

## Chapter 2 – Case Studies

At the core of this project lies the assumption of a disconnect between the international law on reparation and transitional justice practice. This disconnect is not due to states' unwillingness to repair survivors – although the frequent lack of political will does not exactly aid the cause. The international law on reparation is built to respond to individual, not systematic, violations. It, therefore, cannot accommodate the unique challenges the transitional justice situation brings with it.

With the preceding chapter clarifying that disconnect's legal side, its practical side now warrants closer attention. Three in-depth case studies of six transitional justice reparation programs will demonstrate that transitional justice practice deviates in significant ways from international legal standards. It will be shown that these deviations are reasonable responses to the challenges of the transitional justice situation. The identified differences will – together with theoretical considerations laid out in chapter three – serve as guide rails for this project's central endeavor: Bridging the disconnect between law and practice by adapting the international law on reparation to the transitional justice context.

### *A. Introduction*

#### I. Case Selection

The cases surveyed are Sierra Leone's reparation program operating since 2008 in response to the country's internal armed conflict (B.), Colombia's efforts, starting in 2011, to repair survivors of its internal armed conflict (C.) and the reparation programs created under the auspices of the ICC in the Lubanga, Katanga, Al Mahdi and Ntaganda cases in the Democratic Republic of the Congo (DRC) and Mali (D.). All surveyed programs are transitional justice reparation programs. To recall, this study defines transitional justice as a state's attempt to address a legacy of systematic human rights violations, which aims to transform society towards a strengthened respect for human rights and generalized trust. The latter is defined as the expectation that other members of society and state institutions adhere to and support human

rights. A transitional justice situation is consequently defined as a situation in the aftermath of systematic human rights violations, which calls for measures to enhance respect for human rights and generalized trust.<sup>256</sup> The reparation programs this chapter examines all respond to systematic human rights violations and aim at societal transformation.<sup>257</sup> While not all of them conceptualize this transformation as enhanced respect for human rights and generalized trust, their broader transformational aims come close enough. As will be further explained in chapter three, this study's definition of transitional justice is vague and only one of several possible conceptualizations of transitional justice. Some deviations in the aims pursued hence do not let reparation programs fall outside the definition.

The reparation programs were selected according to the logic of maximum variety sampling.<sup>258</sup> They represent opposite ends of important geographical, institutional, political, legal, economic, and other factors. This choice mitigates the risks associated with drawing comparative conclusions from a small sample. Of course, there can be too much variety in case studies, making them not comparable. Readers might think that that is precisely the case with the author's counterintuitive choice to conduct a case study on reparation at the ICC. ICC reparation programs are not state-run; they are not based on state responsibility and are primarily subject to the RS, not the human right to reparation. They hence differ from the reparation programs of Sierra Leone and Colombia and the topic of this study.<sup>259</sup> Exactly those differences make the ICC reparation programs perfect objects of study. They are transitional justice reparation programs. By definition, the ICC deals with systematic human rights abuses – the main feature of transitional justice situations.<sup>260</sup> ICC reparation programs pursue goals often attributed to transitional justice, like

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256 See above, Introduction and below, ch. 3, A. Note that this study uses the terms “transitional justice situation”, “transitional situation”, “transitional justice environment”, “transitional justice context”, “transitional context”, and “transitional society” interchangeably.

257 For this study's definition of transitional justice see above, Introduction, C. and for further detail below, ch. 3.

258 See above, Introduction, D. and Patton, *Qualitative Research and Evaluation Methods*, 283.

259 See above, Introduction, B.

260 See above, Introduction, C. and for further detail below, ch. 3, A.I. See also ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeals Against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for Which Thomas Lubanga Dyilo is Liable - Separate Opinion of Judge Luz del Carmen Ibáñez Carranza*, ICC-01/04-01/06-3466-AnxII (AC), 2019, para 42 ff.

societal transformation and reconciliation.<sup>261</sup> No wonder that ICC reparation orders and implementation plans rely on and draw inspiration from transitional justice considerations.<sup>262</sup> Conversely, the ICC is often perceived to play a part in transitional justice efforts.<sup>263</sup> The similarities extend to the legal basis of the programs. While the formal basis for reparation at the ICC is Art. 75 RS, the human right to reparation is of crucial relevance. Protecting human rights is a fundamental value of international criminal law.<sup>264</sup> Art. 21(3) RS obliges the ICC to consider human rights in the interpretation of the RS. Accordingly, the reparation orders and implementation plans make frequent reference to human rights jurisprudence and cite the right to reparation as inspiration.<sup>265</sup> As the right to reparation, the guiding principle

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- 261 ICC, *The Prosecutor v. Germain Katanga, Order for Reparations Pursuant to Article 75 of the Statute*, ICC-01/04-01/07-3728 (TC II), 2017, para 268, 289, 317; ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 28, 140; ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 192 f., 222, 236. For details on these goals in transitional justice see below, ch. 3, A.II, B.
- 262 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 185, fn. 376; ICC, *Case of the Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeals Against the "Decision Establishing Principles and Procedures to be Applied to Reparations"*, ICC-01/04-01/06-3129 (AC), 2015, para 196; ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 48, 57, 61, 284.
- 263 UN Secretary General, *Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice*, 2010, 8; CEU, *Council Conclusions on EU's Support to Transitional Justice*, 13576/15 Annex, 2015, para 6; ICC, *The Role of the ICC in the Transitional Justice Process in Colombia - Speech by James Stewart, Deputy Prosecutor of the International Criminal Court*, 2018, para 44 ff.; Gallen, *The International Criminal Court - In the Interests of Transitional Justice?*, in: Lawther et al. (eds.), *Research Handbook on Transitional Justice*, 2017, 305, 314 ff.
- 264 Kress, *International Criminal Law*, in: Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Online Edition 2009, para 10.
- 265 Consider for example, ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 57, 127 f., 230 f., 283; ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, fn. 134; ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 185 f., 229, fn. 434. The Appeals Chamber (AC) in the Lubanga Case was more sceptical in this regard, ICC, *Lubanga Reparations Order (Appeals Decision)*, ICC-01/04-01/06-3129 para 127 f., 154. However, it remains that the subsequent court practice gave great weight to human rights jurisprudence. See generally, ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeals Against Trial Chamber II's "Decision Setting the Size of the Reparations Award for Which Thomas Lubanga Dyilo is Liable - Separate Opinion of Judge Luz del Carmen Ibáñez Carranza*, ICC-01/04-01/06-3466-AnxII (AC), 2019, para 49 ff.

for reparation at the ICC is that of full reparation.<sup>266</sup> Obviously, the analysis of the ICC reparation programs must and will account for relevant differences to the other case studies.<sup>267</sup> But since ICC reparation programs are transitional justice reparation programs and share a similar normative basis with state-run programs, they can, in principle, be compared with the reparation efforts of Sierra Leone and Colombia. Doing so allows assessing transitional justice reparation programs in a wholly different legal and institutional context. This is crucial for identifying strategies commonly employed to overcome the unique challenges of the transitional justice situation. If the ICC uses similar strategies as Sierra Leone and Colombia, it can be assumed that this choice is based on nothing but these challenges – one of the few features ICC reparation programs have in common with their counterparts in Sierra Leone and Colombia. This last case study, therefore, serves a control purpose.

To further corroborate the assumption that common strategies respond to unique challenges in transitional justice, the chapter will conclude with some reasoned speculation that ties back the differences identified to features of the transitional justice situation (E.). A more cursory analysis of a wider variety of state practice in chapter four will complement the in-depth studies and support the final normative framework.

The case studies on Sierra Leone and Colombia are based mainly on research stays in the second half of 2018. The study on the ICC was concluded in the second half of 2019. While later developments are included up until October 2022, they could not be treated in the same depth.

## II. Methodological Reflections

The studies detail the benefits offered, the process by which survivors receive reparation, and the challenges and criticism each program faces. They will concentrate on the reparation programs, mostly ignoring connections to other transitional justice mechanisms and their reparative dimensions. The case studies are based on research in Sierra Leone and Colombia in 2018. A stay at the ICC in 2019 and 2020 informed the third case study, although the

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266 ICC, *Case of the Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeals Against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for Which Thomas Lubanga Dyilo is Liable'*, ICC-01/04-01/06-3466-Red (AC), 2019, para 36.

267 For details on that see below, D.I.

findings do not rely in the same manner on the research done in place. What is commonly denoted as “field research”<sup>268</sup> always comes with epistemological and ethical problems. These problems cannot be entirely avoided or solved. They can be somewhat mitigated by critically reflecting the research process and the researcher’s place in it. Such reflexivity accounts for the finding’s epistemological limits and their ethical implications.<sup>269</sup> Reflection does not solve those challenges, but it can constructively deal with them.<sup>270</sup>

The author conducted interviews in Sierra Leone from June until August 2018 and in Colombia from September until November 2018. Further interviews were conducted in Germany in preparation. The studies cite interviews with a dozen individuals. Interviews with several other individuals informed the author’s research, both consciously and unconsciously, but are not relied upon directly. The interviewees were government officials working for the respective reparation programs, survivors, or civil society representatives. They were semi-structured and – mostly upon request of the interviewees – not recorded. For the most part, they are hence cited based on notes the author made during the interview.

Every research conducted in the Global South “carries legal and ethical concerns every step of the way.”<sup>271</sup> Research, theories, and methodologies have always been implicated in and furthered imperialism and colonialism – international law being no exception.<sup>272</sup> Researchers often engage in

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268 The term “field” is problematic in itself, as it often denotes any place outside the Global North, evokes images of otherness and exoticism, and is often problematically embedded in mechanisms for career advancement. The term is for the most part avoided here. If it is used, it denotes any place in which the studied object, in this case reparation programs, unfolds. It thus includes the ICC. On this use of the term see Nouwen, *As You Set Out for Ithaka - Practical, Epistemological, Ethical, and Existential Questions About Socio-Legal Empirical Research in Conflict*, 2014 Leiden J. Intl. L. 27(1), 227, 257.

269 Nouwen, *As You Set Out for Ithaka*, 233 ff.; Sultana, *Reflexivity, Positionality and Participatory Ethics - Negotiating Fieldwork Dilemmas in International Research*, 2007 ACME 6(3), 374, 375 ff.

270 Nouwen, *As You Set Out for Ithaka*, 250 ff. This is not to “reflect away” the fact that this type of research remains problematic, 257 f.

271 Johan et al., *Navigating the Terrain of Methods and Ethics in Conflict Research*, in: Johan et al. (eds.), *Researching Violence in Africa - Ethical and Methodological Challenges*, 2011, 1, 2.

272 Said, *Orientalism*, 31 ff.; Smith, *Decolonizing Methodologies - Research and Indigenous Peoples*, 1999, 37 ff., 43 ff., 80 ff.; Mutua/Anghie, *What Is TWAIL?*, 2000 Proceedings of the ASIL Annual Meeting 94, 33 f. For international law in general see Anghie, *Imperialism, Sovereignty and the Making of International Law*, 2005. For human rights law specifically see Badaru, *Examining the Utility of Third World Approaches to Interna-*

parasitic research, advancing their career on the back of the societies from which they take information without reciprocating.<sup>273</sup> These concerns are especially salient for a researcher from a former colonial power, whose response to this past is beyond shameful.<sup>274</sup> During field research in Sierra Leone and Colombia, the author experienced various instances in which these concerns materialized. Especially in Sierra Leone, he had access to high-level government officials, which probably would not have answered to inquiries of non-Western researchers. Several situations materialized in the messiness of intercultural interactions, in which the author cannot guarantee to have behaved appropriately. The author turned the research into several publications and presentations, from which the interviewees did not benefit directly.

While the discipline of law is relatively new to these concerns, other disciplines, especially anthropology, went to great lengths to grapple with these “conundrums that have haunted the discipline from its inception.”<sup>275</sup> Still, they did not come up with clear-cut ways to deal with them. It is not a solution to refrain from research in place altogether. Bringing in an outsider perspective can result in a different course of the research, local researchers would not necessarily embark on. It can yield results, which otherwise would not have come about. Being an outsider can also give independence local researchers might not have.<sup>276</sup> Of course, these benefits accrue regardless

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*tional Law for International Human Rights Law*, 2008 Intl. Com. L. Rev. 10(4), 379, 383 ff.; Mutua, *Human Rights*.

273 Ross, *Impact on Research of Security-Seeking Behaviour*, in: Sriram et al. (eds.), *Surviving Field Research - Working in Violent and Difficult Situations*, 2009, 177, 183 f.

274 Boehme, *Reactive Remembrance - The Political Struggle Over Apologies and Reparations Between Germany and Namibia for the Herero Genocide*, 2020 J. Hum. Rts. 19(1), 1; Terkessidis, *Wessen Erinnerung Zählt? Koloniale Vergangenheit und Rassismus Heute*, 2019; Grill, *Wir Herrenmenschen - Unser Rassistisches Erbe: Eine Reise in die Deutsche Kolonialgeschichte*, 2019.

275 Sharon, *Uncertain Ethics - Researching Civil War In Sudan*, in: Johan et al. (eds.), *Researching Violence in Africa - Ethical and Methodological Challenges*, 2011, 79, 80.

276 Ukoha, *Hidden Agendas In Conflict Research - Informants' Interests And Research Objectivity In The Niger Delta*, in: Johan et al. (eds.), *Researching Violence in Africa - Ethical and Methodological Challenges*, 2011, 137, 144 ff.; Baines, *Gender Research in Violently Divided Societies - Methods and Ethics of "International" Researchers in Rwanda*, in: Porter (ed.), *Researching Conflict in Africa - Insights and Experiences*, 2005, 140, 147; Smith, *Decolonizing Methodologies*, 10. On the influence of being an insider or outsider, and the many grey areas between the two extremes, Jones et al., *Producing Knowledge on and for Transitional Justice - Reflections on a Collaborative Research Project*, in: Jones/Lühe (eds.), *Knowledge for Peace - Transitional Justice and the Politics of Knowledge in Theory and Practice*, 2021, 49, 57 ff. Rohlin argues that “opening a community

of the researcher's origin and the society they research. It not only applies to researchers from the Global North researching in the Global South. It is high time that the Global North benefits from and actively seeks other perspectives on its transitional processes.<sup>277</sup> While complete abstention from research in the Global South is not the solution, the concerns evince a divide in transitional justice and international law more generally.<sup>278</sup>

The author had and has no satisfying solution to avoid all these ethical pitfalls during his research. All he can offer is some critical reflection. On the issue of parasitic research, the author tried to reciprocate in some ways, albeit much less than warranted for the time and effort interviewees spend for him. Interviewees often asked the author to "tell their story", which the present chapter does to an extent. However, telling someone else's story after a 30- to 60-minute interview is less than ideal. It can only be the author's

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to wider participation as well as to outside criticism increases the likelihood that some default assumptions are challenged in appropriate ways. The more diversity there is in a scientific community, the more likely it is that its default assumptions are challenged, and consequently either defended, modified, or abandoned", Rohlin, *The Bias Paradox in Feminist Standpoint Epistemology*, 2006 *Episteme* 3(1-2), 125, 135. More generally, standpoint theory provided great insights on the connection between knowledge generation and "experiences, social practices, social values and the ways in which perception and knowledge production are socially organized", Stoetzler/Yuval-Davis, *Standpoint Theory, Situated Knowledge and the Situation Imagination*, 2002 *Feminist Theory* 3(3), 315, 316. For an overview see Intemann, *25 Years of Feminist Empiricism and Standpoint Theory – Where are we now?*, 2010 *Hypatia* 25(4), 778, 783 ff. Specifically for the field of peace studies, closely related to transitional justice, Halistoprak, *Knowledge Production and its Politicization Within International Relations and Peace Studies*, in: Jones/Lühe (eds.), *Knowledge for Peace - Transitional Justice and the Politics of Knowledge in Theory and Practice*, 2021, 21, 24 ff. Of course, this is not to suggest that the perspective of a male researcher from the Global North is desperately needed. To the contrary, Haraway showed that it is the hegemonic perspective of science and that rather there is a danger of "romanticizing and/or appropriating the vision of the less powerful while claiming to see from their position", Haraway, *Situated Knowledges – The Science Question in Feminism and the Privilege of Partial Perspective*, 1988 *Feminist Studies* 14(3), 575, 575 ff., 584. This paragraph hopes to evade that risk by reflecting on the author's own standpoint. On that process again see Intemann, *25 Years of Feminist Empiricism and Standpoint Theory*, 785.

277 Only then can what Haraway called "shared conversations in epistemology" be realized, Haraway, *Situated Knowledges*, 584, which are "approximating the truth as part of a dialogical relationship among subjects who are differentially situated", Stoetzler/Yuval-Davis, *Standpoint Theory*, 315. Of course, opening the scientific community, as demanded by the authors cited in this and the preceding footnote is much more urgent in this direction than in the direction the author represents.

278 On that see also below, Conclusion, E.

interpretation of the story, much rather than the interview partner's version of it.<sup>279</sup> For these reasons, the author tried to take a middle ground. He does not quote from the interviews conducted to not misrepresent someone else's story and guard against dramatizing it. At the same time, he does not anonymize the interview partners, honoring their explicit requests not to do so. On the North-South-divide, which the author's mere presence in Sierra Leone and Colombia evinced, perspective is critical: The author considered it necessary to research in the Global South because states of the Global South implement the most wide-ranging and innovative reparation programs worldwide. The Global North either refrains from creating such programs altogether or conceived its programs long ago, never updating them to accommodate new developments in law and practice. By no means is that an outcome of the impeccable morality and legality of the Global North's recent international conduct. It is rather a striking testament to inequalities in international relations.<sup>280</sup> The author sincerely hopes that his research does not reproduce such inequalities to a more considerable degree than necessary. Instead, he hopes that the present case studies can modestly contribute to a genuine interest in transitional justice innovations in the countries studied. There is great potential to learn from Sierra Leone and Colombia's reparation efforts and private initiatives created around them.<sup>281</sup>

Luckily, the epistemological problems encountered during research in Sierra Leone and Colombia can be dealt with more satisfactorily than the ethical ones. In Sierra Leone and Colombia, the author was an outsider with little previous knowledge of the cultural, political, historical, and further context. While that can play out as an advantage and disadvantage simultaneously, it will have affected the way information was gathered and interpreted.<sup>282</sup> That both research stays were singular, short-term, and restricted to the respective states' capitals and their surrounding area will have exacerbated the outsider

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279 Clark, *Fieldwork and its Ethical Challenges - Reflections from Research in Bosnia*, 2012 Hum. Rts. Q. 34(3), 823, 836 f.; Zahar, *Fieldwork, Objectivity, and the Academic Enterprise*, in: Sriram et al. (eds.), *Surviving Field Research - Working in Violent and Difficult Situations*, 2009, 191, 206.

280 See also below, Conclusion, E.

281 Especially the amazing work of the Sierra Leonean NGO Fambul Tok ([www.fambultok.org](http://www.fambultok.org)) and the Colombian artist Juan Manuel Echavarría ([www.jmechavarria.com](http://www.jmechavarria.com)) warrants mentioning as impressive examples of grassroots transitional justice activism. See further below, Conclusion, F.

282 Ukoha, *Hidden Agendas in Conflict Research*, 144 ff.; Baines, *Gender Research in Violently Divided Societies*, 147; Smith, *Decolonizing Methodologies*, 10.



phenomenon.<sup>283</sup> Furthermore, the author had little experience in interview techniques when embarking on the research.

Due to a dearth of written information, the Sierra Leone study relies chiefly on interviews conducted in Freetown and its surroundings. Some information was impossible to verify through an independent second or even third source. For completeness, such information is still included but marked in the text and/or footnote. The interviews in Sierra Leone were scheduled mainly through a snowball system, as is common in difficult research environments.<sup>284</sup> The method carries the inherent danger of a selection bias in the persons interviewed since professional or personal relationships connect the interviewees.<sup>285</sup> Survivor organizations organized most interviews with survivors. Those gatekeepers, as well as interviewees, probably took the research project as an opportunity to advance their agenda.<sup>286</sup> Survivors and representatives of survivor organizations likely saw the research project as an opportunity to voice their demands for more reparation and draw attention to their present situation. Given that Sierra Leone's reparation program was supposed to end soon after the research stay, government officials interviewed probably saw the research project as an opportunity to work on the program's legacy. Survivors often spoke Krio, for which the author required translation. While a trusted translator was available for some interviews, a survivor organization's representative translated others. During some interviews, that representative started asking questions himself, taking increasing control of the interview.<sup>287</sup> His neutrality at that point is doubtful, to say the least. While the author tried his best, he cannot guarantee that he fully accounted for these challenges.<sup>288</sup>

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283 On the problem of restricted geographical reach see Zahar, *Fieldwork, Objectivity, and the Academic Enterprise*, 194.

