinforce identities that are harmful or irreconcilable with local realities, or which the intended beneficiaries themselves may reject.

Whose war? Representations of war in Ituri

The second dimension of the politics of recognition that will influence the provision of reparations is the identity and power struggles rooted in how conflicts, and their victims, are socially represented. Iturian politics are complicated.⁵⁵ I do not attempt to exhaustively review these struggles here, but rather seek to present two examples that illustrate the complex political terrain on which the ICC's reparations process will play out. First, the OTP has focused not only on a limited time frame and set of crimes, but also on a limited number of locations, which has in turn encouraged inter-village competition over 'legitimate' claims to victimisation. Second, the prosecutor's characterisation of the conflict as an essentially ethnic war has excluded other explanations, inspiring local leaders on both sides to reject the ICC's framing.

At the outset, some general context is warranted. Even though Ituri is considered among the more pacified regions of north-eastern DRC, especially when compared to the Kivus to the south, it is still very much marked by lingering tensions.⁵⁶ In interviews, leaders referred often to the district as a 'ticking time-bomb', repeatedly returning to the same issues: severe poverty and hunger, entrenched land conflict, ethnic mistrust, rumours and political manipulation, conflicts over natural resources, thousands of hidden weapons and tens of thousands of former young combatants who are now in their twenties with no education and bleak job prospects. 'The war is not over!' was a common refrain across our interviews. To many observers, peace is only held together by

⁵⁵ See Fahey, 'The Trouble with Ituri'; Dixon and Vignoli, *Le Droit De Connaitre*; S. Hellmüller, 'The Power of Perceptions: Localizing International Peacebuilding Approaches', *International Peacekeeping*, 20 (2013), 219–232.

⁵⁶ Fahey, *ibid.*

Ituri's patchwork of NGOs, UN agencies, and the United Nations' peace-keeping mission in the Congo, known as MONUSCO.⁵⁷

Furthermore, while scholars have now studied the Ituri war and recorded its history, Iturians themselves remain relatively unaware about the war's events and origins.⁵⁸ People know it began with historic grievances over land between the Hema and Lendu in Djugu territory, for example, but they cannot explain how these grievances turned into years of bloodshed that pitted neighbour against neighbour. Many suspect the conflict was partly due to outside manipulation. Many also suspect that at least some of their neighbours benefitted from the war. The schools in Ituri, however, do not teach this history, relying on a curriculum designed in Kinshasa that teaches children about the independence leader Patrice Lumumba, but not their own war.⁵⁹ Instead, we were told, children learn ethnic hatred from their parents. Aside from a few small NGOs, Ituri lacks the sort of public space that is needed to engage in dialogue about this history. This gap is filled by rumours, suspicion and lies.

Many community leaders thus felt the region needed its own small-scale truth and reconciliation process – something more locally run than the DRC's failed 2003 attempt at a national Truth and Reconciliation Commission following the Inter-Congolese Dialogue.⁶⁰ Unlike the international community, which overwhelmingly expressed scepticism and fear over Ituri's 'internal time bomb', these leaders generally felt that public dialogue about the war could help. Our survey data from Irumu and Djugu indicate the general population feels similarly. Over 80 per cent of local respondents said it was either 'important' or 'very important' that the history of the war be made public. An equal number responded that if there were an opportunity to speak publicly about the war, they would share their story.⁶¹ These data inform my analysis of the quotes shared below. In sharing them, I suggest that Iturians generally want recognition for their suffering, but not necessarily according to the categories that have informed the ICC's judicial proceedings and, it

⁵⁷ Personal interviews with members of international community (Ituri, 2013).

⁵⁸ Personal interviews with local leaders (Ituri, 2013).

⁵⁹ Personal interview with local leader (Ituri, 2013).

⁶⁰ Personal interviews with local leaders (Ituri, 2013).