284 Cohen/Arieli, *Field Research in Conflict Environments - Methodological Challenges and Snowball Sampling*, 2011 J. Peace Research 48(4), 423, 426 f.

285 Cohen/Arieli, *Field Research in Conflict Environments*, 428 f.

286 It would be problematic to assume otherwise, thereby denying agency to the interviewees. On the challenge see Russell, *Interviewing Vulnerable Old People - Ethical and Methodological Implications of Imagining our Subjects*, 1999 J. Aging Stud. 13(4), 403, 408 ff.; Ukoha, *Hidden Agendas in Conflict Research*, 137 f., 146 f., 151 f. On the gatekeeper problem see 149 f.; Zahar, *Fieldwork, Objectivity, and the Academic Enterprise*, 206.

287 These interviews are not cited in the study. Since they did inform the author's further research, consciously and unconsciously, the challenge is still mentioned.

288 On challenges to objectivity in general Clark, *Fieldwork and its Ethical Challenges*, 826 ff.

The case studies of Colombia and the ICC suffer from similar problems – snowball sampling of interviewees, cultural gaps, and interviewees’ agendas – with the difference that the author did not require translation. Both studies rely mainly on written sources and use interviews only sparingly to complement them. The challenges encountered will therefore distort the studies less, and the reader will be in a much better position to ascertain their reliability.

Acknowledging these ethical and epistemological challenges, the author abstained, for the most part, from evaluating the reparation programs. He also refrains from speculation about causes or consequences of the conflicts preceding the reparation programs or the programs themselves. There are exceptions at points at which the author felt that not drawing the readers’ attention to specific issues would be mistaking neutrality for complicity. The author cannot guarantee that he made the right call and hopes for readers’ leniency in that regard.

For the abovementioned reasons, none of the case studies should be taken as a complete history, neither of the reparation programs nor their context. The accounts of the history of the conflicts only contain the minimum information necessary to understand the reparation programs’ background. In the case of Sierra Leone and the ICC, they rely mainly on the sources that also provided the basis for the reparation programs, namely the final report of the SLTRC and the judgments, respectively. The resulting histories are deliberately devoid of any attempts at explaining their root causes.<sup>289</sup> To make a long story short, the reader should be mindful that the following case studies present a mere snapshot out of a highly imperfect angle.<sup>290</sup>

## B. Sierra Leone

After a decade-long civil war, Sierra Leone had to cater to numerous severely harmed survivors. Years after the end of the conflict, it started a reparation program that faced many hurdles. The following section will first recount

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289 Such a selection and history writing is again not neutral and has often been intertwined with imperialism and colonialism. For that see Smith, *Decolonizing Methodologies*, 29 ff. For the example of the Rwandan Genocide see, Andrews, *The New Age of Empire - How Racism and Colonialism Still Rule the World*, 2021, 49 ff. The author’s socialization in the Global North alone makes it likely that the bits of history recalled in this chapter represent a colonial angle. The author hopes to have kept that at a minimum.

290 Johan et al., *Navigating the Terrain*, 8.

the history of Sierra Leone's conflict (I.) and the harms it caused (II.), before placing Sierra Leone's reparation efforts within its transitional justice process (III.) and analyzing them (IV.)

## I. The History of Sierra Leone's Internal Conflict

Sierra Leone gained independence from British colonial rule in 1961. Colonial occupation left it with significant economic and ideological rifts between the peninsula on which its capital Freetown lies and the rest of the country. It destabilized traditional authorities and laid the ground for poor governance.<sup>291</sup> After independence, Sierra Leone became more and more autocratic, culminating in a change of constitution in 1978, which established a one-party rule under the All People's Congress (APC).<sup>292</sup> Rampant mismanagement and corruption led to growing frustration and social tensions in the 1970s. When student protests erupted in 1977 at Freetown's Fourah Bay College, the government responded violently and forced some protesters into exile. In Libya, some of them were trained to be insurgents.<sup>293</sup> Two critical figures met in such a training camp: Foday Sankoh, later leader of the insurgency and Charles Taylor, later president of Liberia. When Taylor began his attempt to overthrow Liberia's government, Sankoh supported him. Since international troops used Sierra Leone as an airbase to fight Taylor's National Patriotic Front of Liberia (NPFL), Taylor wanted to ensue chaos in the neighboring country. He allowed Sankoh to recruit from Sierra Leonean captives of the NPFL and pushed him to start an insurgency in Sierra Leone.<sup>294</sup> Sankoh's newly formed Revolutionary United Front (RUF) launched its first attack on the border town of Bomaru on 23 March 1991, marking the official start of the conflict. It received massive support from the NPFL – some estimate that over 80 % of the RUF's initial fighting force relied on Taylor's fighters.<sup>295</sup> The attack formed part of a two-front incursion, which caught the Sierra Leone Army (SLA) by surprise. Being ill-equipped and badly trained,

291 SLTRC, *Witness to Truth*, vol. 3a, 5 ff. The account of the history of Sierra Leone's internal conflict follows in large part the final report of the SLTRC, because the report also served as the basis for Sierra Leone's reparation program.

292 Cook, *Conflict Dynamics - Civil Wars, Armed Actors, and Their Tactics*, 2017, 36, 39.

293 SLTRC, *Witness to Truth*, vol. 3a, 91 ff.

294 Keen, *Conflict and Collusion in Sierra Leone*, 2005, 37; Fuchs-Kaminski, *Der Beitrag des Sondergerichtshof für Sierra Leone zum Völkerstrafrecht*, 2015, 42.

295 SLTRC, *Witness to Truth*, vol. 3a, 120.

the SLA had little to challenge the RUF. Additionally, Sierra Leone's government failed to take the threat seriously at first.<sup>296</sup> Frustrated by the slow course of action, a group of young militaries around Captain Valentin Strasser staged a coup d'état on 29 April 1992. They tripled the number of recruits in the SLA. The recruits had an even lower level of training, and many persons of dubious background enlisted. As a result, the SLA became more violent towards civilians.<sup>297</sup> Still, the measures brought the RUF to the brink of defeat in 1993. In response, the RUF changed its approach to a guerilla tactic, allowing it to regain strength.<sup>298</sup> In this dangerous situation, a new actor came to the fore: The Civil Defence Forces (CDF). Rather than a homogenous fighting force, communities founded local civil defense groups for their protection. The largest and most infamous one, the Kamajor Society, developed out of a hunter society. Their increasing resistance against the RUF became a significant factor in the war.<sup>299</sup> In 1996 Brigadier General Julius Maada Bio overthrew Strasser's government. He quickly held democratic elections, which gave the presidency to Ahmad Tejan Kabbah of the Sierra Leone People's Party (SLPP). Kabbah did not hold on to power for long, though. Yet another coup d'état forced him into exile on 25 May 1997 and brought Johnny Paul Koroma and the Armed Forces Revolutionary Council (AFRC) into power. The AFRC invited the RUF to join a national unity government – a call the rebels answered willingly.<sup>300</sup> Meanwhile, Kabbah's government in exile in Guinea mobilized international support. In early 1998, troops of the Monitoring Group of the Economic Community of West African States (ECOWAS) ousted the AFRC and the RUF from Freetown with the help of CDF, enabling Kabbah's triumphant return on 10 March.<sup>301</sup> The triumph did not last. In January 1999, marking the beginning of the war's final, devastating act, the RUF and AFRC launched an attack on Freetown. For two weeks, they occupied large parts of the capital and wreaked havoc.<sup>302</sup> After being driven out,

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296 Hazen, *What Rebels Want - Resources and Supply Networks in Wartime*, 2013, 76 f.

297 Keen, *Conflict and Collusion in Sierra Leone*, 97 ff.

298 Peters, *War and the Crisis of Youth in Sierra Leone*, 2011, 66 f.; Cook, *Conflict Dynamics*, 42.

299 Hoffman, *The Meaning of a Militia - Understanding the Civil Defence Forces of Sierra Leone*, 2007 Afr. Aff. 106(425), 639, 641 ff.

300 Cook, *Conflict Dynamics*, 43 f.; Fuchs-Kaminski, *Der Beitrag des Sondergerichtshofs für Sierra Leone zum Völkerstrafrecht*, 44 ff.

301 SLTRC, *Witness to Truth*, vol. 3a, 248 ff., 288 ff.

302 UNSC, *Fifth Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, S/1999/237, 1999, para 20 ff.

national and international pressure for a peaceful solution prompted the government and the RUF to conclude a peace agreement in Togo's capital Lomé four months later. Both sides continuously violated its terms in the months to come. The government did not abide by the agreed-upon power-sharing system, and the RUF continued to attack UN peacekeepers and government troops. A series of hostage-takings of UN peacekeepers eventually escalated the situation. A large peace rally gathered in Freetown, just outside Foday Sankoh's residence. After it turned violent, Sankoh fled the premises and was captured several days later. Other members of the RUF were also detained or killed, marking the end of its political arm. The still existing military arm was defeated in the weeks to come, first by the SLA and, after the remaining rebels fled to Guinea, by the Guinean army.<sup>303</sup> The RUF and the government agreed on a ceasefire on 10 November 2000, and the RUF succumbed to a process of disarmament, demobilization, and reintegration (DDR) on 2 May 2001. After the process was finalized on 18 January 2002, all parties met at Lungi Airport to ceremonially burn the weapons collected from the RUF. This day marks the official end of ten years of devastating conflict.<sup>304</sup>

## II. Human Rights Violations and Harms in the Conflict

Sierra Leone's civil war is infamous for the brutality and the disregard for civilian life and suffering all parties displayed. While the RUF was responsible for most atrocities, all parties to the conflict committed numerous violations of human rights and international humanitarian law. Obviously, an exhaustive treatment of all violations committed in a complicated ten-year war is impossible. Nevertheless, since reparation erases harm caused by human rights violations, an initial, rough idea of the violations and harms the conflict caused is vital for understanding Sierra Leone's reparation program. To facilitate such an understanding, the following account will provide a panorama of typical violations suffered by the five survivor groups eligible for

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303 Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 166 ff.; SLTRC, *Witness to Truth*, vol. 3a, 348 ff., 356 ff., 405 ff., 457 ff. Guinea and Sierra Leone worked together from the beginning to counter the insurgency. On that see Fuchs-Kaminski, *Der Beitrag des Sondergerichtshofs für Sierra Leone für das Völkerstrafrecht*, 42.

304 SLTRC, *Witness to Truth*, vol. 3a, 461 f.

Sierra Leone's reparation program – amputees, war-wounded, survivors of sexualized violence, war widows, and children.<sup>305</sup>

From the outset, the RUF built its numerical strength upon forced conscription and abduction, primarily affecting many child survivors. Other factions did the same, albeit to a lesser degree. Thus, a large portion of the fighting forces consisted of children. Some suggest that they made up 50 % of rebel forces.<sup>306</sup> Amputees evoked the most vivid pictures from the Sierra Leonean conflict. Mostly the RUF cut off arms, legs, hands, fingers, ears, noses, and sexual organs. During the “Operation Stop Election” in 1996, the RUF deliberately cut off persons’ hands to either stop them from voting or punish them for having voted.<sup>307</sup> Other prevalent violations suffered by the mentioned survivor groups were torture, assault, arbitrary detention, looting, and property destruction. Often, fighters burnt whole villages to the ground.<sup>308</sup> The conflict displaced approximately 2.6 million Sierra Leoneans.<sup>309</sup>

All these violations caused severe harm to survivors. It is even more problematic to provide an account of typical harm than generalize the violations committed. Harm is often highly subjective and contingent on the circumstances of the individual survivor. Still, since reparation is harm-centered, it is crucial to understand the kind of harm a reparation program aims to mitigate. Therefore, a necessarily under-complex overview of typical harms survivors suffered must be attempted at this point. Its broad brush should not paint over the fact that every survivor experienced harm differently and that survivors do not just passively endure harm. Instead, many find remarkable, creative ways to deal with their plight and build resilience, which would merit much more scholarly attention.

Most survivors suffered more than one violation. These violations often created a complex web of intertwined harms on an individual, family, and community level. Paired with the devastating macrosocial and economic

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305 With that the chapter reproduces severe blindspots of transitional justice, which too often focuses on violations of life and bodily integrity at the expense of economic, social and cultural rights, see Carranza, *Plunder and Pain - Should Transitional Justice Engage With Corruption and Economic Crimes?*, 2008 Intl. J. Transitional Just. 2(3), 310, and below, Conclusion, E.

306 Mazurana/Carlson, *From Combat to Community - Women and Girls of Sierra Leone*, 2004, 3.

307 SLTRC, *Witness to Truth*, vol. 3a, 472 ff.

308 COHRE, *Housing Rights in West Africa - Report of Four Fact-Finding Missions*, 2004, 103; SLTRC, *Witness to Truth*, vol. 3a, 489 f.

309 UNDP, *Evaluation of UNDP Assistance to Conflict-Affected Countries - Case Study Sierra Leone*, 2006, 4.

effects of the war, many survivors were and still are caught in that web with little chance to escape it.

A type of harm that spanned all categories of survivors and indeed the country as a whole was the rupture in Sierra Leone's social fabric. Apart from the fact that many communities were physically torn apart by displacement and destruction of their community spaces, the fighting factions ensured that their actions had a lasting effect on community relations. Mostly the RUF deliberately destroyed social ties and culture by strategically overstepping cultural boundaries and social taboos. Often, they tortured, humiliated, and killed figures of authority.<sup>310</sup> They strategically destroyed family bonds by forcing persons to kill, mutilate or rape family members. When abductees were forced to commit such acts, it kept them from returning to their original community, even after the war ceded.<sup>311</sup> The fighting factions employed sexualized violence as an especially effective tool to destroy social taboos, and with them, community bonds: Rape in public, by several perpetrators, of pregnant or lactating persons and forced incest were frequent and violated deeply-rooted fundamental social norms.<sup>312</sup> After the war, the social fabric in many communities was thus profoundly shattered. This harmed society, added another layer to the harm survivors experienced, and took away support networks that could have helped them cope with their experiences.

Amputees were the most visible survivors in Sierra Leone's conflict. Many probably died of their wounds either immediately or during the war. For those who survived, amputation often caused further medical issues, such as phantom pain and infections as well as severe psychological problems. It often led to a dramatic reduction in earning capacity and accordingly to impoverishment or a heightened if not complete dependence on others. Such dependence further affected amputees' psychological well-being. Some amputees also reported that their communities stigmatized and discriminated against them.<sup>313</sup> Sexualized violence created a multitude of complex, intertwined harms. First, there were medical consequences, mostly in the form of recto-vaginal and vesico-vaginal fistulas.<sup>314</sup> This condition is not only

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310 SLTRC, *Witness to Truth*, vol. 3a, 509 ff.

311 SLTRC, *Witness to Truth*, vol. 3a, 498 ff.

312 HRW, "We'll Kill You if You Cry" - *Sexual Violence in the Sierra Leone Conflict*, 2003, 35 ff.

313 Berghs, *War and Embodied Memory - Becoming Disabled in Sierra Leone*, 2012, 114 f., 132 f., 140 ff.

314 Fistulas are tears in tissue, which in case of survivors of sexualized violence can occur e.g. between the vagina and rectum (rectovaginal fistula) or between the vagina and

painful but can lead to infertility and incontinence. Sexually Transmitted Infections and Diseases (STIs / STDs), as well as HIV, were common ailments in the survivor population, some of which also led to infertility. Psychological consequences were manifold and severe, often amounting to depression and Post-Traumatic Stress Disorder.<sup>315</sup> In addition, many survivors of sexualized violence faced severe social consequences. Survivors were stigmatized and often ostracized by their partners, families, and communities. Ingrained gender roles exacerbated the stigma if survivors became infertile or had difficulties engaging in relationships. If armed forces had abducted them, they were often perceived as part of the warring factions. Many persons became pregnant after being raped and carried the child to full term. “Rebel children” faced similar stigmatization and ostracism. The combined social, psychological, and physical effects marginalized survivors and thus diminished their opportunities in life.<sup>316</sup> War widows not only suffered the emotional and psychological pain that losing a spouse entails. Their partner often was the primary breadwinner of the household. In that case, war widows found themselves deprived of their livelihood.<sup>317</sup> Children experienced many different forms of victimization. Often, they were abducted and forced to fight. In that case, they witnessed traumatic events and had to engage in traumatic action. They were abused and, in the aftermath, often suffered severe psychological problems.<sup>318</sup> Forced drugging was rampant so that many children developed severe drug addictions.<sup>319</sup> Upon return to their communities, they were met with suspicion, ostracism, and stigma. Often, this prevented former child soldiers from returning to their community.<sup>320</sup>

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the bladder (vesicovaginal fistula), Noack-Lundberg, *Impacts of Sexual Violence on Women's Sexual Health*, in: Ussher et al. (eds.), *Routledge International Handbook of Women's Sexual and Reproductive Health*, 2019, 468, 470 f.; Onsrud et al., *Sexual Violence-Related Fistulas in the Democratic Republic of Congo*, 2008 Intl. J. Gynecology Obstetrics 103(3), 265.

315 HRW, “We’ll Kill You if You Cry”, 50 ff.; SLTRC, *Witness to Truth*, vol. 3b, 207 ff.

316 Coulter, *Bush Wives and Girl Soldiers – Women's Lives Through War and Peace in Sierra Leone*, 2009, 132, 208 ff.; HRW, “We’ll Kill You if You Cry”, 52 f.; SLTRC, *Witness to Truth*, vol. 3b, 197 ff.

317 SLTRC, *Witness to Truth*, vol. 2, 244.

318 Betancourt et al., *Sierra Leone's Child Soldiers - War Exposures and Mental Health Problems by Gender*, 2011 J. Adolescent Health 49(1), 21, 21.

319 SLTRC, *Witness to Truth*, vol. 3a, 479 ff.

320 Denov, *Coping With the Trauma of War - Former Child Soldiers in Post-Conflict Sierra Leone*, 2010 Intl. Soc. Work 53(6), 791, 798 f.; Denov, *Child Soldiers in Sierra Leone - Experiences, Implications and Strategies for Rehabilitation and Community Reintegration*, 2005.



Many children had their parents or one parent killed and suffered the involved psychological and social consequences. The breakdown of the education system in large parts of the country kept many children from enjoying an education.<sup>321</sup> In sum, the experience of war fundamentally altered the trajectory of many children's life.

### III. Sierra Leone's Transitional Justice Effort

To deal with this complex web of violations and harms, Sierra Leone's transitional justice process consisted of three main parts. The Sierra Leone Truth and Reconciliation Commission (SLTRC) and the Special Court for Sierra Leone (SCSL) were created right after the civil war.<sup>322</sup> The SLTRC handed in a comprehensive report on the conflict, its causes, and consequences in 2004, after taking numerous testimonies from survivors, perpetrators, and other stakeholders.<sup>323</sup> The SCSL conducted several notable trials, including against Charles Taylor. Foday Sankoh's trial could not commence since he died in custody of natural causes.<sup>324</sup> The reparation program started its work in 2008, complementing the efforts at truth and punishment.

### IV. Sierra Leone's Reparation Effort

The convoluted way reparation entered the Sierra Leone peace process already cast a shadow on the state's future handling of its responsibility towards survivors. The Lomé Agreement did not contain an explicit obligation to repair the survivors of the conflict. It merely obliged Sierra Leone to establish a rehabilitation program.<sup>325</sup> The SLTRC gave the decisive impetus

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321 Denov, *Coping With the Trauma of War*, 799 f.

322 On the SLTRC see Hayner, *Unspeakable Truths*, 58 ff.; Dougherty, *Searching for Answers - Sierra Leone's Truth and Reconciliation Commission*, 2004 Afr. Stud. Q. 8(1), 39. On both institutions and their relationship see Schabas, *Conjoined Twins of Transitional Justice - The Sierra Leone Truth and Reconciliation Commission and the Special Court*, 2004 J. Intl. Crim. Just. 2(4), 1082. On the SCSL see Fuchs-Kaminski, *Der Beitrag des Sondergerichtshofs für Sierra Leone zum Völkerstrafrecht*.

323 SLTRC, *Witness to Truth*.

324 Bassiouni, *Introduction to International Criminal Law*, 2nd Revised Edition 2013, 739 ff.

325 Art. XXIX Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front (Lomé Peace Agreement).

to Sierra Leone’s reparation program by dedicating an entire chapter of its final report to reparation recommendations. In doing so, the Commission stretched its mandate, which just vaguely tasked it to respond to survivors’ needs, restore their dignity, and foster healing and reconciliation.<sup>326</sup> With a delay of eight months, Sierra Leone’s government reluctantly accepted the SLTRC recommendations “in principle”, but conditioned their implementation on the availability of resources and external support.<sup>327</sup> More than 15 years later, few of the recommendations have been implemented.

1. The Recommendations of the Sierra Leone Truth and Reconciliation Commission

a. Framework

The SLTRC held the state responsible for repairing all survivors, relying on the state’s positive obligation to prevent human rights violations and notions of equality, justice, and fairness.<sup>328</sup> While employing the broad survivor definition of the Basic Principles, it restricted reparation to the most vulnerable survivors: amputees, severely war-wounded, survivors of sexualized violence, war widows, and children. Arguing that repairing every survivor would be an impossible burden on the state, it limited reparation for everyone else to symbolic measures.<sup>329</sup> Reparation was supposed to further reconciliation, the restoration of civic trust and solidarity. To achieve that, reparation was to signal the government’s and society’s interest in survivors and relationships of equality with them. Concretely, the SLTRC wanted to restore survivors’ dignity by improving their quality of life and facilitating their independence and reintegration into their communities.<sup>330</sup> Symbolic reparations were supposed to show respect for survivors, recognize

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326 § 6 Truth and Reconciliation Commission Act 2000; Schabas, *Reparation Practices in Sierra Leone and the Truth and Reconciliation Commission*, in: de Feyter et al. (eds.), *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations*, 289, 293.

327 Government of Sierra Leone, *White Paper on the Truth and Reconciliation Report*, 2005, 16.

328 SLTRC, *Witness to Truth*, vol. 2, 231 f.

329 SLTRC, *Witness to Truth*, vol. 2, 234, 242. The survivor definition of the Basic Principles coincides with the one established above, ch. 1, B.

330 SLTRC, *Witness to Truth*, vol. 2, 236 f., 239 ff., 247.

their harm, preserve the memory of what happened and show the shared determination of society never to let these violations happen again.<sup>331</sup>

The SLTRC departed from the international law on reparation by arguing that there is no proportionate reparation for the crimes committed. Instead, the Commission balanced survivors' needs, the state's capacities, and development agenda. As a result, the Commission emphasized services and symbolic measures over cash payments. This choice corresponded with the needs and preferences survivors expressed before it. Services were also deemed more sustainable as they enhanced the country's infrastructure and lessened social tensions because whole communities, not only survivors, benefitted from them.<sup>332</sup>

Three principles guided the SLTRC in designing its recommendations: No harm, accessibility, and participation. The first mandated avoiding additional stigma and social divisions through reparation. The second justified creating an administrative, not a court-based reparation program because the latter would have heavily overburdened the judicial system. It also warranted removing potential barriers for survivors during the registration and disbursement process. The last principle tasked the SLTRC to allow for the broad participation of survivors in all stages of the process.<sup>333</sup>

## b. Reparation Recommendations

As mentioned above, the SLTRC recommended confining reparation to amputees, war-wounded, survivors of sexualized violence, children, and war widows. Survivors were considered amputees if they lost upper or lower limbs. All those who sustained other injuries were designated as war-wounded. These survivors could only benefit from reparation if their injuries – either singly or collectively – reduced their earning capacity by at least 50 %. The reduction was to be determined either by a list appended to Sierra Leone's workers compensation act or – if the injury sustained was not listed – by a medical professional. Survivors of sexualized violence were defined as any person subject to acts such as rape, sexual slavery, mutilation of genitals or breasts, and forced marriage. The 50 % reduction in earning capacity threshold did not apply to them. The SLTRC determined that their reduction

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331 SLTRC, *Witness to Truth*, vol. 2, 232, 234 f.

332 SLTRC, *Witness to Truth*, vol. 2, 232, 234 f., 244 ff.

333 SLTRC, *Witness to Truth*, vol. 2, 229, 232, 245 ff.

in earning capacity did not result chiefly from their injury but stigma. The SLTRC granted war widows reparation because it assumed that they had depended on their husbands. It did not apply the assumption vice versa, thereby excluding widowers from the program. Children were considered survivors if they were under 18 by 1 March 2002 and sustained physical or psychological harm, if their parents were killed, or if they were born out of sexualized violence and raised by a single mother.<sup>334</sup>

The SLTRC recommended reparation in the areas of physical and mental health, education, finances, and symbolic reparation. It demanded free health care for war-related injuries for amputees, war-wounded survivors of sexualized violence, and children. Amputees were to benefit their entire life, the other three groups as long as necessary. Spouses and minor children of survivors were supposed to access free health care as long as the direct survivor could. Healthcare should encompass specialized services different groups of survivors needed, e.g., assistive and orthotic devices for amputees, specialized surgery for survivors of sexualized violence, and physiotherapy for war-wounded. In addition to these individual measures, the SLTRC advocated for systemic changes to overcome structural shortcomings in Sierra Leone's health sector. It recommended strengthening the referral system so that survivors could receive care from specialized professionals. It tasked the government with establishing more medical facilities, training medical professionals, and incentivizing foreign specialists to come to the country.<sup>335</sup> In mental health, the SLTRC demanded free counseling and psychosocial support for all survivors and their dependents. On a systemic level, the government should recruit and train counselors, include mental health in the curriculum of nursing and medical schools, and install trauma counseling services at all rehabilitation centers and at all facilities, which treated women.<sup>336</sup> As regards education, child survivors were to receive a free education until senior secondary school level. The government should assist teacher training programs and provide incentives for teachers to work in remote areas.<sup>337</sup>

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334 SLTRC, *Witness to Truth*, Vol. 2, 248 ff.

335 The shortcomings at that time were dramatic. In 2004 only 250-300 doctors catered to the needs of a population of ca. 5 million people. Half of them practised in Freetown. Three years after the conflict had ended, still only one psychiatrist practiced in Sierra Leone, SLTRC, *Witness to Truth*, vol. 2, 251 ff.; vol. 3b, 208.

336 SLTRC, *Witness to Truth*, vol. 2, 258 f.

337 SLTRC, *Witness to Truth*, vol. 2, 261.

Adult amputees, war-wounded, and survivors of sexualized violence were to receive pensions. The amount depended on the reduction in earning capacity suffered. All survivors should receive skill training, including courses on running small-scale businesses. Upon completion of these courses, survivors should be eligible to receive a micro-credit or micro-project.<sup>338</sup>

As symbolic reparation, the government should apologize “for all actions and inactions since 1961”, the year of independence. Further, all responsible individuals, groups, and organizations were asked to apologize for their role in the conflict. A national war memorial in Freetown and several memorials in other parts of the country were to be built after consultation with survivors and affected communities. The government should organize commemoration ceremonies by traditional and religious leaders, including symbolic reburials. Some of these were to be held on a designated National Reconciliation Day. Actual reburials were to be facilitated if survivors so wished.<sup>339</sup> For the communities most affected by the war, the government was to provide financial and technical assistance for the reconstruction and consolidation of their institutions. These processes were to be held in close consultation with the communities concerned especially considering women and youth.<sup>340</sup> Lastly, the SLTRC made recommendations for the registration process. It should be easily accessible also in remote areas; local leaders and civil society organizations should support survivors’ identification and registration. It was deemed crucial to maintain the privacy of individuals, especially of survivors of sexualized violence. The SLTRC emphasized the importance of sensitization programs before a reparation program started.<sup>341</sup>

## 2. Implementation

Eight months after the SLTRC handed in its report, the government accepted its recommendations “in principle”, but conditioned their implementation on the availability of resources and outside support.<sup>342</sup> The half-hearted acceptance already hinted at a familiar pattern over the following years: Reparation has been delivered in a piece-meal fashion, mostly dependent on external funding.

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338 SLTRC, *Witness to Truth*, vol. 2, 259, 262 f.

339 SLTRC, *Witness to Truth*, vol. 2, 264.

340 SLTRC, *Witness to Truth*, vol. 2, 265.

341 SLTRC, *Witness to Truth*, vol. 2, 270.

342 Government of Sierra Leone, *White Paper*, 16.

Three phases of the program can be identified. The initial phase comprised the registration of survivors (a.), an “interim-relief-payment”, and educational support (b.). It lasted from 2008 until 2010. In the other two phases, Sierra Leone distributed rehabilitation grants to amputees and war-wounded between 2011 and 2015 and to war widows and survivors of sexualized violence from 2016 until at least 2019 (c.). These grants constituted the core of the program. Other measures complemented them, mostly funded and implemented by external actors (d.).

#### a. Initiation and Registration

The reparation program was created in 2008 after the United Nations Peacebuilding Fund (PBF) granted three million US-Dollars (USD) to start it. The government complemented the effort with 246.000 USD, mostly consisting of office space and personnel.<sup>343</sup> The International Organization for Migration (IOM) helped set up a reparation unit within the National Commission for Social Action (NaCSA), which the SLTRC designated to lead the reparation efforts. A National Steering Committee was created, in which representatives of NaCSA, the government, the UN, civil society, and survivor organizations were supposed to advise on the implementation.<sup>344</sup> The program started registering survivors in 2008. NaCSA held stakeholder meetings and broadcasted information over TV and radio in a sensitization and awareness campaign. In two phases, 33.863 survivors registered – twice as many as the IOM project proposal expected, but only half the number NaCSA estimated in its five-year strategic plan.<sup>345</sup> To register, survivors had to give a detailed account of their victimization to a NaCSA official. The account was

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343 PBF, *NaCSA/IOM Reparations Project Proposal*, PBF/SLE/A-4, 2008, 11; PBF, *Final Programme Narrative Report*, PBF/SLE/A-4, 2010, 1.

344 For the complete allocation of the seats in the committee see PBF, *Project Proposal*, PBF/SLE/A-4, 11. Amnesty International bemoaned that no Women NGO was represented in the committee, Amnesty International, *Sierra Leone - Getting Reparations Right for Survivors of Sexual Violence*, AFR 51/005/2007, 2007, 23. The steering committee stopped meeting in 2011, Ottendörfer, *Translating Victims’ “Right to Reparations” Into Practice - A Framework for Assessing the Implementation of Reparations Programs From a Bottom-Up Perspective*, 2018 Hum. Rts. Q. 40(4), 905, 922.

345 MPTF, *Enhancing Social Protection and Rehabilitation fo War Victims Through Reparations*, *Project Document*, 2013, 3; PBF, *Final Report*, PBF/SLE/A-4, 3; NaCSA, *Statistical Overview of Administered Reparations*, 2018, on file with the author; Ottendörfer, *Translating Victims’ “Right to Reparations” Into Practice*, 920.

verified either by cross-referencing the survivor's name with lists provided by the SLTRC and designated civil society organizations or by a local authority's confirmation of the account, e.g., a chief or religious leader.<sup>346</sup> The rules attached to the grant of the PBF proved detrimental to the registration process. 75 % of the funds had to benefit survivors directly, and the project had to be finalized within a year.<sup>347</sup> Due to the scarcity of funds and the strict timeframe, the sensitization and awareness campaign had limited reach, and the initial registration phase only lasted two months. Given the obvious shortcomings, a second phase with better outreach followed. Still, many survivors probably failed to register. Some simply did not know about the possibility. Others, especially survivors of sexualized violence, did not register out of shame or fearing stigma.<sup>348</sup> As a result, registration remained open and closed for good only in 2010.<sup>349</sup>

## b. Interim-Relief

The institutional rules of the PBF also hindered the effective design of reparation measures. The project proposal foresaw pensions, free education and healthcare, skills training, micro-credits, community reparations, and psychosocial support. Funding needed beyond the initial three million USD was to be sourced from taxes, former fighters' assets, and debt-relief-for-reparation-schemes, among others.<sup>350</sup> These sources were never uncovered. Faced with limited time and resources and the increasing agitation of survivors, those responsible abandoned the initial plan and limited the

346 Ottendörfer, *The Fortunate Ones and the Ones Still Waiting - Reparations for War Victims in Sierra Leone*, 2014, 15. "Chiefs" are part of Sierra Leone's administrative structure and lead one of the 149 "Chiefdoms", Sierra Leone's lowest administrative entity. The system has its origins in British colonial rule, Jackson, *Reshuffling an old Deck of Cards? The Politics of Local Government Reform in Sierra Leone*, 2007 Afr. Aff. 106(422), 95, 95 ff. More generally on the role of chiefs in British colonial rule, Reinhard, *Die Unterwerfung der Welt*, 2016, 992 f.

347 ICTJ, *Report and Proposals for the Implementation of Reparations in Sierra Leone*, 2009, 1 f.

348 ICTJ, *Reparations in Sierra Leone* 4 f.; Williams/Opdam, *The Unrealised Potential for Transformative Reparations for Sexual and Gender-Based Violence in Sierra Leone*, 2017 Intl. J. Hum. Rts. 21(9), 1281, 1291 f.

349 Interview with *Amadu Bangura* (Program Manager Sierra Leone Reparation Program), Freetown, 8 August 2018.

350 PBF, *Project Proposal*, PBF/SLE/A-4, 4, 13; ICTJ, *Reparations in Sierra Leone*, 6.

program to an interim-relief payment of approximately 100 USD<sup>351</sup> for every survivor.<sup>352</sup> Children received the same amount as an educational grant paid directly to their school to cover school fees, material, etc.<sup>353</sup> Additionally, 49 survivors in urgent need of medical attention received medical care, e.g., surgical removal of bullets. 235 survivors of sexualized violence underwent examination and received financial assistance to treat STIs. Some underwent surgery, e.g., to repair vaginal fistulas.<sup>354</sup> Those who received medical care received another 100 USD for the costs incurred.<sup>355</sup> Few survivors received psychological support.<sup>356</sup>

Survivors collected their interim-relief payment from central disbursement places in Freetown and other large cities upon presenting the ID they received after registration. NaCSA ensured that survivors of sexualized violence could not be identified as such during the disbursement process.<sup>357</sup> Before receiving the money, every survivor attended a workshop on using the grant for an income-generating activity to ensure some sustainability.<sup>358</sup> In the end, 20,107 of the 21,700 eligible survivors received the payment.<sup>359</sup> Those who did not receive the grant in 2009 were attended to in 2011 when the PBF provided funding for that purpose.<sup>360</sup>

Symbolic reparation was disbursed equally among 40 out of 149 chiefdoms to avoid creating social tensions.<sup>361</sup> It comprised ceremonies and memorials. Local and religious leaders symbolically cleansed the community of the atrocities committed. Vigils, consecrations, and symbolic reburials were

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351 If the sources state monetary values in Leones, the author calculated the equivalent in USD based on the then-applicable exchange rate, as taken from <https://www.exchangerates.org.uk/SLL-USD-exchange-rate-history-full.html>.

352 Ottendörfer, *The Fortunate Ones and the Ones Still Waiting*, 14; Interview with Bangura, 8 August 2018.

353 Interview with Bangura, 8 August 2018.

354 PBF, *Final Report*, PBF/SLE/A-4, 7.

355 ICTJ, *Reparations in Sierra Leone*, 10.

356 PBF, *Final Report*, PBF/SLE/A-4, 7.

357 ICTJ, *Reparations in Sierra Leone*, 7.

358 Interview with Bangura, 8 August 2018.

359 ICTJ, *Reparations in Sierra Leone*, 8; Ottendörfer, *Translating Victims' "Right to Reparations" Into Practice*, 921. Of those, 6,984 persons received the amount as educational support, PBF, *Final Report*, PBF/SLE/A-4, 7.

360 MPTF, *Reparation Project Document*, 4.

361 Interview with Bangura, 8 August 2018. On the concepts of chiefdoms see above, B.IV.2.a.



performed. Peace trees were planted. Survivors and perpetrators told their stories, and survivors had the opportunity to forgive perpetrators.<sup>362</sup>

### c. Rehabilitation Grants

After this initial relief effort, the government decided to concentrate on rehabilitation grants coupled with workshops on financial literacy to foster survivors' independence.<sup>363</sup> Since there was not enough funding to pay rehabilitation grants to all survivors at once, the government decided to sequence reparation based on survivors' vulnerability. Because it measured vulnerability as survivor's physical ability to generate income, amputees and war-wounded were prioritized over war widows and survivors of sexualized violence. Children did not receive any reparation after the initial education grants.<sup>364</sup>

In 2011, the first amputees received 200 USD with funding from the PBF. Two years later, a grant of the Multi-Partner Trust Fund (MPTF) worth 2,5 million USD enabled NaCSA to give rehabilitation grants of 1.400 USD to 1138 amputees and 162 especially vulnerable war-wounded.<sup>365</sup> In 2014 and 2015, another 2.608 war-wounded received 600 USD, concluding the reparation process for the first two categories of survivors.<sup>366</sup> After the Ebola crisis stalled NaCSA's work in 2015, the agency spent much of 2016 updating the survivor register. Seven years after the initial registration, much of the information was outdated. The reverification paused in 2017 because government funding did not arrive until December. NaCSA completed it in 2018.<sup>367</sup> In mid-2018, the government approved funding for NaCSA to cater to the reverified war widows and survivors of sexualized violence. NaCSA started distributing

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362 NaCSA, *Sierra Leone Reparations Programme Newsletter*, 2016, 5; HOPE - Sierra Leone, *Report of Symbolic Reparations (Memorials and Reburials) - Bomaru, Kailahun District, 21st - 23rd March 2009*, 2009, 4 ff.

363 NaCSA, *Annual Report 2015*, 2015, 24; Interview with *Bangura*, 8 August 2018.

364 Interview with *Bangura*, 8 August 2018.

365 MPTF, *Updated Consolidated Report on Projects Implemented Under the Sierra Leone Multi-Donor Trust Fund*, 2015, 65.

366 NaCSA, *Statistical Overview*, on file with the author.

367 Interview with *Bangura*, 8 August 2018.

rehabilitation grants in the second half of 2019. Once that process concludes, the program will close.<sup>368</sup>

d. Additional Measures

Beyond the core-prong of providing rehabilitation grants, outside funding enabled several projects for specific survivor groups. The Norwegian Refugee Council and later the Norwegian Friends for Sierra Leone built 888 houses to shelter survivors. The government provided land for some of them, and NaCSA assisted in the coordination of the project.<sup>369</sup> In 2009, then president Koroma inaugurated the War Victims Trust Fund, which was supposed to receive donations from private individuals, companies, and organizations to support the reparation efforts. The 50.000 USD it collected – significantly less than initially pledged by different actors – were used for interim-relief payments to 330 survivors and emergency medical relief for 14 survivors.<sup>370</sup> The grant of the MPTF provided 26 further survivors with medical support.<sup>371</sup> On international women's day 2010, Koroma apologized to the women of Sierra Leone.<sup>372</sup> A joint funding effort of UNWomen and the PBF enabled further reparation for survivors of sexualized violence. It provided 650 women with three to six months of skill training. They received a monthly stipend of 60 USD during the training. Afterward, they received a 500 USD grant and a starter kit containing tools, training manuals, and other equipment. Further, according to government statements, 16.500 persons received psychosocial counseling until 2016, when funding for the program ran out.<sup>373</sup>

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368 Interview with *Bangura*, 8 August 2018; NaCSA, *NaCSA Pays 2,250 Female War Victims Nationwide*, 2019.

369 NaCSA, *Reparations Newsletter*, 9; Schanke, *Housing and Reintegration of Amputees and War-Wounded in Sierra Leone*, 2004 *Forced Migration* 21, 60; COHRE, *Housing Rights in West Africa*, 110; Schabas, *Reparation Practices in Sierra Leone*, 297.

370 NaCSA, *Reparations Newsletter*, 8; PBF, *Final Report*, PBF/SLE/A-4, 6.

371 MPTF, *Updated Consolidated Report*, 65.

372 CEDAW, *Consideration of Sixth Periodic Reports of States Parties - Sierra Leone*, CEDAW/C/SLE/6, 2012, para 85. For the full text of the apology see, *President Koroma Apologizes to Sierra Leonean Women*, Sierra Express Media, 29 March 2010.