⁶¹ Dixon and Vignoli, *Le Droit De Connaître*. See also P. Vinck et al., 'Living with Fear: A Population-Based Survey on Attitudes About Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of the Congo' (University of California, Berkeley Human Rights Center, 2008).

follows, reparations. Here, though, categories refer not to vulnerable people – for whom, as noted, recognition can bring harm – but to geographies, for example, via community leaders from towns devastated by the war where the OTP has paid relatively little attention.

Competing for victim status

Such desire for recognition, coupled with the lack of faith in external representations by institutions like the ICC, motivates the first of the two struggles I focus on here: competition over legitimate victimhood. Vis-à-vis reparations, this competition expresses itself primarily in questions about collective and individual reparations. Overall, there was a strong preference for collective reparations. This would seem to fit with the *Lubanga* Trial Chamber's emphasis on collective reparations, but not with its linguistic distinction between victims and beneficiaries. Many subjects, for instance, expressed that it would be unfair to draw lines through individual awards because the OTP only investigated a subset of the towns and villages that were devastated by the war:

Here, there is truly the need for collective reparations. Because, as I said, even if some were not chosen [for investigation by the prosecutor], there were grave crimes affected almost everyone in Ituri . . . Even if Bunia was not chosen, the war affected all, and we need collective reparations, something from which the whole population can benefit.⁶²

The emphasis here is on 'chosen' localities; that is, the towns and villages officially sanctioned by the ICC as having suffered. Others added, along these lines, that it would simply be impractical to repair victims individually when everyone had suffered.

There isn't a single village, a single person who escaped. So if everyone is to be awarded individually, where is that money going to come from? . . . It is important to recognize the victims, very important, but practically, in practice it is difficult to distribute reparations individually.⁶³

Many also expressed a lack of faith in the ICC's objectivity, recalling the 'fake victims' that beleaguered the prosecutor's case in *Lubanga*.⁶⁴ How, they asked, can we trust that someone is really the victim they claim to be?

⁶² Personal interview with local leader (Ituri, 2013). ⁶³ *Ibid.*

⁶⁴ Personal interviews with local leaders (Ituri, 2013). See Article 74 Judgment, *Lubanga*, 14 March 2012.

There are fake victims, like, for example, we can say that there are fake victims or falsified testimonies there at the ICC. Really, individual reparations will not be easy.⁶⁵

One leader, in particular, offered an interesting case study. He is the leader of the town of Nyankunde, which endured one of the deadliest massacres of the Ituri war, but which has not received significant attention from the ICC. Nyankunde is ethnically Bira and therefore is difficult to place in the Hema-Lendu dichotomy, although the Bira were alleged to have supported the Hema in the ICC trials against Lendu leaders Germain Katanga and Mathieu Ngudjolo Chui. He recounted how at one point he had personally begun to collect the skulls of those killed in his town, after an international church group brought him to Kigali to see a monument built for the Rwandan genocide. He believed something collective like a monument could help his town as well. 'People must know what happened here,' he said, 'so it does not happen again.'⁶⁶

The Nyankunde chief's perspective is significant because it differs quite sharply from those expressed in the town of Bogoro, a day's drive away and also the site of a brutal massacre. Unlike Nyankunde, Bogoro has played a key role in ICC proceedings as it is the town where Ngudjolo Chui and Katanga were alleged to have carried out an attack against the predominantly Hema population. Indeed, Bogoro is the only town in Ituri to have received such sustained focus, including a visit from former prosecutor Moreno-Ocampo and from ICC trial judges.

Community leaders in Bogoro expressed the strongest desire for individual reparations of all our interviewees. Some NGOs in Bunia even suspected them of trying to turn their fellow villagers against the idea of collective reparations. 'It is clear' who the victims are, one Bogoro leader told us, 'because the ICC has a list' – a reference to the list of victims approved to participate in the *Ngudjolo* and *Katanga* trials.⁶⁷ 'Others,' one added, 'were trying to generalize this list.' These leaders recognised that other towns had also suffered during the war – including other Hema towns – and might be upset by Bogoro's individualised recognition, but this did not seem to matter. 'The ICC talks about Bogoro,' one village elder concluded. Such attitudes can also be seen in some of the submissions from those victims participating in the ICC's trials. Some of the participating victims in *Lubanga*, for example,