373 CEDAW, *List of Issues and Questions in Relation to the Sixth Periodic Report of Sierra Leone - Replies of Sierra Leone*, CEDAW/C/SLE/Q/6/Add.1, 2014, para 9; NaCSA, *Reparations Newsletter*, 9; Interview with *Bangura*, 8 August 2018.

NaCSA also tried to negotiate free health care and education for survivors, but the competent ministries denied its requests.<sup>374</sup> Freetown's Connaugh Hospital provided some medical assistance. Lastly, NaCSA secured university scholarships for ten survivors.<sup>375</sup>

### 3. Challenges and Criticism

Sierra Leone's reparation program did not manage to fulfill the expectations the SLTRC created. It offered much fewer benefits in a piece-meal fashion depending on the funds available at any given moment. Severe delay pervaded the entire program. It started only four years after the government accepted the SLTRC reparation recommendations. Most survivors waited several more years before they received their grant. Survivors of sexualized violence and war widows found themselves at the end of a long queue. They waited 14 years from the point the SLTRC promised them reparation until they finally received them. The delay coupled with almost no survivor participation and a non-transparent process sent a fatal signal of neglect to survivors.<sup>376</sup> While the government related the delay and the piece-meal implementation to a lack of funds, the short-term nature of international donations and competing demands in the country,<sup>377</sup> civil society, and survivors saw a lack of political will as the actual reason for most problems the program faced.<sup>378</sup>

Given that the government provided less than half of the program's resources, one could doubt whether it actually discharged its obligation to repair. During the first half of the program's existence, the bulk of its budget came from external sources, whereas the second half was primarily paid for by the state.<sup>379</sup>

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374 ICTJ, *Reparations in Sierra Leone* 10 f.

375 Interview with *Bangura*, 8 August 2018; NaCSA, *Annual Report 2014*, 2014, 22.

376 Interview with *John Caulker* (President of Fambul Tok), Freetown, 19 July 2018; Berghs, *Local and Global Phantoms - Reparations National Memory and Sacrifice in Sierra Leone*, in: Devlieger et al. (eds.), *Rethinking Disability - World Perspectives in Culture and Society*, 2016, 275, 284 f.

377 NaCSA, *Annual Report 2014*, 23; IOM, *What Hope of Reparations for Sierra Leone's War Victims?*, 2009; Interview with *Bangura*, 8 August 2018.

378 Interview with *John Caulker*, 19 July 2018; Interview with *Tommy Ibrahim* (Director of the Center for Accountability and the Rule of Law), Freetown, 27 July 2018.

379 ICTJ, *Reparations in Sierra Leone* 13; Interview with *Bangura*, 8 August 2018; Interview with *John Caulker*, 19 July 2018; Interview with *Tommy Ibrahim* 27 July 2018.

Specific critique pertains to the registration and disbursement phase. It is safe to say that a large number of survivors were unable to register for the program. Many did not receive information about its existence owed to the short-lived and limited sensitization and awareness campaign. Other survivors lived far away from registration centers, travel and accommodation costs deterred them.<sup>380</sup> Accordingly, the regional distribution of registered survivors does not concur with the distribution of wartime violations.<sup>381</sup> Especially, but not solely, survivors of sexualized violence often refrained from registering out of shame or fear of stigma.<sup>382</sup> NaCSA tried to counter these problems by employing more female staff and cooperating with experienced non-governmental organizations (NGOs) to reach survivors via persons they trusted.<sup>383</sup> Despite these efforts, comparing estimates with the number of registered survivors of sexualized violence speaks volumes: Physicians for Human Rights (PHR) estimated in 2002 that 50.000 to 64.000 internally displaced women alone were survivors of sexualized violence – almost twice the number of *all* registered survivors.<sup>384</sup>

Much criticism pertained to the content of the reparation program. Many survivors felt that the reparation they received was inadequate. The rehabilitation grants were deemed too low to have a transformative effect. Often, survivors used them to cater to primary needs. The lack of a safety net for survivors amplified this effect.<sup>385</sup> As a result, many survivors emphasized the importance of service-based reparation in addition to rehabilitation grants. They wished for pensions, free healthcare, including psychosocial care and education to count on a safety net for them and their children.<sup>386</sup> On the

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380 Ottendörfer, *Translating Victims' "Right to Reparations" Into Practice*, 922 f.

381 ICTJ, *Reparations in Sierra Leone* 4 f.

382 Berghs/Conteh, 'Mi At Don Poil' - A Report on Reparations in Sierra Leone for Amputee and War-Wounded People, 2014, 7, 24; Ottendörfer, *The Fortunate Ones and the Ones Still Waiting*, 20, 22; ICTJ, *Reparations in Sierra Leone* 4 f.

383 Interview with Bangura, 8 August 2018.

384 PHR, *War-Related Sexual Violence in Sierra Leone - A Population-Based Assessment*, 2002, 3 f.

385 Berghs/Conteh, 'Mi At Don Poil', 7, 15 f.; Ottendörfer, *The Fortunate Ones and the Ones Still Waiting*, 27.

386 Interview with Edward Conteh (Survivor, President of AWWA), Freetown, 17 July 2018; Interview with Tommy Ibrahim 27 July 2018; Interview with Lahai Sia-Bintu (Survivor), 26 July 2018, Freetown, 26 July 2018; Interview with Osman Kamara (Survivor), Grafton, 26 July 2018; Interview with Eiah M'Bayoh (Survivor), Grafton, 26 July 2018. The lack of psychosocial services also concerned the HRCOM, *Concluding Observations on the Initial Report of Sierra Leone*, CCPR/C/SLE/CO/1, 2014, para 8.

other hand, the government claimed that many survivors demanded a lump-sum payment instead of pensions and that the competent National Social Security and Assurance Trust (NASSIT) lacked the expertise and funding to implement pensions.<sup>387</sup> When compensation was paid, it sometimes created social tensions. First, survivors envied ex-combatants. Sierra Leone was quick to set up a DDR-program so that ex-combatants received more extensive and swifter benefits than survivors did.<sup>388</sup> Second, tensions arose within communities because some survivors did not enter the program. Third, tensions arose between registered survivors because of the stark and arbitrary differences in their waiting periods. Also, NaCSA often failed to explain why some groups received more than others. Lastly, compensation sometimes led to tensions within families. Some survivors' relatives relinquished support once they learned about the payment and demanded a share.<sup>389</sup> Some husbands demanded control over their wives' grants in line with traditional views of gender and marital roles.<sup>390</sup>

Survivors judged the housing project as necessary but criticized the location of the houses. There was no fertile farming land nearby, and their distance to urban centers deprived survivors of access to health care facilities.<sup>391</sup>

Symbolic reparation was deemed to be of little effect.<sup>392</sup> While survivors welcomed the effort, they emphasized that symbolic reparation is of little use if they still suffer materially.<sup>393</sup> Many survivors did not understand why commemoration ceremonies were held. The local population at times did not understand what the memorials were supposed to commemorate. Where

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387 Interview with *Bangura*, 8 August 2018.

388 Schabas, *Reparation Practices in Sierra Leone*, 302. On the DDR-program in general, Bradley et al., *Sierra Leone - Disarmament, Demobilization and Reintegration (DDR)*, 2002 World Bank Africa Region Findings & Good Practice Infobriefs No. 81; ICTJ, *Transitional Justice and DDR - The Case of Sierra Leone*, 2009. On the gendered impact of the early focus on the DDR-program and the program's shortcomings in that regard see Williams/Opdam, *Unrealised Potential*, 1292 f.

389 Berghs/Conteh, *'Mi At Don Poil'*, 6, 10, 20 ff., 27; Berghs, *Local and Global Phantoms*, 285; Ottendorfer, *The Fortunate Ones and the Ones Still Waiting*, 25 f.

390 Berghs, *War and Embodied Memory*, 123; Interview with *Sanusi Savage* (Head of IOM Freetown Mission), Freetown, 11 July 2018.

391 Berghs/Conteh, *'Mi At Don Poil'*, 16, 19; Asiedu/Berghs, *Limitations of Individualistic Peacebuilding in Postwar Sierra Leone*, 2012 Afr. Conflict Peacebuilding Rev. 2(1), 136, 146; Berghs, *War and Embodied Memory*, 112 ff.

392 Interview with *Edward Conteh*, 17 July 2018.

393 Asiedu/Berghs, *Limitations of Individualistic Peacebuilding in Postwar Sierra Leone*, 148; Interview with *Edward Conteh*, 17 July 2018; Interview with *Tommy Ibrahim* 27 July 2018.

that was clear, survivors signaled incomprehension as to why memorials were built in city centers and not at the sites of massacres.<sup>394</sup> Survivors bemoaned the lack of a comprehensive governmental apology.<sup>395</sup>

As a result of these inadequacies and problems, survivors interviewed for this study often felt forgotten, abandoned, or neglected by the government.<sup>396</sup> The large discrepancy between the SLTRC recommendations and the actual reparation program led them to accuse the government of breaking its promises.<sup>397</sup> They explained the inadequacy of reparation by a perceived wish of the government and society to forget the war and its survivors.<sup>398</sup> A study on survivors' perception of the reparation program corroborates these findings and reaches the damning conclusion that reparation had a "minimally positive effect on the living conditions of very few war victims [...], it did not have any positive effect on the beneficiaries' perceptions of the state or their position as citizens [...]." <sup>399</sup> The state failed to communicate that reparation was a right, and instead, a narrative of being fortunate to receive reparation came into being.<sup>400</sup> According to the largest survivor organization, the Amputees and War-Wounded Association (AWWA), the message that survivors did not deserve reparation as of right trickled down to society and led to discrimination.<sup>401</sup>

### C. Colombia

In stark contrast to Sierra Leone's modest reparation program, Colombia created one of, if not the most comprehensive and complex transitional justice reparation program in the world. It provides a wide range of measures to more than 9 million survivors of Colombia's internal conflict. The following section will detail those measures (IV.) and the transitional justice process surrounding them (III.) after recounting the history of the Colombian conflict (I.) and the human rights violations and harms accompanying it (II.).

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394 Ottendörfer, *The Fortunate Ones and the Ones Still Waiting*, 23 f.

395 IRIN News, *Lack of Aid Funds for Amputees, Rape Survivors, War Widows*, 2009.

396 Interview with *Edward Conteh*, 17 July 2018; Interview with *Lahai Sia-Bintu*, 26 July 2018.

397 Interview with *Edward Conteh*, 17 July 2018.

398 Interview with *Edward Conteh*, 17 July 2018; Interview with *Tommy Ibrahim* 27 July 2018.

399 Ottendörfer, *The Fortunate Ones and the Ones Still Waiting*, 28.

400 Ottendörfer, *The Fortunate Ones and the Ones Still Waiting*, 23.

401 Berghs/Conteh, *'Mi At Don Poil'*, 23.

## I. The History of the Colombian Conflict

The Colombian conflict was the longest-running conflict in the western hemisphere.<sup>402</sup> It dates back to the 1960s. Colombia had come out of a ten-year civil war between its liberal and conservative party in 1958. To end the violence, both parties formed a national front, in which they divided up key governmental positions and agreed that the presidency would alternate between them for 16 years.<sup>403</sup> While successful at ending violence on a national level, the national front did not manage to overcome the structural inequalities, which pervaded Colombia. Communist political forces felt excluded from legal avenues to voice their ideas.<sup>404</sup> Frustration about the political situation rose. When the military attacked self-proclaimed independent republics in the country's south, it was the straw that broke the camel's back. In the mid-1960s, Manuel Maranda and others founded the orthodox communist Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo (FARC-EP)<sup>405</sup> out of pre-existing peasant self-defense forces. Around the same time, the Ejército de Liberación Nacional (ELN)<sup>406</sup> emerged out of student protests in Bogotá, looking to Castro's Cuba for inspiration. Lastly, the Ejército Popular de Liberación (EPL)<sup>407</sup> started fighting for a Maoist revolution. Some years later, the urban communist guerilla Movimiento de 19 de Abril (M-19)<sup>408</sup> was founded in reaction to alleged electoral fraud, which supposedly prevented their left-leaning candidate from assuming the presidency.<sup>409</sup> Despite these manifold actors, the conflict was of low intensity

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402 ICTJ, *An Overview of Conflict in Colombia*, 2009, 1.

403 Hristov, *Paramilitarism and Neoliberalism - Violent Systems of Capital Accumulation in Colombia and Beyond*, 2014, 76 ff.

404 CNMH, *¡Basta Ya! Colombia - Memorias de Guerra y Dignidad*, 2014, 117; CHCV, *Contribución al Entendimiento del Conflicto Armado en Colombia*, 2015, 26 ff., 34 ff.

405 Armed Revolutionary Forces of Colombia – People's Army. The guerilla added “-EP” to its name only in 1982, when it officially turned into an offensive guerilla, Olaya, *Férrea Pero Consciente - Disciplina y Lazo Identitario en las Organizaciones Clandestinas de las Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (FARC-EP)*, 2020 Izquierdas 49, 540, 546 f. The full name is used throughout the text to prevent confusion.

406 National Liberation Army.

407 Popular Liberation Army.

408 Movement of the 19th of April.

409 Metelits, *Inside insurgency - Violence, Civilians, and Revolutionary Group Behavior*, 2010, 90; CNMH, *¡Basta Ya!*, 117; Buitrago, *Armed Actors in the Colombian Conflict*, in: Koonings/Kruijt (eds.), *Armed Actors - Organised Violence and State Failure in Latin America*, 2004, 87, 88.

and did not reach a national scale in its first decades.<sup>410</sup> This changed towards the end of the 1970s when the economy slowed down, social inequalities deepened, and drug trafficking became rampant in the country.<sup>411</sup> In the 1980s, guerilla groups increasingly kidnapped members of Colombia's elite to finance their operations. In response, drug lords, together with economic and political elites, founded Muerte a Secuestradores (MAS)<sup>412</sup> to defend themselves against kidnappings by guerillas. While the group itself was short-lived, MAS served as a model for future right-wing paramilitary groups, which became a central factor in the conflict's further trajectory.<sup>413</sup> With the conflict gaining pace, then-president Betancur searched for a political solution from 1982 onwards. The government and the FARC-EP agreed to transform the guerilla into a political party, the Unión Patriótica (UP)<sup>414</sup>. Colombia's military, political and economic elites soon began to torpedo the process. Scared by the UP's first electoral successes, they started an assassination campaign against party members. It cost the lives of around 4.000 persons, among them two presidential candidates, several senators, members of Congress, and mayors, and eventually led to the party's factual disappearance. The FARC-EP also undermined the peace process by declaring itself an offensive guerilla in 1982 and increasing its military capacity and operations.<sup>415</sup> In parallel, the number of paramilitary groups increased. The indigenous guerilla Movimiento Armado Quintín Lame started fighting for indigenous interests and defended indigenous communities.<sup>416</sup> In this already difficult climate, M-19 launched an attack on Colombia's highest court in 1985, taking several judges and staff hostage. The recapture by the military led to a bloodbath and struck the final blow to the already fragile peace talks.<sup>417</sup> In contrast, the 1990s started hopefully. Peace talks with M-19 and the EPL led to their disarmament and demobilization. A new constitution fundamentally altered the Colombian state and strengthened its democratic structures. Finally, in the first half

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410 CHCV, *Contribución al Entendimiento del Conflicto Armado* 31 f.

411 CNMH, ¡*Basta Ya!*, 130 ff.

412 Death to Kidnappers.

413 CNMH, ¡*Basta Ya!*, 134 f.; CHCV, *Contribución al Entendimiento del Conflicto Armado* 49.

414 Patriotic Union.

415 Metelits, *Inside Insurgency*, 98 f.; CNMH, ¡*Basta Ya!*, 135 f.

416 Suárez Flórez/Wilches Sierra, *El Movimiento Armado Quintín Lame y su Proceso de Paz - Una Lección de Dignidad y Resistencia*, 2016, 28 ff.

417 IACtHR, *Rodríguez Vera et al. (The Disappeared From the Palace of Justice) v. Colombia*, 2014, para 89 ff.



of the decade, Colombia managed to dismantle the largest drug cartels operating in the country. Ironically, successes in fighting organized crime strengthened the guerillas and paramilitaries and exacerbated the conflict. Armed groups filled the void cartels left, turning Colombia into the largest coca producer, the raw ingredient of cocaine, from 1997 onwards. Among other factors, a new law legalizing certain paramilitary groups led to a sharp increase in such groups in 1994. Many paramilitary groups organized and fused their operations in 1997 in Autodefensas Unidas de Colombia (AUC)<sup>418</sup>. These dramatic developments turned the conflict from aggregated localized violence to a national struggle.<sup>419</sup> Under these circumstances, a new attempt at peace negotiations in 1999 was fraught from the start. While negotiating, the government ramped up its military capacities with the help of the United States. The FARC-EP continued military operations. When it kidnapped the Senate peace commission president in 2002, it was thus rather the trigger than a reason for the government to end the process.<sup>420</sup> The failed peace process coupled with a slowing economy led to the rise of Alvaro Uribe. He took the presidency with huge popular support in 2002 when the conflict had reached its peak geographical extension.<sup>421</sup> He campaigned on the promise to defeat the guerillas militarily and denied the existence of a conflict by reducing them to “narcoterrorists”. Undeniably, he delivered on his promises. Under Uribe’s “Democratic Security” doctrine, military action escalated and struck decisive blows against the guerillas. By 2008 the FARC-EP found itself in a profound crisis. A significant portion of its leadership was dead, and its military capacity was lower than it had been in decades. At the same time, Uribe’s government started a disarmament and demobilization process with paramilitaries in 2005. As a result, the conflict’s geographical reach was heavily diminished.<sup>422</sup> However, Uribe’s successes came at a high cost. The military progress was bought with severe violations of human rights and

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418 United Colombian Self-Defence Groups.

419 CNMH, *¡Basta Ya!*, 146 ff., 158 ff.; Buitrago, *Armed Actors in the Colombian Conflict*, 94 ff.

420 Buitrago, *Armed Actors in the Colombian Conflict*, 100 f.; Echavarría, *In/security in Colombia - Writing Political Identities in the Democratic Security Policy*, 2010, 87 ff.

421 CNMH, *¡Basta Ya!*, 176.

422 Echavarría, *In/security in Colombia*, 33, 85 f., 197 ff.; Pachon, *Colombia 2008 - Éxitos, Peligros y Desaciertos de la Política de Seguridad Democrática de la Administración Uribe*, 2009 Rev. Cienc. Polít. (Santiago) 29(2), 327, 329 ff.

international humanitarian law.<sup>423</sup> The disarmament of the paramilitaries was at best partially successful. Many groups rearmed and only became more volatile and detached from the state.<sup>424</sup> Still, Uribe's popularity remained high until the end of his second term, when his former defense minister, Juan Manuel Santos, won the presidency. To the surprise of many – and contrary to his previous positions – Santos did not continue Uribe's hardline politics. From 2012 he engaged in peace negotiations with the FARC-EP, culminating in the 2016 Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (Final Agreement). The process hung by a thread when a slim majority defeated the agreement in a referendum, also owed to Uribe's vocal campaign against it. Since a popular vote was not necessary under the Colombian Constitution, Santos renegotiated the agreement, refrained from scheduling a second referendum, and merely sought approval by the legislature. The revised agreement entered into force in November 2016 after it passed the Senate and the House of Representatives.<sup>425</sup> The FARC-EP disarmed and demobilized as planned and newly established transitional justice mechanisms slowly took up their work in 2017 and 2018.<sup>426</sup> A change of government in 2018 put a protégé of Uribe in office, Ivan Duque. The first moves of the new government raised serious concern about its agenda for the transitional justice process.<sup>427</sup> They led some former FARC-EP fighters to take up arms again – a move widely condemned, including by most former

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423 WOLA, *Colombia - Don't Call it a Model*, 2010; Eleanor, *Crimes of the Powerful in Conflict-Affected Environments - False Positives, Transitional Justice and the Prospects for Peace in Colombia*, 2017 *State Crime J.* 6(1), 132, 137; Aranguren Romero et al., *Inhabiting Mourning - Spectral Figures in Cases of Extrajudicial Executions (False Positives) in Colombia*, 2021 *Bull. Lat. Am. Res.* 40(1), 6, 6 f.; HRC, *Statement by Professor Philip Alston, UN Special Rapporteur on Extrajudicial Executions - Mission to Colombia 8-18 June 2009*, 2009. See also below on false positives, C.II.

424 CNMH, *¡Basta Ya!*, 179.

425 Alto Comisionado Para La Paz/Presidencia De La Republica, *Biblioteca Del Proceso de Paz con las FARC-EP - Tomo VIII*, 2018, 30 ff.

426 The implementation of the peace process is monitored and documented by the International Verification Commission ([www.cinep.org.co](http://www.cinep.org.co)) and in the KROC institute ([www.kroc.nd.edu](http://www.kroc.nd.edu)).

427 Ambos, *Transitional Justice Without Truth?*, EJIL:Talk!, 27 August 2018; Ambos, *Another Challenge for Colombia's Transitional Justice Process - Aggravated Differential Treatment between Armed Forces and FARC*, EJIL:Talk!, 19 October 2018; Langmack, *Reforming Land Restitution – A Concerted Effort to Derail Colombia's Transitional Justice System?*, EJIL:Talk!, 2 November 2018.

FARC-EP leadership.<sup>428</sup> Since the agreement's ratification, many human rights defenders and community leaders were killed by armed groups and organized crime, further putting the peace process in jeopardy.<sup>429</sup>

## II. Human Rights Violations and Harms in the Conflict

All actors in the conflict committed severe violations of human rights and international humanitarian law. Of course, this study cannot exhaustively describe all violations and harms suffered by the nine million registered survivors of the Colombian conflict. Just as in the previous case study, it will describe typical patterns in a necessarily under complex panorama of the violations and harms survivors endured.

Forced displacement was by far the most prevalent violation in the Colombian conflict. In 2019, the United Nations High Commissioner for Refugees (UNHCR) counted 7.5 million internally displaced, a figure only outmatched at the time by Syria.<sup>430</sup> All actors contributed to this humanitarian catastrophe. Assassinations, threats, and other violations forced survivors to leave their land. More often, though, the parties to the conflict created an atmosphere of terror through prominent attacks and threats in a calculated attempt to displace entire populations. Armed actors thereby gained control over territory and, with it, sources of income.<sup>431</sup>

As in most conflicts, death, injury, and sexualized violence were rampant. The Colombian conflict is infamous for targeted killings and massacres, which were used primarily by paramilitaries to consolidate control over

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428 UNSC, *United Nations Verification Mission in Colombia - Report of the Secretary-General*, S/2019/780, 2019, para 3 f.

429 CCJ et al., *Panorama de Violaciones al Derecho a la Vida, Libertad e Integridad de Líderes Sociales y Defensores de Derechos Humanos en 2016 y Primer Semestre de 2017*, 2017; CSMLV, *Sexto Informe de Seguimiento al Congreso de la República 2018-2019*, 2019, 51 ff.; HRC, *Annual Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia*, A/HRC/37/3/Add.3, 2018, para 8 ff.; McVeigh, *2017 was the Deadliest Year on Record for Colombian Human Rights Defenders*, *The Guardian*, 1 May 2018.

430 UNHCR, *Global Focus Colombia*, 2020, People of Concern; IDMC, *Global Report on Internal Displacement*, 2020, 11; Sánchez León / Sandoval-Villalba, *Go Big or Go Home? Lessons Learned From the Colombian Victims' Reparation Program*, in: Ferstman / Goetz (eds.), *Reparations for Victims of Genocide War Crimes and Crimes Against Humanity - Systems in Place and Systems in the Making*, 2<sup>nd</sup> Edition 2020, 547, 568.

431 Ibañez, *Forced Displacement in Colombia - Magnitude and Causes*, 2009 *Econ. Peace Sec. J.* 4(1), 48, 50 ff.; CNMH, *¡Basta Ya!*, 71 ff., 104 ff.

territory and population. Targeted killings were often aimed at community leaders and public figures. Coupled with highly visible massacres, these violations instilled fear and terror in the population.<sup>432</sup> Under the infamous “false positives”-policy, the Colombian armed forces killed civilians and masqueraded them as guerilla fighters to improve their statistics.<sup>433</sup> Guerillas were mostly responsible for death and injury by antipersonnel mines and improvised explosive devices, which they used strategically to offset military disadvantages.<sup>434</sup> All sides engaged in sexualized violence, albeit on different scales, with different aims and ways. Survivors endured rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, forced abortion, and forced labor.<sup>435</sup> Paramilitaries used rape and other forms of sexualized violence to destroy community bonds and control a population. For that, they often attacked female community leaders and perceived collaborators. They also used sexualized violence as a punishment for transgressions of the “good order” they created in communities under their control.<sup>436</sup> The FARC-EP employed a significant portion of female fighters. They had to take contraceptives and undergo forced abortions, regardless of when the pregnancy was discovered. Although on a lesser scale than the paramilitaries, the FARC-EP and the armed forces also violated civilians’ sexual and reproductive rights.<sup>437</sup>

Armed actors further committed numerous enforced disappearances and kidnappings. Enforced disappearance harrowingly shows the absolute power an armed actor exercises over a person. It thus effectively complemented the paramilitaries strategy to control communities through spreading a climate of fear and terror. The armed forces used the covert nature of this crime to evade

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432 CNMH, *¡Basta Ya!*, 43 ff., 47 ff.; CHCV, *Contribución al Entendimiento del Conflicto Armado* 75, 81.

433 HRC, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston - Mission to Colombia, A/HRC/14/24/Add.2*, 2010, para 10 ff.; IACtHR, *Villamizar-Durán y Otros v. Colombia*, 2018, para 58 ff. The SJP opened an entire so-called macro-case on the false positives, SJP, *Ruling No. 033 of 2021*, 2021. It informs the public about the case in a shining example for judicial communication in transitional justice at: <https://www.jep.gov.co/especiales1/macrocasos/03.html>.

434 CNMH, *¡Basta Ya!*, 92 ff.

435 Casa de la Mujer, *Primera Encuesta de Prevalencia - Violencia Sexual en Contra de las Mujeres en el Contexto del Conflicto Armado Colombiano 2001-2009*, 2011, 15 ff.

436 CNMH, *¡Basta Ya!*, 77 ff.; CNMH, *La Guerra Inscrita en el Cuerpo*, 2017, 48 ff., 54 ff., 94 ff.

437 Fajardo Arturo/Valoyes Valoyes, *Violencia Sexual Como Crimen Internacional Perpetrado por las FARC*, 2015, 37; Casa de la Mujer, *Violencia en el Conflicto Armado*, 15 ff.

accountability.<sup>438</sup> While the guerillas were less engaged in disappearances, they committed the clear majority of kidnappings. They used ransom as a source of income and kidnapped high-profile members of the Colombian elite for propagandistic purposes and to destabilize the state and its elites. At times, guerillas used kidnappings to increase their leverage in peace processes. Many abductees did not return alive.<sup>439</sup> Lastly, irregular armed groups, mostly the FARC-EP, frequently enlisted or forcibly recruited children.<sup>440</sup>

These violations caused multitudes of harm, which again can only be described in an under complex panorama. To repeat, survivors experience harm differently. They do not only passively endure it but develop resilience and find astonishing, creative ways to deal with it. Nonetheless, violations caused typical complex, intertwined harms on an individual, family, and community level.

Individuals suffered severe physical and psychological injuries, often with long-term effects. Violations ruptured their existing relationships and hurt their capacity to engage in new ones. Many survivors carry a stigma because people believe that perpetrators “had their reason” to victimize them.<sup>441</sup> Violations often altered family roles, for example, when a family needed to replace a dead, incapacitated, or disappeared breadwinner. Such changes and other sources of internal conflict often tore families apart.<sup>442</sup> Communities lost spaces, central figures, and, with them, knowledge, rituals, and traditions. Armed groups and the general violent environment inhibited the performance of rituals and traditions and sowed distrust among community members. Many communities disintegrated or were torn apart by displacement.<sup>443</sup> Harms on all three levels often reinforced each other by destroying support structures and ways to cope with what happened.<sup>444</sup>

About harm specific to typical violations, displacement fundamentally ruptured the life of persons, families, and communities and threw them into deep insecurity. It destroyed families and communities by physically tearing them

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438 CNMH, *¡Basta Ya!*, 57 ff.

439 CNMH, *¡Basta Ya!*, 64 ff.; CHCV, *Contribución al Entendimiento del Conflicto Armado* 78.

440 CNMH, *¡Basta Ya!*, 84 ff.

441 AVRE, *Aspectos Psicosociales de la Reparación Integral*, 2006, 7, 10 ff., 15, 35 f.; CNMH, *¡Basta Ya!*, 261 ff.

442 AVRE, *Aspectos Psicosociales*, 7, 12; PPP, *La Viga en el Ojo*, 2003, 29.

443 AVRE, *Aspectos Psicosociales*, 7, 21 f.; PPP, *La Viga en el Ojo*, 28 f., 49 f., 79 ff.; CNMH, *¡Basta Ya!*, 266, 272 ff., 289 f.

444 AVRE, *Aspectos Psicosociales*, 23.

apart.<sup>445</sup> In addition to the psychological effects of that insecurity and the loss of most social relations, displacement also had severe economic effects. Individuals often lacked the labor skills required in their new environment, especially if they fled from rural to urban settings. They had to abandon their belongings and means of subsistence. Survivors' new community often discriminated against them, stigmatized, and ostracized them.<sup>446</sup>

Enforced disappearance had brutal effects on the family and community of the disappeared. It left them in excruciating insecurity about the whereabouts and possible suffering of a loved one, with no possibility of closure. The experiences of relatives and other persons close to the survivor often amounted to psychological torture.<sup>447</sup> If the disappeared was a breadwinner or if they spent considerable sums on searching for them, families experienced economic pressure.<sup>448</sup> The general climate of terror and fear caused by enforced disappearance often deteriorated community relations. Additionally, armed groups often disappeared leaders or other persons with essential roles in the community.<sup>449</sup> Kidnapping similarly exposed those left behind to a fundamental uncertainty about a loved one's fate, significantly altered family relations, and could cause significant conflict within families and communities. Ransom could ruin survivors' families just as the absence of a breadwinner could. The experience of being at the complete mercy of the perpetrators, a constant fear of death, and a total loss of privacy often left the abducted scarred for life.<sup>450</sup>

Survivors of anti-personal mines report that beyond severe physical injuries, their reintegration into society is hampered by impediments to their ability to work, especially in rural settings, where much of the work is

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445 CNMH, *Una Nación Desplazada - Informe Nacional del Desplazamiento Forzado en Colombia*, 2015, 443 ff.

446 CHCV, *Contribución al Entendimiento del Conflicto Armado*, 76; CNMH, *¡Basta Ya!*, 268; Weber, *Trapped Between Promise and Reality in Colombia's Victims' Law - Reflections on Reparations, Development and Social Justice*, 2020 *Bulletin Latin Am. Research* 39(1), 5, 8 ff.

447 CNMH, *Entre la Incertidumbre y el Dolor - Impactos Psicosociales de la Desaparición Forzada*, 2014, 55 ff.

448 CNMH, *¡Basta Ya!*, 293.

449 CNMH, *Entre la Incertidumbre y el Dolor*, 73 f.

450 CNMH, *¡Basta Ya!*, 299 ff.; PPP, *La Viga en el Ojo*, 31 f.; CHCV, *Contribución al Entendimiento del Conflicto Armado* 78.

physical.<sup>451</sup> Survivors of sexualized violence faced manifold consequences. Aside from the psychological and physical effects detailed in the Sierra Leone case study, survivors also suffered from stigma, discrimination, and ostracism by their partner, family, and community.<sup>452</sup> Forced and unwanted pregnancies exacerbated their social, psychological, and economic marginalization.<sup>453</sup> Lastly, child soldiers experienced a traumatic conflict that fundamentally altered their lives' trajectory. Most lost all ties to their family and community, educational opportunities, and, in sum, a normal childhood.<sup>454</sup>

### III. Colombia's Transitional Justice Effort

In response to 50 years of conflict and the multiple human rights violations and harms that came with it, the 2016 Final Agreement between the FARC-EP and the Colombian government foresaw a comprehensive transitional justice effort, the Sistema Integral de Justicia, Verdad, Reparación y No-Repetición (SIJVRNR)<sup>455</sup>. It comprises three main institutions: the Special Jurisdiction for Peace for the prosecution and punishment of the most responsible perpetrators, a truth commission, and the Search Unit for Disappeared Persons.<sup>456</sup> Reparation measures constitute the fourth element of the system. It predates the Final Agreement, which only modified it. The components of

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451 Sanchez/Rudling, *Reparations in Colombia - Where to? Mapping the Colombian Landscape of Reparations for Victims of the Internal Armed Conflict*, 2019, 19. See generally, Case-Maslen/Vestner, *A Guide to International Disarmament Law*, 2019, 156 f.

452 CINEP/PPP, *Reparación Psicosocial*, 2011; CNMH, *La Guerra Inscrita en el Cuerpo*, 338 ff., 362 ff., 376 ff. See above, B.II.

453 CNMH, *La Guerra Inscrita en el Cuerpo*, 349 ff.

454 Villanueva O'Driscoll et al., *Children Disengaged From Armed Groups in Colombia - Integration Processes in Context*, 2013, 110 ff. See above, B.II.

455 Integral System of Justice, Truth, Reparation and Non-Repeticion.

456 An introduction to the Special Jurisdiction for Peace can be found here, Ambos/Aboueldahab, *The Colombian Peace Process and the Special Jurisdiction for Peace*, 2018 *Diritto Penale Contemporaneo* 4, 255. Information on the Truth Commission and the Search unit can be found on their homepages: <https://comisiondelaverdad.co>; <https://www.ubpdbusquedadesaparecidos.co>. The Truth Commission published its final report in 2022, see Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición, *Hay Futuro si hay Verdad*, 2022.

the SIJVRNR are interconnected and slowly took up their work mostly in 2017 and 2018.<sup>457</sup>

#### IV. Colombia's Reparation Effort

Colombia started several early attempts at repairing the survivors of the armed conflict. Unfortunately, all efforts had fatal defects. While Law 418 of 1997 provided survivors with benefits to mitigate their harm, it was initially conceived as humanitarian assistance. Only retroactively did Colombia flag it as reparation.<sup>458</sup> The Justice and Peace Law of 2005 provided the normative framework for the demobilization of the paramilitaries. It emphasized prosecution and only enabled individual reparation proceedings against convicted perpetrators or their armed group. Conditioning reparation upon individual convictions made the reparation provisions de-facto inoperative: After five years, only two survivors had benefitted from the regime.<sup>459</sup> In reaction to this failure, Decree 1290 of 2008 created an administrative reparation program. However, it only repaired violations committed by illegal armed groups and denied state responsibility. Accordingly, the government based it on the principle of solidarity rather than responsibility.<sup>460</sup>

Colombia's current administrative reparation program is based on the 2011 Law on Victims and Land Restitution (Victims Law).<sup>461</sup> The 2016 Final Agreement modified details of the law. Most importantly, the Colombian government recognized Colombia's responsibility for the violations as a basis for reparation. Just as Decree 1290 of 2008, the original Victims Law had evaded this question.<sup>462</sup>

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457 A comprehensive and updated assessment can be found in the Trimestral Reports of the International Verification Commission ([www.cinep.org.co](http://www.cinep.org.co)) and in the reports by the KROC institute ([www.kroc.nd.edu](http://www.kroc.nd.edu)).

458 ICTJ, *From Principles to Practice - Challenges of Implementing Reparations for Massive Violations in Colombia*, 2015, 13.

459 Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 213 f.

460 Art. 2 f. Decreto 1290 de 2008 por el Cual se Crea el Programa de Reparación Individual por vía Administrativa Para las Víctimas de los Grupos Armados Organizados al Margen de la Ley.

461 Ley de Víctimas y Restitución de Tierras, oficialmente Ley 1448 de 2011 Por la Cual se Dictan Medidas de Atención, Asistencia y Reparación Integral a las Víctimas del Conflicto Armado Interno y se Dictan Otras Disposiciones, in the following "Victims Law" or "Ley 1448 de 2011".

462 Final Agreement, Introduction to Chapter 5, 5.1; ICTJ, *From Principles to Practice*, 25.



Colombia's reparation program provides individual and collective restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. At the moment of writing, it caters to more than nine million individual survivors and 754 collectives.<sup>463</sup> The numbers continue to grow, albeit at a much slower pace than in the first years of the program's existence. Throughout the reparation process, the program ensures a differential treatment of Colombia's minorities, ethnicities, and women.<sup>464</sup> It further emphasizes survivor participation.<sup>465</sup> The massive universe of survivors and the variety of reparation measures make the Colombian program probably the most comprehensive and complex administrative reparation program globally.<sup>466</sup>

### 1. Eligibility

Art. 3 of the Victims Law defines an individual survivor as any person who suffered harm because of a violation of international humanitarian law or because of a grave and manifest breach of their human rights. The violation must have happened after 1 January 1985 and must be related to the armed

463 The exact number of individual survivors can be seen here, <https://www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394> (data from 15 October 2022). The number of collectives can be seen at Unidad de Víctimas, *Boletín Fichas Estadísticas Nacional*, 2022 (data from 15 October 2022).

464 Measures ensuring differential treatment pervade every stage of the program and are present in most reparation measures. For reasons of space and clarity and because the normative framework in ch. 4 does not focus on differential treatment, they are for the most part left out in the present account. For an overview see de la Hoz del Villar et al., *El Enfoque de Género Dentro del Sistema Integral de Verdad, Justicia, Reparación y No Repetición*, 2019 *Justicia* 24(36), 1, 9 ff., 12 f.; Ministerio del Interior de Colombia, *El Enfoque Diferencial y Étnico en la Política Pública de Víctimas del Conflicto Armado*, 2015; Unidad de Víctimas, *ABC del Modelo de Operación con Enfoque Diferencial y de Género*, 2017; Unidad de Víctimas, *Guía Operativa Para la Implementación de Acciones de Enfoque Diferencial y de Género en los Procesos de Asistencia y Reparación a las Víctimas*, 2017.

465 Survivor participation is regulated in Art. 261 ff. Decreto 4800 de 2011 por el Cual se Reglamenta la Ley 1448 de 2011 y se Dictan Otras Disposiciones. Examples of participation are listed in Procuraduría General, *Primer Informe al Congreso Sobre el Estado de Avance de la Implementación del Acuerdo de Paz 2016 – 2019*, 2019, 267. A comprehensive analysis of survivors participation is provided by de Waardt/Weber, *Beyond Victims' Mere Presence - An Empirical Analysis of Victim Participation in Transitional Justice in Colombia*, 2019 *J. Hum. Rts. Prac.* 11(1), 209.

466 Sikkink et al., *Evaluation of Integral Reparations Measures in Colombia - Executive Summary*, 2015, 3; Sánchez León / Sandoval-Villalba, *Go Big or Go Home?*, 565

conflict. Survivors of violations committed before 1985 have access to symbolic reparation, truth, and guarantees of non-repetition.<sup>467</sup> Relatives and companions of dead or disappeared survivors and persons, which suffered harm while trying to assist the survivor or prevent victimization qualify as indirect individual survivors. The Colombian Constitutional Court understands the required nexus between the violation and the armed conflict broadly. It covers acts of criminal groups, which surged because of the conflict.<sup>468</sup> The Victims Law excluded adult combatants of illegal armed groups from survivor status while explicitly including members of the armed forces. In the Final Agreement, the parties agreed to abolish this distinction. Victimized members of the FARC-EP and the Public Forces were to be repaired through different programs. To date, the provision was not implemented.<sup>469</sup> In a landmark case, Colombia's Constitutional Court held the exclusion of an ex-combatant and survivor of sexualized violence from the Victims Law to be unconstitutional. While it emphasized that this holding was valid for the concrete case only, it could have wider repercussions on ex-combatants' eligibility.<sup>470</sup> A point of contention between the government and civil society was how else the Final Agreement modified the individual survivor definition. Some organizations contended that the agreement established a "principle of

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467 Art. 69(3) Ley 1448 de 2011.

468 Corte Constitucional de Colombia, *Sentencia C-280 de 2013*, C-280/13, 2013; Corte Constitucional de Colombia, *Auto 119 de 2013*, 2013; ICTJ, *From Principles to Practice*, 3.