⁶⁵ Personal interview with local leader (Ituri, 2013). ⁶⁶ *Ibid.*

⁶⁷ Personal interviews with local leaders (Ituri, 2013).

suggested that they could receive a 'war victim' certificate from the Court, designating their official status and providing them access to services.⁶⁸

Framing the Ituri war

The desire for individualised reparations in Bogoro was more of an expression of solidarity along geographic, not necessarily ethnic, lines. This reflects the second element of the struggle over representations on which I focus: contest over the legitimate characterisation of the conflict itself, particularly over the Court's framing of it as essentially ethnic. The great majority of leaders with whom we spoke acknowledged the ethnic nature of the conflict, and many expressed ethnic bias and hatred during interviews, but both Hema and Lendu (and the other groups with whom we spoke) took issue with the ICC's account. While each group felt they alone were the true victims of the war, leaders from all sides felt strongly that the Court had mischaracterised their grievances, with which they had managed to live since long before war broke out in Ituri.

'We are condemned to live together,' subjects frequently said. Often they followed with rhetorical questions such as, 'Whose were the hands that manipulated us?', 'Where did the guns come from?' and 'Why are they not in The Hague?', referring to the Ugandans, Rwandans and Congolese from Kinshasa who, in their mind, fuelled the conflict and gained from it. Moreover, subjects repeatedly noted that Ituri has more than two ethnic groups and that they were all somehow involved in the conflict.

I would like to add something. It was not simply that the war was between two tribes. No! Because I know that the international community ignores that. The great majority of communities were victims during that war.⁶⁹

Competition over the characterisation of the war plays into contemporary Iturian power struggles, where ethnicity is used to divide and motivate constituencies. The 'extremists' in Ituri are well known and have the power to block initiatives where they are not sufficiently implicated, or which they feel may not be in their best interests. One international NGO, for instance, found its reconciliation project ground to a halt when Hema and Lendu notables demanded, as a precondition for their cooperation, that their 'brothers in The Hague' be released.⁷⁰ Yet,

⁶⁸ Observations sur la fixation de la peine et les réparations de la part des victimes, *Lubanga*, ICC-01/04-01/06, Trial Chamber I, ICC, 18 April 2012, para. 23.

⁶⁹ Personal interview with local leader (Ituri, 2013). ⁷⁰ *Ibid.*

virtually all with whom we spoke, whether ethnic community leaders or civil society leaders, agreed that the extremists must be implicated, and that attempting to forge ahead on a project about the war without them would go nowhere.

These narratives are not meant to argue for or against the veracity of the different claims our subjects made about the truth of the Ituri war. Rather, I cite them to illustrate the struggles over recognition that are likely to influence how the ICC's reparations process will be received. The key issue will not only be who gets what, but what does this distribution mean for the myriad categories and frames through which the conflict can potentially be represented. Opening up the process to both 'victims' and 'beneficiaries', as the Trial Chamber in *Lubanga* has proposed, could in theory be one way to make the process inclusive, although the Appeals Chamber's judgment appears to limit such inclusivity. But there is more to claiming victim status than the benefits it might yield. The truth of what happened is also at stake.

Ultimately, such challenges cannot be managed through technical means alone. The truth implied in a reparations award is received and interpreted through the means and categories by which the award is targeted. This demands sustained involvement from ICC chambers and meaningful participation from Iturians themselves throughout the reparations process. Moreover, where technical expertise does matter, it is not necessarily the kind that the TFV has exhibited in its provision of assistance projects. Rather, the provision of reparations demands a very particular form of expertise about how to carry out meaningful participation in charged circumstances, like the politics of recognition in Ituri, described above. The concluding section considers some potential ways forward.

Conclusion: unlocking restorative justice in international criminal law

Reparations are a potentially restorative tool of transitional justice, but the restricted framing imposed by a system of individual criminal responsibility harbours a fundamental tension. In my view, though, the ICC's reparations regime still offers restorative potential. As a first and crucial step, the Court has acknowledged some of the resulting gaps and indicated that reparations and assistance could be used to bridge them, although not as easily as the Trial Chamber originally envisaged. The OTP's plan to begin realising more expansive investigations,

notwithstanding its perennial resource and time limitations, could indicate similar acknowledgement.⁷¹ Indeed, the Ituri trials were particularly limited in scope – *Lubanga* in terms of the charges and *Katanga* and *Ngudjolo* in terms of their geography.

Second, notwithstanding the Appeals Chamber's judgment, the Trial Chamber in *Lubanga* at least recognised the importance of inclusion, embracing the idea of collective reparations and an expanded class of beneficiaries, in addition to the category of victims. Such inclusive measures could do much to ameliorate the distributive tensions that any reparations reward will cause. At the same time, the Appeals Chamber's judgment suggests that attempts at inclusivity will always be limited, and that the distinction between reparations and 'assistance' could be increasingly eroded, especially in the absence of sustained involvement by the ICC itself.

The Court, then, should play a sustained role in the reparations process, from the reparations decision to the targeting of awards. Those on the receiving end of the ICC's technologies of truth, particularly its reparations regime, will not simply accept reparations at face value but will challenge, adapt and incorporate them. This gives the ICC significant potential to play a restorative role in these processes, but it must embrace this potential. It can do so through two ways in particular: first, the Court could adopt a participatory and consultative approach to the entire reparations process, drawing on the experience of community-driven reconstruction; second, the chambers could play a more active role in beneficiary identification and verification, helping to guide the meaning that recipients and their communities will attach to reparations.

International criminal reparations can look to the experience of community-driven development and reconstruction – particularly in lessons drawn from working with CAAF and SGBV victims – which utilise participatory approaches to targeting by incorporating local definitions of need and deprivation into programme design.⁷² Proponents cite a

⁷¹ OTP, *Strategic Plan, 2012–2015* (The Hague: International Criminal Court, 11 October 2013).

⁷² J. Conning and M. Kevane, 'Community-Based Targeting Mechanisms for Social Safety Nets: A Critical Review', *World Development*, 30 (2002), 375–394; T. Slaymaker, K. Christiansen and I. Hemming, *Community-Based Approaches and Service Delivery: Issues and Options in Difficult Environments and Partnerships* (London: Overseas Development Institute, 2005). For work on targeting in conflict and post-conflict contexts, see S. Jaspars and J. Shoham, 'Targeting the Vulnerable: A Review of the Necessity and Feasibility of Targeting Vulnerable Households', *Disasters*, 23 (1999), 359–372; K. Kuehnast, J. de Berry and N. Ahmed, *Community-Driven Development in the*

number of potential advantages to this approach: lower costs, more community accountability, better information about and adaptation to realities on the ground, harnessing and strengthening of social capital as a positive external effect, more programme legitimacy and the empowerment of disadvantaged groups. Community-driven reconstruction thus holds particular promise. These projects 'support the democratic selection of local community councils, including measures on the representation of women, youth or other disadvantaged groups', and then provide them with grants to implement local priorities.⁷³ Indeed, communities receiving this type of support have reported less social tension and greater acceptance of vulnerable groups as a result.⁷⁴ Moreover, marginalised groups, including women and CAAF, have been found to be better informed, more actively involved in reconstruction activities and more likely to trust their community representatives when compared to control communities.⁷⁵

Such projects, however, demand specific forms of expertise that neither the ICC nor the TFV is likely to have. The experts that Trial Chamber I discussed in the *Lubanga* reparations decision could thus include those who do possess such experience.⁷⁶ Indeed, 'community-based' or 'community-driven' approaches entail significant risks. In one such example from South Sudan, for instance, 'relief committees and other community representatives put on a show for [the donor] which gave the appearance of targeting. In reality, "targeted" women were chosen to carry food to a site where it was then redistributed by local chiefs.'⁷⁷ Close monitoring and oversight by organisations with specific experience in this area are essential to avoid such scenarios.