469 Members of the FARC-EP receive reparation from the DDR-program, members of the Armed Forces from the Ministry of the Interior, Final Agreement, 5.1.3.7. To date, the provision has not been implemented, Secretaría Técnica et al., *Segundo Informe de Verificación de la Implementación del Acuerdo Final de Paz en Colombia Para los Verificadores Internacionales Felipe González y José Mujica*, 2018, 159; Secretaría Técnica et al., *Tercer Informe de Verificación del Primer Año de Implementación del Acuerdo Final de Paz en Colombia Para los Verificadores Internacionales Felipe González y José Mujica*, 2018, 190; Rivera, *Opinión - ¿Pueden los/las ex FARC ser Considerados Víctimas?*, 2020 ICON-S Colombia. For a critique of this distinction see Aguirre-Aguirre, *Victimario - La Víctima Desconocida del Conflicto Armado Colombiano: Análisis de su Reparación en Torno al Principio de Igualdad*, 2019 Revista Derecho del Estado 43, 291.

470 Corte Constitucional de Colombia, *Sentencia SU-599 de 2019*, SU-599/19, 2019; Rivera, *¿Pueden los/las ex FARC ser Considerados Víctimas?*; de Vos, *Colombia's Constitutional Court Issues Landmark Decision Recognising Victims of Reproductive Violence in Conflict*, IntLawGrrls, 11 January 2020.

universality” at odds with the cut-off date of 1985 and other limiting provisions. The government denied the necessity of any further changes.<sup>471</sup>

Collective reparation is open to communities, organizations, and other groups, which suffered collective harm. A collective must demonstrate shared practices, organizational structures, relations between its members, a collective project, and some form of self-recognition or recognition by third parties. These attributes must have existed before the violation occurred. The collective suffered collective harm if a violation of its collective rights or individual rights of its members affected these collective attributes. Violations of individual member’s rights must be of relevance to the collective, either because of their scale or because they affected important community figures.<sup>472</sup>

## 2. Registration

To start their reparation processes, all individual and collective survivors must request to be registered in the Registro Único de Víctimas (RUV)<sup>473</sup>. They must do so within two years after the violation.<sup>474</sup> Survivors can present their claim in Centros Regionales de Atención y Reparación a Víctimas (CRAV)<sup>475</sup> or at offices of other state entities. The CRAV are supposed to be attended by all government agencies relevant to the reparation program. They shall thereby ensure that survivors can access centralized, uniform information. In practice, only some departments have CRAVs. Not all relevant government entities are present in them, and they suffer from deteriorating infrastructure.<sup>476</sup> The registration starts with an interview conducted by a

471 Secretaría Técnica et al., *Primer Informe de Verificación del Primer Año de Implementación del Acuerdo Final de Paz en Colombia Para los Verificadores Internacionales Felipe González y José Mujica*, 2018, 163; CODHES/USAid, *13 Propuestas Para la Adecuación Participativa de la Normativa Sobre Víctimas al Acuerdo Final de Paz Entre las FARC-EP y el Gobierno de Colombia - Aportes Para la Implementación del Subpunto 5.1.3.7*, 2017, 13 ff., 17 f., 20.

472 Art. 152 Ley 1448 de 2011; Art. 2.2.7.8.2 Decreto 1084 de 2015 por Medio del Cual se Expide el Decreto Único Reglamentario del Sector de Inclusión Social y Reconciliación; Unidad de Víctimas, *Modelo de Reparación Colectiva*, 2018, 25 ff., 50 ff., 54 ff.

473 Unified Victims Register.

474 Meza/Escalante, *Transformative Procedural Law in the Reparation of the new Victims of the Armed Conflict in Colombia - Challenges for the State Liability Proceedings*, 2019 Rev. Chilena Derecho 46(1), 129, 132.

475 Regional Centers for the Care and Reparation of Victims.

476 CSMLV, *Sexto Informe*, 65, 72 ff.; CSMLV, *Quinto Informe de Seguimiento al Congreso de la República 2017-2018*, 2018, 59 ff.

state official. The interview covers a range of questions on the violation, the personal data, and the socio-economic situation of the survivor and their family.<sup>477</sup> The survivor must substantiate their claim. To facilitate this task, their good faith is presumed, and only summarical evidence is required.<sup>478</sup> While this does not imply a lower standard of proof, it prohibits the Victims Unit<sup>479</sup> – the central state entity running the reparation program – from challenging the evidence provided.<sup>480</sup> The Victims Unit can ask a variety of state entities for information to corroborate the survivor's claim.<sup>481</sup> It has 60 days to decide on the survivor's request to be registered. Survivors can appeal an adverse decision at the Victims Unit.<sup>482</sup> Once the survivor entered the register, they start the individual (3.) or collective reparation route (4.).

### 3. The Individual Route

The individual reparation route begins with an interview between the survivor and an official from the Victims Unit. The official presents the program and what it offers and assesses the survivor's socio-economic situation and the harm they suffered. On that basis, the official and the survivor devise an individual reparation plan, which defines adequate measures of restitution (a.), compensation (b.), rehabilitation (c.), satisfaction (d.), and guarantees of non-repetition (e.). After the interview, the official stays on the case and serves as a survivor's contact person.<sup>483</sup> Because survivors of forced displacement have access to special humanitarian assistance, they only proceed to the initial interview in two cases: Either their basic needs in terms of housing, nutrition, and health are met, or they are extremely vulnerable because no household member can generate income. If they do not fulfill either requirement,

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477 Art. 31 No. 6 Decreto 4800 de 2011; ICTJ, *Estudio Sobre la Implementación del Programa de Reparación Individual en Colombia*, 2015, 19.

478 Art. 5 Ley 1448 de 2011; Unidad de Víctimas, *Manual de Criterios de Valoración V2*, 2017, 25.

479 Unidad de Víctimas.

480 Corte Constitucional de Colombia, *Sentencia C-523 de 2009*, C-523/09, 2009; Unidad de Víctimas, *Manual de Criterios de Valoración V2*, 167; DeJusticia, *La Buena Fe en la Restitución de Tierras - Sistematización de Jurisprudencia*, 2017, 19.

481 Art. 37 Decreto 4800 de 2011.

482 Art. 156 f. Ley 1448 de 2011.

483 ICTJ, *Implementación de Reparación Individual en Colombia*, 25 ff.

they qualify for special humanitarian assistance and are relegated to the relevant entities.<sup>484</sup>

#### a. Restitution

Given that 15 % of Colombia's population and 89 % of all registered survivors were displaced, the focus of restitution – if not of the whole reparation program – lies on land restitution.<sup>485</sup> According to Art. 75 of the Victims Law, every survivor of forced displacement can reclaim the land they legally owned, possessed, or occupied after 1 January 1991.<sup>486</sup> The reparation program tackles this massive task through a specialized entity, the Unidad de Restitución de Tierras (URT)<sup>487</sup>, and a three-stage administrative and judicial restitution process.

In the first, administrative stage, the survivor requests the URT to enter a plot of land into the Registro de Tierras Despojadas o Abandonadas Forzosamente (RTDAF)<sup>488</sup>. A URT official records the survivor's account of the violation, the alleged perpetrator, personal data, the survivor's relation to the land, and other information. Survivors can initiate the process collectively if the land in question is adjacent and the same violation caused the displacement.<sup>489</sup> Given the continuously difficult security situation in many parts of

484 Unidad de Víctimas, *Esta es mi Ruta*, available at: <https://www.unidadvictimas.gov.co/es/esta-es-mi-ruta/8948>.

485 UNHCR, *Global Focus Colombia*, People of Concern 2018.

486 The rigid cut-off date was set on the basis that by that year, armed groups started to use forced displacement as an important strategy. The constitutional court upheld it, also relying on valid fiscal reasons for the choice, Baade, *Post-Conflict Land Restitution - The German Experience in Relation to Colombian Law 1448 of 2011*, 2021 W. Comp. L. 54, 1, 11.

487 Land Restitution Unit.

488 Register of Evacuated or Forcibly Abandoned Land. Another database, the Registro Único de Predios y Territorios Abandonados, RUPTA, is based on an earlier law on land restitution and also covers plots of land outside of microfocalized zones (on that process see below, fn. 490), CSMLV, *Quinto Informe*, 10. RUPTA displays a slow progress, URT, *RUPTA - Registro Único de Predios y Territorios Abandonados*, 2017, 132 f.

489 Art. 8 Decreto 4829 de 2011 por el Cual se Reglamenta el Capítulo III del Título IV de la Ley 1448 de 2011 en Relación con la Restitución de Tierras; URT, *Memorias de la Restitución - Lecciones Aprendidas y Metodologías Para Restituir Tierras y Territorios en Colombia*, 2018, 74 f.; Delgado Mariño, *Segundos Ocupantes en el Marco de la Ley 1448 de 2011 - Un Debate Abierto*, in: del Pilar García Pachón (ed.), *Lecturas Sobre Derecho de Tierras - Tomo II*, 2018, 193, 205.

Colombia, the URT first verifies whether the conditions in the area of the reclaimed land allow for the process to proceed.<sup>490</sup> If that is not the case, it suspends the request until conditions in the area improve. If it is the case, the official examines within ten days whether the survivor is eligible for land restitution according to their account, whether there are reasons to prioritize the case and whether third parties currently occupy the land. Afterward, the URT has 60-90 days to decide the request.<sup>491</sup> Here again, the survivor must corroborate their claim through evidence. Evidentiary rules in the Victims Law greatly facilitate the task. Once the survivor summarily<sup>492</sup> proved their survivor status and legal relation to the land, the burden of proof is reversed. Several norms presume the nullity of contracts over land in a conflict-affected zone because of a lack of consent. Also, the URT helps to gather evidence.<sup>493</sup>

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490 Art. 1, 2 Decreto 1167 de 2018 por el Cual se Modifica el Artículo 2.15.1.1.16 del Decreto 1071 de 2015, Decreto Único Reglamentario del Sector Administrativo Agropecuario, Pesquero y de Desarrollo Rural, Relacionado con las Zonas Microfocalizadas. The URT officially designated certain zones as ready for restitution processes through a process of macro- and microfocalization, which it carried out together with other entities. First, the ministry of defence evaluated the security situation in large areas, e.g. provinces or departments – the macrofocalization. The URT then entered secure areas and evaluated municipalities or even smaller zones, looking at the density of displacement, security conditions and whether basic state services are available – the microfocalization. Only if the latter two conditions were fulfilled did the URT open the zone up for restitution processes. The density of displacement served as a criteria for the prioritization of certain zones in the process. In 2016 the whole Colombian territory was macrofocalized. At the time of writing, almost the whole territory was microfocalized, URT, *Memorias de la Restitución*, 75, 97 ff. The introduction of an end-date to present claims relating to focalized zones and a three months limit to present claims beginning with the date on which new zones become focalized was criticized by civil society, Dejusticia, *Coadyuvancia a Solicitud de Suspensión Provisional de los Efectos del Decreto 1167 de 2018, por el Cual se Modifica el Artículo 2.15.1.1.16 del Decreto 1071 de 2015*, 2018; CCJ, *Radiografía de la Restitución de Tierras en Colombia - Informe Presentado Ante la Comisión Interamericana de Derechos Humanos por Incumplimiento de Reparación a las Víctimas Despojadas de Tierras en Colombia*, 2019, 5 f. 15 f.

491 Art. 79 Ley 1448 de 2011; Art. 9 ff., 14 ff. Decreto 4829 de 2011; URT, *Memorias de la Restitución*, 78 f., 248.

492 For the concept of summary evidence see above, Fn. (480).

493 Art. 77 Ley 1448 de 2011; Art. 2(4) Decreto 4829 de 2011; del Llano Toro, *El Desequilibrio Procesal y Probatorio del “Opositor Víctima o Sujeto Vulnerable” en el Proceso de Restitución de Tierras*, 2016, 91; URT, *ABC Para Jueces en Materia de Restitución de Tierras*, 2012, 45 ff.; URT, *Memorias de la Restitución*, 209 f., 228 ff.

Once the survivor entered the RTDAF, the second, judicial, phase begins. Specialized judges decide the case in an expedited and simplified process.<sup>494</sup> The survivor can be represented by the URT or by a lawyer of their choice. In both cases, the URT covers the legal costs.<sup>495</sup> The same reversal of the burden of proof and presumptions as in the administrative proceedings favor the survivor.<sup>496</sup> The judge communicates the initiation of proceedings to possible third parties with a legal interest in the case, which have 15 days to respond. In the following 30 days, the judge takes evidence from both sides. Once convinced, the judge can decide the case without entertaining outstanding requests for evidence by either party.<sup>497</sup> A decision in favor of the survivor can order one of three main measures: Primarily, the judge is supposed to reconstitute the reclaimed land. If that is impossible due to security issues or if the land became uninhabitable, the judge can compensate the survivor with a similar land plot. In both cases, the judgment is a title to the land and overrides any contrary register entries, administrative or judicial decisions. If both options are unavailable, the survivor can receive monetary compensation.<sup>498</sup> The judge can order a range of additional measures to facilitate a safe and sustainable return. Among them are prioritized access to housing subsidies, debt restructuring or repayment, and even infrastructure projects.<sup>499</sup> Only under limited circumstances can a party appeal such a judgment.<sup>500</sup>

Once the judgment is issued, the survivor enters the third, post-judgment, phase. The specialized judge remains seized of the case and can order further measures to facilitate the return if the need arises. The URT implements the judgment. Depending on what is ordered, the URT negotiates with private

494 Art. 82 f., 94 Ley 1448 de 2011; Ramírez et al., *El Amparo de Tierras - La Acción, el Proceso y el Juez de Restitución*, 2015, 75 f.

495 URT, *Memorias de la Restitución*, 83, 275 ff., 434 f.

496 Art. 77 f. Ley 1448 de 2011.

497 Art. 87 ff. Ley 1448 de 2011; Ramírez et al., *El Amparo de Tierras*, 81.

498 Art. 97 f. Ley 1448 de 2011; Art. 38 Decreto 4829 de 2011; URT, *Memorias de la Restitución*, 84.

499 URT, *Memorias de la Restitución*, 85; Sabogal Urrego, *Los Mecanismos de la Acción de Restitución de Tierras - Garantías Para las Víctimas y la Reconciliación*, in: del Pilar García Pachón (ed.), *Lecturas Sobre Derecho de Tierras - Tomo II*, 2018, 167, 177; Ramírez et al., *El Amparo de Tierras*, 59. These again correspond to elaborate reparation schemes, which for reason of space will not be detailed here. For a review of some of them see CSMLV, *Quinto Informe*, 133 ff., 155 ff. The resulting judgments are quite complex. They usually encompass 60-80 pages, García-Godos/Wiig, *Ideals and Realities of Restitution - The Colombian Land Restitution Programme*, 2018 J. Hum. Rts. Prac. 10(1), 40.

500 Ramírez et al., *El Amparo de Tierras*, 84; URT, *ABC Para Jueces*, 39 ff.

creditors for debt restructuring, repays the debt, brings state entities to waive outstanding tax debt, or facilitates the survivor's entry into the state housing subsidies program.<sup>501</sup>

Independently of the judgment, the URT and the Victims Unit offer displaced persons two programs to accompany their return. The URT and the survivor can create a so-called Plan de Vida Productiva<sup>502</sup> in which they devise an income-generating project tailored to the survivor's situation. The URT gives up to 55 monthly minimum salaries<sup>503</sup> in support and provides technical assistance.<sup>504</sup> Under the second program, the Victims Unit facilitates the survivor's decision to return by providing information on the security situation and the availability of essential state services in the area of return. Once survivors decide to return, the Victims Unit covers transportation costs. It also obliges all municipalities to which survivors return or relocate to elaborate a Plan of Return or Relocation. These serve to coordinate all state entities involved in the process and ensure that they provide essential services and infrastructure to survivors. The program also offers to assist and fund projects for survivors' socio-economic stabilization for up to two years. Examples are building or strengthening community infrastructure or giving computers, sports equipment, or other goods to the community.<sup>505</sup> For survivors of other violations than forced displacement, the reparation program offers mainly debt restructuring, special credit lines, and services as restitution.<sup>506</sup>

While showing promising results, the land restitution process faces two key challenges: the scarcity of evidence and the treatment of secondary occupants. Colombia has a history of informal land holdings and transactions. In 2016, 28 % of its territory was not featured in any register. In the most conflict-affected areas, this number jumped to 79 %. 63,9 % of the registered land was

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501 Art. 102 Ley 1448 de 2011; DeJusticia, *Restitución de Tierras, Política de Vivienda y Proyectos Productivos*, 2017, 30; URT, *Memorias de la Restitución*, 85, 430 ff.

502 Plan for a Productive Life.

503 The amount of compensation is determined on the basis of the monthly minimum salary, which in 2021 was around 260 \$. The current value of the monthly minimum salary can be seen at <http://www.salariminimocolombia.net>.

504 URT, *Programa Proyectos Productivos Para Población Beneficiaria de Restitución de Tierras*, 33 ff., 43 ff. In practice, such programs are of very limited reach and rarely tailored to the situation of the displaced population, CSMLV, *Quinto Informe*, 187.

505 Unidad de Víctimas, *Proceso de Acompañamiento al Retorno, Reubicación o Integración Local*, 2015, 5 ff., 11; Unidad de Víctimas, *Retornos y Reubicaciones - Hacia la Reparación Integral a Víctimas del Desplazamiento Forzado*, 2015, 25 f., 32, 47 ff.

506 Art. 128 f. Ley 1448 de 2011; Art. 140, 143 f. Decreto 4800 de 2011.



entered with outdated information so that different registers contradicted each other. Land transactions usually relied on the spoken word leading to a scarcity of evidence for such transactions.<sup>507</sup> The URT devised creative methods to overcome this massive evidentiary problem. It draws maps and timelines of land holdings and violations based on interviews with displaced populations. It also researches the general history of displacement in an area to create contextual information.<sup>508</sup> Still, evidence remains a massive challenge in the proceedings, which is particularly threatening for persons who currently occupy a reclaimed plot of land. These so-called secondary occupants often had nothing to do with the act of displacement. While some of them profited from the situation, many took the land out of necessity. They are themselves survivors of displacement or other violations and rely on the land to sustain themselves.<sup>509</sup> The evidentiary rules heavily tilt the administrative as well as the judicial restitution process against them. Coupled with the scarcity of evidence, secondary occupants are highly unlikely to win a restitution case and keep the land they occupy. They have a right to compensation if they prove an aggravated form of good faith, *buena fe exenta de culpa*<sup>510</sup>. For that, secondary occupants must show that they were convinced that the land acquisition was legal and took steps to verify their conviction.<sup>511</sup> Primarily since specialized judges treat the existence of a conflict in many areas as a notorious fact, many secondary occupants cannot meet this demanding standard.<sup>512</sup> More importantly, the standard does not correspond to the situation on the ground. As mentioned, many secondary occupants took the land out of necessity, often fully aware of what happened before. As a result, the land restitution process threatens to throw them off the land without compensation and stripping them of their means of subsistence.<sup>513</sup> In reaction to this dilemma, the URT devised a support program for secondary occupants, with measures similar to those provided for returning

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507 CONPES, *Política Para la Adopción e Implementación de un Catastro Multipropósito Rural-Urbano* (CONPES 3859), 2016, 3; CSMLV, *Cuarto Informe al Congreso de la República Sobre la Implementación de la Ley de Víctimas y Restitución de Tierras*, 2017, 190; DeJusticia, *Restitución de Tierras* 31, 33 ff.; URT, *Memorias de la Restitución*, 203 f.

508 URT, *Memorias de la Restitución*, 209 f., 228 ff.

509 Delgado Mariño, *Segundos Ocupantes*, 206.

510 Literally: good faith without guilt.

511 Art. 98 Ley 1448 de 2011; DeJusticia, *La Buena Fe en la Restitución de Tierras*, 30 f.

512 DeJusticia, *La Buena Fe en la Restitución de Tierras*, 58 ff.

513 Delgado Mariño, *Segundos Ocupantes*, 206; del Llano Toro, *El Desequilibrio Procesal y Probatorio*, 83 f.

survivors, including awarding secondary occupants land and productive projects.<sup>514</sup> The Constitutional Court ordered the specialized judges to treat the buena fe exenta de culpa-requirement with flexibility or even disregard it in cases of vulnerable secondary occupants who were not involved in the survivor's displacement.<sup>515</sup> Thus, vulnerable secondary occupants must show a lower standard of good faith or even no good faith at all to access compensation and the support program of the URT.<sup>516</sup>

## b. Compensation

The Colombian reparation program awards compensation to survivors of forced displacement, homicide, enforced disappearance, kidnapping, torture, inhuman or degrading treatment, forced recruitment, sexualized violence, children born out of acts of sexualized violence, and survivors who sustained physical or psychological injuries, which caused a permanent or temporal disability.<sup>517</sup> The survivor requests compensation by filling out a form together with an official of the Victims Unit. Based on this information, the Unit determines their eligibility and recognizes possible reasons for their prioritization.<sup>518</sup> If eligible, the survivor enters either the prioritized or the regular route.<sup>519</sup> The prioritized route is open to survivors over the age of 74, displaced households in a state of extreme vulnerability<sup>520</sup>, and survivors whose income-generating capacity was reduced by more than 40 % due to a disability or illness. In both routes, the Victims Unit has 120 days to decide on the request.<sup>521</sup> Afterward, it ranks all eligible survivors to determine the order in

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514 Art. 1 Acuerdo 33 de 2016; Delgado Mariño, *Segundos Ocupantes*, 213 ff.; URT, *Memoorias de la Restitución*, 424.