Context of Conflict-Affected Countries: Challenges and Opportunities (Washington, DC: The World Bank: Social Development Department and Environmentally and Socially Sustainable Development Network, 2006); World Bank, *World Development Report 2011: Conflict, Security, and Development* (Washington, DC: The World Bank, 2011).

⁷³ S. Cliffe, S. Guggenheim, and M. Kostner, *Community-Driven Reconstruction as an Instrument in War-to-Peace Transitions* (Washington, DC: The World Bank: Conflict Prevention and Reconstruction Unit and Social Development Department, 2003), 2; 'IRC's Approach to Community-Driven Reconstruction: A Basic Primer for First Generation Programming', The International Rescue Committee (2007).

⁷⁴ J.D. Fearon, M. Humphreys, and J.M. Weinstein, *Evaluating Community-Driven Reconstruction Lessons from Post-Conflict Liberia* (Washington, DC: The World Bank Institute, 2009).

⁷⁵ J.D. Fearon, M. Humphreys, and J.M. Weinstein, 'Can Development Aid Contribute to Social Cohesion after Civil War? Evidence from a Field Experiment in Post-Conflict Liberia', *The American Economic Review*, 99 (2009), 287–291.

⁷⁶ Reparations Decision, *Lubanga*, 7 August 2012, para. 263.

⁷⁷ Jaspars and Shoham, 'Targeting the Vulnerable'.

Regardless of whether the ICC utilises such an approach, trial chambers should involve themselves more closely in overseeing the entire reparations process. This chapter has argued that much of the meaning attached to a reparations award will be communicated through its targeting strategy. In practice, the dichotomy between ‘design’ and ‘implementation’ is thus false; rather, the former depends upon the latter.⁷⁸ In an ideal world, Trial Chamber I, or even a separately constituted reparations chamber, could hold hearings to oversee this ‘implementation’ phase, which will be fundamental to the very design of the award itself.

Whether or not such hearings are feasible, the chamber should stay involved to provide an authoritative forum through which Iturians can engage in debate over the categories and representations that make reparations symbolically powerful. Without the involvement of the ICC in such a role, the danger is that either the politics of recognition will overwhelm the reparations process or the process itself will become little more than long-delayed assistance, stripped of the meaning that makes reparations powerful beyond their material value.⁷⁹

Ultimately, international criminal law can transform social relations and identities through official designations of ‘truth’. Through reparations, categories of crime and victimisation in the courtroom become social categories of people on the ground. This is part of what makes them symbolically powerful. But it also entails great risk. For vulnerable groups, the need for reparative justice can stem more from the social exclusion resulting from crimes than from the crimes themselves. In post-conflict settings like Ituri, the truths determined in a courtroom in The Hague, manifested through reparations, can interact with existing power relations in ways that antagonise social cohesion and promote competition.

Given these complexities, some might argue that international criminal reparations should perhaps be left entirely to non-legal agencies, with more relevant resources and experience. Indeed, scholars have warned that ‘many involved with international justice have lost sight of its goals in favour of developing and maintaining an international system of criminal law over and above what might be the needs and desires of the

⁷⁸ The use of such a dichotomy can be seen in the Appeals Chamber’s ruling, Appeal Decision on Reparations, *Lubanga*, 14 December 2012.

⁷⁹ The Rome Statute system provides for such a role. If the experience of the Trial Chamber in *Lubanga*’s case is any indication, the real hurdle will be the length of trials versus the term limits of the judges.

victims of abuse'.⁸⁰ In my view, relegating reparations to an entirely non-legal body also sells the ICC short and overlooks the fact that it is already involved in the distribution of *recognition*, which is rooted in its power to issue definitions of crime, responsibility and victimisation. Reparations are one form of this power, and the targeting strategies used to distribute them are its manifestation on the ground. By focusing on these strategies, and carefully managing them, the Court can more fully embrace its restorative potential.

⁸⁰ See H.M. Weinstein, et al., 'Stay the Hand of Justice: Whose Priorities Take Priority?', in R. Shaw et al. (eds.), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford, CA: Stanford University Press, 2010).