515 Corte Constitucional de Colombia, *Sentencia C-330 de 2016*, C-330/16 (Sala Plena), 2016, para 112.2.

516 Delgado Mariño, *Segundos Ocupantes*, 215 ff.; DeJusticia, *La Buena Fe en la Restitución de Tierras*, 66 ff.

517 Art. 149 Decreto 4800 de 2011; Unidad de Víctimas, Resolución 00848 de 30 Diciembre 2014, Art. 5 f.

518 Unidad de Víctimas, Resolución 01958 de 6 Junio 2018, Art. 9; CSMLV, *Cuarto Informe*, 145.

519 A third route is available for persons, who requested compensation under previous reparation programs, the so-called transitional route.

520 For the definition see above, C.IV.3.

521 Unidad de Víctimas, Resolución 01958 de 6 Junio 2018, Art. 7 f., 13, 15. Raising the age for prioritization to 74 was criticized by survivor organizations, Secretaría Técnica et al., *Sexto Informe de Verificación de la Implementación del Acuerdo Final de Paz en*

which they receive compensation. Those in the prioritized route enter at the top of the order. All others are ranked based on an individual assessment of demographic and socio-economic variables and the harm suffered.<sup>522</sup> The number of compensation requests by far surpasses the annual budget available for compensation, so that the exercise is crucial. Still, prioritization is not always implemented uniformly, and the process suffers from structural deficiencies.<sup>523</sup> Survivors entering the lower end of the ranking often wait for several years until they receive compensation.<sup>524</sup>

The amount of compensation is determined based on the severity of the harm suffered. Compensation for each violation is capped at between 17 and 40 minimum monthly salaries. If a survivor suffered multiple violations, the amounts are added, but the total can never exceed 40 minimum monthly salaries.<sup>525</sup>

Groups of 100-200 survivors receive the compensation in a half-day “dignifying event”, which culminates in the delivery of the compensation together with a dignifying letter.<sup>526</sup> At the event, survivors can attend a support program, which offers financial literacy training on saving, investing, and financial planning. Survivors can choose between additional specialized training on investment in housing, business, or education. Lastly, investment opportunities are presented at fairs, and the Victims Unit tries to create such opportunities itself.<sup>527</sup>

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*Colombia Para los Verificadores Internacionales Felipe González y José Mujica*, 2019, 218.

522 Unidad de Víctimas, Resolución 01958 de 6 Junio 2018, Art. 4, 13; Art. 2.2.4.7.4 Decreto 1084 de 2015. This system replaced one based on fixed criteria for prioritization, enumerated in Unidad de Víctimas, Resolución 00090 de 17 Febrero 2015, Art. 4, because that system suffered from structural and practical problems, CSMLV, *Quinto Informe*, 200 f.

523 CSMLV, *Quinto Informe*, 198, 200 f.

524 ICTJ, *Implementación de Reparación Individual en Colombia*, 43.

525 Art. 148 f. Decreto 4800 de 2011. The value of 40 minimum monthly salaries is explained above, fn. 503.

526 ICTJ, *Implementación de Reparación Individual en Colombia*, 42, 45 f. The dignifying letter is a measure of satisfaction described below, C.IV.3.d.

527 Unidad de Víctimas, *Programa de Acompañamiento*, available at: <https://www.unidadvictimas.gov.co/es/ruta-integral-individual/programa-de-acompanamiento/8931>.

c. Rehabilitation

The rehabilitation component of the reparation program consists of three prongs. Its core is the Programa de Atención Psicosocial y Salud Integral a Víctimas (PAPSIVI)<sup>528</sup>, which offers individualized psychological and medical support based on an initial interview with each survivor.<sup>529</sup> Specialized psychological treatment on an individual, family, and community level seeks to mitigate and repair psychological damages and alleviate the emotional suffering of the survivor, their family, and community. The physical health component offers prioritized access to free, individualized, and specialized healthcare. It encompasses biomechanic, physiological, psychiatric, and neuropsychological care as well as prevention and rehabilitation measures for two years. The program also covers limited ambulant or stationary group and individual therapy. The goal of the health component is to enhance the survivor's corporal, personal and social autonomy.<sup>530</sup>

Because the Ministry of Health delayed the creation of PAPSIVI, the Victims Unit devised the Estrategía de Recuperación Emocional al Nivel Grupal (ERE)<sup>531</sup>, which provides survivors with nine two-hour group sessions, in which they share their experiences, coping strategies, and feelings.<sup>532</sup> Importantly, these programs only complement the health care already available to survivors as assistance. Lastly, the whole reparation program seeks to incorporate a psychosocial approach. Survivors receive psychosocial accompaniment in the CRAVs.<sup>533</sup> The staff tries to prevent revictimization and incorporates psychosocial care in every interaction with survivors.<sup>534</sup>

Apart from psychosocial and health measures, the program offers preferential access to formal and informal education, which lasts from a couple of months to three years. A special education credit line for survivors existed but

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528 Program of Psychosocial and Health Attention for Victims.

529 Oficina de Promoción Social, *Programa de Atención Psicosocial y Salud Integral a Víctimas en el Marco de la Ley 1448 de 2011 - Versión 2 Justada*, 2012, 41 f., 80 f.

530 Oficina de Promoción Social, *PAPSIVI - Versión 2 Justada*, 42 ff., 58 ff., 63 ff., 74 ff.; Oficina de Promoción Social, *Programa de Atención Psicosocial y Salud Integral a Víctimas del Conflicto Armado - Documento Marco*, 2017, 18; CSMLV, *Cuarto Informe*, 125.

531 Strategy for Emotional Recuperation on a Group Level.

532 CSMLV, *Cuarto Informe*, 126 f.

533 CSMLV, *Sexto Informe*, 72 f.

534 Unidad de Víctimas, *Elementos Para la Incorporación del Enfoque Psicosocial en la Atención, Asistencia y Reparación a las Víctimas*, 2014.

only had minimal reach. In general, the education sector of the reparation program suffers severe difficulties.<sup>535</sup>

#### d. Satisfaction

The program's satisfaction measures aim to reestablish the survivors' dignity, enhance their well-being and mitigate the pain. On a societal level, they serve to establish and disburse the truth about the violation.<sup>536</sup> All measures must be carried out with survivors' involvement to meet their expectations and wishes.<sup>537</sup> The Victims Law contains a non-exhaustive list of satisfaction measures, to which the Final Agreement added some more. It encompasses memorials, a memorial day for survivors, public acts of commemoration and acknowledgment of responsibility on the part of the government and the FARC-EP, official apologies, and exemption from military service.<sup>538</sup> The dignifying letter, which survivors receive together with their compensation, acknowledges the victimization and aims to restore the survivor's honor. However, it does not contain an acknowledgment of state responsibility.<sup>539</sup>

#### e. Guarantees of Non-Repetition

Finally, the Victims Law and the Final Agreement provide a laundry list of guarantees of non-repetition. Among them are changes in state policies, legal reform, awareness campaigns, and changes in school curriculums.<sup>540</sup>

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535 Art. 130 f. Ley 1448 de 2011; ICTJ, *Implementación de Reparación Individual en Colombia*, 33 f.; CSMLV, *Sexto Informe*, 158 ff.; CSMLV, *Quinto Informe*, 167 ff.

536 Art. 139 ff. Ley 1448 de 2011.

537 Subcomité Técnico de Medidas de Satisfacción, *Guía de Medidas de Satisfacción*, 19, 25.

538 Final Agreement, 5.1.3.1. f.; Subcomité Técnico de Medidas de Satisfacción, *Guía de Medidas de Satisfacción*, 8 ff.; Procuraduría General, *Primer Informe*, 266. Many survivors reported difficulties in securing the exemption from military service. Until 2017, the measure was interpreted in a way that only survivors of forced displacement received it without incurring costs. Other survivors were subjected to certain fees, CSMLV, *Quinto Informe*, 206 f., 209.

539 ICTJ, *Implementación de Reparación Individual en Colombia*, 56 f.; ICTJ, *From Principles to Practice*, 21.

540 Art. 149 Ley 1448 de 2011; Final Agreement, 5.1.4.

Additionally, Colombia has started a human rights education program in schools and human rights training for militaries and other state officials.<sup>541</sup>

#### 4. The Collective Route

The collective route can be initiated on request of eligible collectives or by the Victims Unit, which can approach collectives *proprio motu*.<sup>542</sup> The route proceeds in five phases. First, the Victims Unit creates a preliminary description of the collective and the harm it suffered. Second, the Victims Unit meets with the collective and other stakeholders to prepare them for the reparation process. The Unit informs them about possible benefits and the upcoming process. It helps the collective create structures to communicate with the Unit and support the reparation process. In a third step, the Victims Unit and the collective engage in an in-depth analysis of the collective, the harm it suffered, causes for its victimization, its coping strategies, and socio-economic situation. On that basis, the collective and the Victims Unit create the Plan Integral de Reparación Colectiva (PIRC)<sup>543</sup>. It contains the envisaged outcome of the reparation process, the necessary measures, and a timeframe. In the fifth phase, the PIRC gets implemented within three years.<sup>544</sup>

All five forms of reparation are available to collectives. Restitution concentrates on the reconstruction of community spaces, infrastructure, and organizational capacities. The Victims Unit can give goods or between 242 and 394 monthly minimum salaries<sup>545</sup> as compensation. As collective rehabilitation, the Victims Unit devised a psychosocial recovery program, the *Entrelazando-Strategy*. It centers on community reflection, memory activities, acknowledgment of the harm suffered, and creating and strengthening collective coping strategies. The collective can choose whether to implement the strategy or other rehabilitation measures of a similar kind. All rehabilitation measures seek to enhance the collective's social fabric as well as its internal and external relations. Collective satisfaction consists of activities reconstructing collective

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541 CSMLV, *Segundo Informe de Seguimiento y Monitoreo a la Implementación de la Ley de Víctimas y Restitución de Tierras 2012-2013*, 2013, 554 f.

542 Art. 227 Decreto 4800 de 2011. On eligibility for collective reparation see above, C.IV.1.

543 Collective Integral Reparation Plan.

544 Unidad de Víctimas, *Modelo de Reparación Colectiva*, 73 ff., 102; Unidad de Víctimas, Resolución 03143 de 23 Julio 2018 Capítulo I.

545 See above, C.IV.3.a.

memory and the creation of memory spaces. Symbolic measures, such as commemoration acts, serve to dignify survivors and restore their good name. Satisfaction measures help to recover lost practices and traditions of the collective. Lastly, just as the individual route, the collective route offers a laundry list of guarantees of non-repetition, among them human rights education, education against gender-based violence, technical assistance in establishing methods of alternative conflict resolution, capacity training for social leaders, and support to local reconciliation initiatives.<sup>546</sup>

## 5. Challenges and Criticism

Colombia conceived and implemented an impressively comprehensive, complete, and complex program. It devised innovative procedures regarding access to the program, differential treatment, etc. That makes the program a potential role model to many reparation programs worldwide. Still, naturally, such a complex and comprehensive program meets a wide array of challenges and critiques. These will not be recounted here in all detail. Some more considerable structural challenges and critiques will be pointed out in the following.

Most importantly, while the program provides an ambitious range of benefits on paper, its implementation has been slow and its coverage limited. Partially, this is because the government wildly underestimated the number of survivors.<sup>547</sup> Additionally, many trace the problem back to a lack of political will.<sup>548</sup> The individual and collective routes are significantly underfunded, suffer from staff shortage, and proceed at a pace at which they will take much

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546 Unidad de Víctimas, *Modelo de Reparación Colectiva*, 62, 78 ff., 86 ff., 95 ff.; CSMLV, *Cuarto Informe*, 166; Sánchez León / Sandoval Villalba, *Go Big or Go Home?*, 558 f.

547 ICTJ, *From Principles to Practice*, 8 f.; Montes Alba, *El Reclamo de las Víctimas al Gobierno por Demoras en las Indemnizaciones*, *El Espectador*, 21 February 2018. This was also due to the fact that the Constitutional Court later held the many survivors of internal displacement to be eligible for compensation as well, which increased the potential beneficiaries of that measure manifold, Sánchez León / Sandoval-Villalba, *Go Big or Go Home?*, 555.

548 Group Interview with *Efraín Villamil* (Confederación Nacional de Juntas de Acción Comunal), *Guillermo Cardona Monreno* (Confederación Comunal Nacional, Collective Reparation Subject), *Jorge Marín Rívela* (Survivor, Confederación de Acción Comunal), *Jairo Alberto Delgado Beltran* (Universidad Pedagógica y Tecnológica de Colombia, Facultad de Derecho), and *Gloria Inés González Bravo* (Agro Comunal), Bogotá, 8 October 2018.

longer to complete than expected.<sup>549</sup> This led the international verification commission for the 2016 Final Agreement to conclude in 2018 that the implementation of the envisaged reparation showed so little progress that compliance with the agreement in this area was impossible to verify.<sup>550</sup> While the commission noted few advancements in later reports, it still lamented delays and partial non-compliance.<sup>551</sup>

Regarding single measures, the Victims Law's monitoring commission sees the judicial stage of the land restitution process as ill-equipped to handle the expected caseload. Proceedings are slow due to evidentiary problems, a lack of resources, and the continuing dire security situation in many parts of the country. In addition, requests for security and other post-judgment measures distract the specialized judges from the core restitution cases, over which they take priority. Cooperation with other state entities, for example, those administering housing subsidies, is slow and difficult.<sup>552</sup> Often, parts of the judicial orders are not complied with.<sup>553</sup> While the administrative stage complies more or less with its caseload, a suspicious number of negative decisions sparks doubts about possible false negatives.<sup>554</sup> Survivors are sometimes barred from accessing the land restitution program because of the continually insecure situation in some parts of the country. Also, the government started to close restitution processes in zones, which have a low density of cases or show substantial progress.<sup>555</sup> The return assistance faces grave difficulties, mainly due to the dire security situation in some parts of the country,

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549 CSMLV, *Cuarto Informe*, 137 f., 158, 176 f., 196 ff.; CSMLV, *Quinto Informe*, 46; CSMLV, *Sexto Informe*, 48 f.; KROC Institute, *Tercer Informe Sobre el Estado de Implementación del Acuerdo Final de Paz de Colombia*, 2019, 152; Secretaría Técnica et al., *Segundo Informe*, 159; Montes Alba, *El Reclamo de las Víctimas*, El Espectador 2018.

550 Secretaría Técnica et al., *Segundo Informe*, 156.

551 Secretaría Técnica/CINEP/PPP-CERAC, *Cuarto Informe de Verificación de la Implementación del Acuerdo Final de Paz en Colombia Para los Verificadores Internacionales Felipe González y José Mujica*, 2019, 215; Secretaría Técnica et al., *Sexto Informe*, 220; Secretaría Técnica et al., *Quinto Informe de Verificación de la Implementación del Acuerdo Final de Paz en Colombia Para los Verificadores Internacionales Felipe González y José Mujica*, 2019, 193.

552 CSMLV, *Cuarto Informe*, 195 ff.; CSMLV, *Sexto Informe*, 134 ff., 138 ff., 143 f., 154 f.; CSMLV, *Quinto Informe*, 127; Procuraduría General, *Primer Informe*, 264; DeJusticia, *Restitución de Tierras* 38 ff., 65 ff.; García-Godos/Wiig, *Ideals and Realities of Restitution*.

553 CSMLV, *Sexto Informe*, 138 f.

554 CSMLV, *Sexto Informe*, 137; CSMLV, *Quinto Informe*, 126 ff.

555 CSMLV, *Sexto Informe*, 136; CSMLV, *Quinto Informe*, 127; García-Godos/Wiig, *Ideals and Realities of Restitution*.



the deterioration of land due to abandonment, and the lack of infrastructure and economic opportunity.<sup>556</sup> As regards compensation, survivors can wait years for their turn. By 2019 only 13 % of eligible survivors were compensated.<sup>557</sup> The lack of resources also affects the support program, which is supposed to facilitate the sustainable investment of compensation. In 2016, it covered only 12 % of eligible survivors.<sup>558</sup> The same problem affects the rehabilitation program PAPSIVI, which by 2019 had only covered 13 % of survivors in need of the program.<sup>559</sup> The collective reparation route cannot meet the demand either. Only a few collectives have moved beyond the planning stage. Collective rehabilitation is not available in all regions. Infrastructure projects are often not implemented, partially because they were not planned in cooperation with actors necessary for their implementation.<sup>560</sup> In light of the delay and limited coverage, civil society and other actors mounted pressure on the government to extend the Victims Law beyond its originally envisaged cut-off date in 2021. Shortly before the Constitutional Court decided in their favor<sup>561</sup>, Colombia's government announced that it would prolong the reparation program for another ten years.<sup>562</sup>

Not only the limited coverage of many measures but also their quality has received criticism. Survivor organizations criticized new changes implemented by Ivan Duque's government as a turn towards minimalist reparation, centered on individual monetary benefits.<sup>563</sup> The effort to provide land restitution beneficiaries with productive projects is often thwarted by an unfavorable macroeconomic climate and poor socio-economic conditions at the place of return.<sup>564</sup> Compensation is deemed too low to have a life-changing

556 Weber, *Trapped Between Promise and Reality*, 11; Guzman-Rodriguez, *Dignity Takings and Dignity Restoration - A Case Study of the Colombian Land Restitution Program*, 2017 Chi.-Kent L. Rev. 92(3), 871, 893 f. On some of the structural causes for these problems imbedded in the Victims Law see Attansio/Sánchez, *Return Within the Bounds of the Pinheiro Principles - The Colombian Land Restitution Experience*, 2012 Wash. U. Global Stud. L. Rev. 11(1), 1, 45 ff.

557 CSMLV, *Sexto Informe*, 191 ff.

558 CSMLV, *Cuarto Informe*, 156.

559 CSMLV, *Sexto Informe*, 113. Until 2018, it only covered 800.000 persons, CSMLV, *Cuarto Informe*, 127 f.

560 CSMLV, *Sexto Informe*, 215 ff., 222, 226 f.; CSMLV, *Quinto Informe*, 214, 219, 227.

561 Corte Constitucional, C-588 de 2019, C-588/19 (Sala Plena), 2019.

562 UNSC, *Verification Mission Report*, S/2019/780, para 10; Liévano, *More Time to Redress Colombia's Victims - The Question is How*, JusticeInfo.net, 24 October 2019; *Corte Constitucional Amplió la Vigencia de la Ley de Víctimas*, El Espectador, 5 December 2019.

563 Secretaría Técnica et al., *Quinto Informe*, 199.

564 DeJusticia, *Restitución de Tierras* 78.

effect. The accompanying seminars and productive projects are criticized for not being tailored to survivors' needs, capabilities, and situations.<sup>565</sup> The rehabilitation program varies in its quality depending on the region.<sup>566</sup> In contrast to what has been promised, it rarely offers specialized health care for survivors. Complicated cases are often remitted to the regular health care system, whose professionals lack training on dealing with survivors. Even the supposedly specialized health professionals in the reparation program sometimes lack previous experience with survivors. Also, putting a deadline on psychosocial support measures misconceives the nature of most of the psychological issues survivors have. Especially trauma-related problems tend to occur cyclically so that lifelong psychosocial support would be necessary.<sup>567</sup> An evaluation of both PAPSIVI and ERE showed little measurable effect, even though most participants said they benefitted from both programs.<sup>568</sup>

A third large problem concerns access. Many survivors are in a dire economic situation and live in remote areas. For them, receiving reparation or presenting a claim can require many resources, such as time and money for transport and accommodation. Some survivors cannot attend measures that require their prolonged presence, e.g., education, because the program does not offer childcare. These factors dissuade some survivors from claiming their rights.<sup>569</sup> Organizations also criticize legal barriers to claim reparation, such as the strict and somewhat arbitrary cut-off dates for eligibility and the deadlines to present claims.<sup>570</sup> Crucial information about the program does not reach all survivors. The Victims Unit officials, which are supposed to guide survivors through the process and disseminate information, are heavily overburdened and thus difficult to reach after the initial interview.<sup>571</sup>

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565 CSMLV, *Sexto Informe*, 201; ICTJ, *Implementación de Reparación Individual en Colombia*, 44.

566 CSMLV, *Sexto Informe*, 122 f.; CSMLV, *Quinto Informe*, 114 f., 117.

567 CSMLV, *Cuarto Informe*, 127; ICTJ, *Implementación de Reparación Individual en Colombia*, 50; ICTJ, *From Principles to Practice*, 17.

568 CSMLV, *Cuarto Informe*, 130 ff., 135 ff., 139 f.

569 ICTJ, *Implementación de Reparación Individual en Colombia*, 33 f.; CSMLV, *Cuarto Informe*, 134.

570 CODHES/USAid, *13 Propuestas*, 19 ff.; CAJAR et al., *Organizaciones y Víctimas Exigimos Mayor Compromiso del Congreso con el Acuerdo de Paz*, 2017; Luna Escalante, *Tierras Despojadas, ¿Derechos Restituidos? - Encuentros Acerca del Problema de la Tierra en Colombia en un Escenario de “Justicia Transicional”*, 2013, 67.

571 ICTJ, *Implementación de Reparación Individual en Colombia*, 23, 25 ff.; DeJusticia, *Restitución de Tierras* 35 f.; CSMLV, *Cuarto Informe*, 134.

Lastly, Colombia's reparation program often confuses social policy and the fulfillment of social, economic, and cultural rights with reparation.<sup>572</sup> This is most obvious for rehabilitation. Under this heading, the Victims Law offers a wide range of measures. In a seemingly arbitrary manner, it denotes some as reparation, some as assistance.<sup>573</sup> As mentioned, Colombia retroactively labeled assistance given under previous regimes as reparation.<sup>574</sup> Some collective reparation projects generate confusion about whether the state is fulfilling an obligation to repair or its obligation to provide essential services.<sup>575</sup> All these problems frustrate survivors. Many feel that the state did not live up to its promises. This led to a significant loss of trust in the state and its institutions.<sup>576</sup>

#### D. The International Criminal Court

The ICC is the first international criminal court or tribunal equipped with a reparation mechanism.<sup>577</sup> Four cases have reached this last stage of the process: those against Thomas Lubanga Dyilo, Germain Katanga, Ahmad Al Faqi Al Mahdi, and Bosco Ntaganda. Each process culminated in a unique and independent reparation program. A study of 622 survivors in four situation countries found that reparation is a primary motivation for survivors to

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572 ICTJ, *Implementación de Reparación Individual en Colombia*, 7, 10 ff., 14; ICTJ, *From Principles to Practice*, 7, 10 ff.; DeJusticia, *Restitución de Tierras* 70, 90 ff.; Vargas Valencia, *Antecedentes Normativos y Jurisprudenciales Sobre Justicia Restaurativa en Colombia - A Propósito de la Reparación de Víctimas en el Acuerdo Final de Paz*, in: del Pilar García Pachón (ed.), *Lecturas Sobre Derecho de Tierras - Tomo II*, 2018, 135, 156. This is especially obvious in Art. 25(1) Ley 1448 de 2011.

573 see Art. 49 ff., 135 ff. Ley 1448 de 2011, respectively.

574 See above, C.IV.

575 CSMLV, *Cuarto Informe*, 179.

576 ICTJ, *From Principles to Practice*, 12 f.; ICTJ, *Implementación de Reparación Individual en Colombia*, 27 f.; Secretaría Técnica et al., *Segundo Informe*, 158 f.; Weber, *Trapped Between Promise and Reality*, 14 f.; Montes Alba, *El Reclamo de las Víctimas*, *El Espectador*; Group Interview with Efraín Villamil, Guillermo Cardona Monreno, Jorge Marín Rivela, Jairo Alberto Delgado Beltran, and Gloria Inés González Bravo, Bogotá, 8 October 2018.

577 Ambach, *The International Criminal Court Reparations Scheme – A Yardstick for Hybrid Tribunals?*, 132 f.

participate in ICC proceedings. It is fundamental for their positive perception of the ICC and the feeling that justice has been rendered.<sup>578</sup>

## I. Comparability and Methodology

The rationale behind examining ICC reparation programs was explained above.<sup>579</sup> To quickly recall, these programs differ from those of Sierra Leone and Colombia because they are not rooted in state responsibility, are not state-run, and do not rest principally on the human right to reparation. Nevertheless, ICC reparation programs are transitional justice reparation programs. They respond to systematic human rights violations and pursue broader transformational aims. They draw inspiration from transitional justice reparation programs, and the international law on reparation plays a crucial role in their setup. This makes them comparable to the reparation efforts of Sierra Leone and Colombia. The undeniable differences make ICC reparation programs perfect for control purposes. Strategies common to Sierra Leone, Colombia, and the ICC in all likelihood serve to overcome challenges unique to the transitional situation – one of the few things all case studies have in common.

To effectively serve control purposes, the analysis must acknowledge differences between ICC reparation programs and those of Sierra Leone and Colombia nonetheless. As was already mentioned, the Rules of Procedure and Evidence (RPE) and the Regulations of the Trust Fund for Victims (TFV) create a unique normative regime for reparation. The international law on reparation is a key factor in that regime, but not the only one. The ICC orders reparation against an individual with rights.<sup>580</sup> Its reparation programs are therefore of a much more adversarial nature than the two state-run programs considered before. The financial limitations of ICC reparation programs are often stronger and political considerations fewer or at least distinct. Lastly,

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578 Berkeley Human Rights Center, *The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court*, 2015, 36 f., 45 f., 58; Balta et al., *Trial and (Potential) Error - Conflicting Visions on Reparations Within the ICC System*, 2019 Intl. Crim. Just. Rev. 29(3), 221, 224.

579 See above, A.I.

580 For a critical take on the rights of the accused and the defence in reparation proceedings see Dijkstal, *Destruction of Cultural Heritage Before the ICC – The Influence of Human Rights on Reparations Proceedings for Victims and the Accused*, 209 J. Intl. Crim. Just. 17(2), 369, 401 ff., 408 ff.

the ICC faces different constraints in working in the target state than a state, which operates a reparation program on its own territory. While these differences do not make a comparison between ICC reparation programs and those of Sierra Leone and Colombia impossible, they warrant consideration. The analysis must disregard features of the ICC reparation programs, which are likely to be a consequence of these differences and not of the transitional justice situation's particular exigencies. Where that is the case, it will be pointed out below.<sup>581</sup>

Two final caveats apply to methodology: First, the study relies exclusively on the facts and harms established in the respective reparation orders. Historical accounts mainly derived from one source will necessarily have blind spots. But since the reparation programs are based exclusively on that source, the author deliberately confined the historical accounts to the chambers' findings, with anything but a claim to comprehensiveness. The short summaries of the history, violations, and harms at the basis of the reparation programs must hence be taken with more than a grain of salt.<sup>582</sup> Second, the study is confined, for the most part, to the reparation decisions and implementation plans. There are rarely details available on the actual state of implementation of the reparation programs. The reports of the TFV are either unavailable publicly or heavily redacted. The case studies on Sierra Leone and Colombia evinced that implementation can differ starkly from plans made at the outset. The reader should hence be mindful that the following sections recite plans, not necessarily practice. Still, these ideals can inform the study, as they display strategies to deal with transitional situations' special exigencies.

## II. The Reparation System of the International Criminal Court

Art. 75 RS introduces independent reparation proceedings following the conviction of a perpetrator. Based on its wording, the court needs to establish reparation principles in each case *proprio motu*. Only the more detailed decisions on concrete reparation measures and the extent of harm can be

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581 Of course the distinction between features based on such decisive differences and features based on other factors is not obvious to draw. The author will explain his choices and leave a more reasoned judgment of his decisions to the reader.

582 For similar considerations see above, A.II.

instigated upon application of survivors or by the court, if it so chooses.<sup>583</sup> It seems rather futile for the court to establish reparation principles, if no survivor applies for reparation. This odd constellation probably is the result of the drafters' vision that there would be one set of overarching reparation principles, whereas the court later chose a case-by-case approach.<sup>584</sup> In all likelihood, the odd relationship between the potentially mandatory reparation principles and the non-mandatory nature of reparation proceedings will remain theoretical though. So far, in all four reparation proceedings survivors applied for reparation, relieving the court of the decision whether it needs to establish reparation principles absent survivors' request.<sup>585</sup> Also, the chamber is not bound by the applications and can order reparation to further survivors yet to be identified.<sup>586</sup>

After hearing the parties<sup>587</sup>, the court issues a reparation order, specifying the reparation modalities for the case at hand. At the Rome Conference, delegates recognized that reparation would be complex and hard to deliver for a criminal court. They decided to establish a TFV to support the court's reparation efforts in Art. 79 RS.<sup>588</sup> The Fund has two mandates. Under its

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583 Donat-Catin, *Article 75*, in: Ambos (ed.), *Rome Statute of the International Criminal Court - A Commentary*, 4th Edition 2022, para 10, 20.

584 Cf. Carayon/O'Donohue, *The International Criminal Court's Strategies in Relation to Victims*, 2017 J. Intl. Crim. Just. 15(3), 567, 581 ff.; Pérez-León-Acevedo, *Reparation Principles at the International Criminal Court*, in: Andenas et al. (eds.), *General Principles and the Coherence of International Law*, 2019, 328, 339 ff. Hence, Dwertmann opines that the entire proceedings are not mandatory, Dwertmann, *The Reparation System of the International Criminal Court - Its Implementation, Possibilities and Limitations*, 2010, 195.

585 ICC, *The Prosecutor v. Thomas Lubanga Dyilo, First Report to the Trial Chamber on Applications for Reparations*, ICC01-/04-01/06-2847 (Registry), 2012; ICC, *The Prosecutor v. Germain Katanga, Transmission de Demandes en Réparation*, ICC-01/04-01/07-3614 (Registry), 2015; ICC, *The Prosecutor v. Ahmad al Faqi al Mahdi, First Transmission and Report on Applications for Reparations*, ICC-01/12-01/15-200 (Registry), 2016. Unclear, but likely that survivors requested reparation: ICC, *The Prosecutor v. Bosco Ntaganda, Joint Response of the Legal Representatives of Victims to the Registry's Observations on Reparations*, ICC-01/04-02/06-2430 (Office of Public Counsel for Victims), 2019, para 32 ff.

586 See e.g. ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 105.

587 More detail on survivor participation in the proceedings is provided by Safferling/Petrossian, *Victims Before the International Criminal Court*, 286 ff.

588 Moffett, *Reparations for Victims at the International Criminal Court - A New Way Forward?*, 2017 Intl. J. Hum. Rts. 21(9), 1204, 1205. The TFV was never intended to operationalize and implement the reparation awards though, Moffett/Sandoval, *Tilting at Windmills*, 762. However, that it eventually assumed this function might reflect its greater ability to handle the complex issues involved in setting up large-scale re-

assistance mandate, the TFV conceives and supports projects that benefit survivors in situation countries, independently of any proceeding or judgment. Here, the Trust Fund basically acts as a development agency specifically for the benefit of survivors of potential crimes within the court's jurisdiction.<sup>589</sup> The TFV's reparation mandate is more relevant to the present study. The court usually relies on the TFV to administer reparation following Art. 75(2) RS. In that case, the Fund helps with the conception and implementation of the reparation program based on the court's reparation order. The relationship between the Fund and the ICC is still in an embryonic phase, with many details unsettled. Generally speaking, the chamber lays down broad parameters of reparation, based on which the Fund drafts a concrete implementation plan. The chamber must approve that plan and supervise its implementation by the Trust Fund.<sup>590</sup> The TFV receives the money for reparation from the convicted person, Rule 98 RPE. The Fund can complement reparation efforts with its resources, Rule 98(5) RPE. So far, it chose to do so in the Lubanga, Katanga, and Al Mahdi cases in light of the defendants'

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paration programs, de Greiff/Wierda, *The Trust Fund for Victims of the International Criminal Court*, in: de Feyter et al. (eds), *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations*, 225, 228, 239 ff. On the TFV's operational structure, Safferling/Petrossian, *Victims Before the International Criminal Court*, 300 f.

589 For an overview and analysis of the assistance mandate and the work carried out under it see Dutton/Ní Aoláin, *Between Reparations and Repair – Assessing the Work of the ICC Trust Fund for Victims Under its Assistance Mandate*, 2019 Chicago J. Intl. L. 19(2), 490.

590 ASP, Regulations of the Trust Fund for Victims, regulations 54, 57; Capone, *An Appraisal of the Al Mahdi Order on Reparations and its Innovative Elements – Redress for Victims of Crimes Against Cultural Heritage*, 2018 J. Intl. Crim. Just. 16(3), 645, 655 f. The intricacies of this relationship are still subject to quarrels between the court and the TFV. For an overview see Balta et al., *Trial and (Potential) Error*, 231 ff. Apart from the TFV, some aspects of the implementation of reparation require the cooperation of states parties. For that dimension see Kress/Broomhall, *Implementing Cooperation Duties Under the Rome Statute – A Comparative Synthesis*, in: Kress et al. (eds.), *The Rome Statute and Domestic Legal Orders – Vol. II: Constitutional Issues, Cooperation and Enforcement*, 2005, 515, 538 ff.; ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 102.

indigence.<sup>591</sup> It has been asked to do the same in the Ntaganda case.<sup>592</sup> For these situations, as well as its activities under the assistance mandate, the TFV receives funds from the Assembly of States Parties (ASP) and voluntary donations. The court can also transfer seized assets and collected fines to the TFV, according to Art. 79(2) RS.<sup>593</sup>

### III. The Reparation Programs of the International Criminal Court

Other than initially planned, the ICC did not create one set of overarching reparation principles, e.g., at the plenary session of judges.<sup>594</sup> Instead, the court opted to develop them case by case. At the time of writing, four chambers issued reparation orders. Since, naturally, no chamber reinvented the wheel, the orders show strong similarities and introduce first strategies in the ICC reparation practice.<sup>595</sup> They gave rise to overarching reparation principles (1.),

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591 ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Notification d'un Complément Additionnel en Vertu de la Règle 56 du Règlement du Fonds au Profit des Victimes*, ICC-01/04-01/06-3432 (TC II), 2018; ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Notification of the Board of Directors' Decision on the Trial Chamber's Supplementary Complement Request Pursuant to Regulation 56 of the Regulation 5 of the Regulations of the Trust Fund for Victims*, ICC-01/04-01/06-3422 (TC II), 2018; ICC, *The Prosecutor v. Germain Katanga, Notification Pursuant to Regulation 56 of the TFV Regulations Regarding the Trust Fund Board of Director's Decision Relevant to Complementing the Payment of the Individual and Collective Reparations Awards as Requested by Trial Chamber II in its 24 March 2017 Order for Reparations*, ICC-01/04-01/07-3740 (TC II), 2017; ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi, Public Redacted Version of "Monthly Update Report on the Implementation Plan, Including Notification of the Board of Directors' Decision on the Trial Chamber's Complement Request Pursuant to Regulation 56 of the Regulations of the Trust Fund for Victims"*, ICC-01/12-01/15-277-Red (TFV), 2018, para 14 ff.

592 ICC, *The Prosecutor v. Bosco Ntaganda, Reparations Order*, ICC-01/04-02/06-2659 (TC VI), 2021, para 257.

593 ASP, TFV Regulations, regulation 21. On the practical difficulties see Moffett/Sandoval, *Tilting at Windmills Reparations and the International Criminal Court*, 2021 *Leiden J. Intl. L.* 34, 749, 753 f.; Safferling/Petrossian, *Victims Before the International Criminal Court*, 301 ff.

594 Carayon/O'Donohue, *The International Criminal Court's Strategies in Relation to Victims*, 2017 *J. Intl. Crim. Just.* 15(3), 567, 581 f.; Pérez-León-Acevedo, *Reparation Principles at the International Criminal Court*, in: Andenas et al. (eds.), *General Principles and the Coherence of International Law*, 2019, 328, 339 ff.

595 Subsequent reparation orders referred to the first reparation order of the court: ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 30; ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 26; ICC, *Ntaganda Reparations Order*,



which underlie the four reparation programs in the Lubanga (2.), Katanga (3.) Al Mahdi (4.), and Ntaganda (5.) cases.

### 1. General Principles

The Appeals Chamber in Lubanga held that any reparation order must make at least five determinations: (1) The chamber must issue the order against the convicted person; (2) it must identify survivors or set out criteria for identifying them; (3) it must define the harm caused by the crime; (4) it must determine the scope of liability of the convicted person and (5) it must specify the type of reparation ordered, especially whether it shall be individual, collective or both.<sup>596</sup> Chambers in the Katanga, Al Mahdi, and Ntaganda cases confirmed these elements.<sup>597</sup> Only points two, three, and five are relevant to the present study. Points one and four are rooted in the particularities of international criminal law. According to the reparation orders so far, the principal purpose of reparation is to remedy the harm suffered.<sup>598</sup> In addition, reparation shall contribute to reconciliation between the convicted person and survivors.<sup>599</sup>

Art. 75(1) RS foresees restitution, compensation, and rehabilitation as possible forms of reparation. Since that list is not exhaustive, the court can also order satisfaction and guarantees of non-repetition.<sup>600</sup> The court's definitions

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ICC-01/04-02/06-2659, para 29. See also Safferling/Petrosian, *Victims Before the International Criminal Court – Definition, Participation, Reparation*, 2021, 270.

596 ICC, *Lubanga Reparations Order (Appeals Decision)*, ICC-01/04-01/06-3129, para 1.

597 ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 31; ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 38; ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 23.

598 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 179; ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 267; ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 27 f.

599 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 179, 193, 244; ICC, *Lubanga Reparations Order (Appeals Decision)*, ICC-01/04-01/06-3129, para 202 f.; ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 268; Brodney, *Implementing International Criminal Court-Ordered Collective Reparations - Unpacking Present Debates*, 2016 J. Oxford Centre Socio-Legal Stud. 2(1), 19.

600 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 222, 237; ICC, *Lubanga Reparations Order (Appeals Decision)*, ICC-01/04-01/06-3129, para 202 f.; ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 297; ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 46, 67; Moffett, *Justice for Victims Before the ICC*, 176 f.

of these categories match those employed in general international law.<sup>601</sup> The court can order individual, collective, or both kinds of reparation. Possible factors for making that decision are the number of survivors as well as the scope and extent of the damage.<sup>602</sup> Collective reparation is often more appropriate for collective harm or large numbers of eligible survivors since it maximizes the programs' speed and efficiency.<sup>603</sup> In case the chamber orders only collective reparation, there is no need to examine individual applications for reparation. Still, collective reparation measures must benefit eligible individuals.<sup>604</sup>

Eligibility is determined based on the survivor definition in Rule 85 RPE. It resembles the survivor definition in general international law identified above<sup>605</sup>: A survivor is any natural and certain legal persons specified in Rule 85(2) RPE, who suffered harm due to the commission of any crime within the court's jurisdiction. The definition covers direct and indirect survivors. The latter category encompasses persons with a close relationship with the direct survivor or persons who suffered harm while intervening to prevent the violation or help the direct survivor. What constitutes a close relationship depends on the cultural context. It usually covers immediate family members.<sup>606</sup> The court determines causality through a but/for- coupled with a proximate cause test.<sup>607</sup> In conformity with general international law, the ICC employs a broad

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601 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 223 f., 226, 230, 243. For the definitions see above, ch. 1, C.I-V.

602 Rule 97 (1), 98 (2) RPE; ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 271 ff.; ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 67.

603 ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 272 ff.; ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 67, 76; ICC, *Ntaganda Reparations Order*, ICC-01/04-01/07-3728, para 186 ff.; Dwertmann, *The Reparation System of the International Criminal Court*, 121 f.; McCarthy, *Reparations and Victim Support in the International Criminal Court*, 2012, 254 ff.

604 ICC, *Lubanga Reparations Order (Appeals Decision)*, ICC-01/04-01/06-3129, para 152 ff., 214.

605 See above, ch. 1, B.

606 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 194 ff.; ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 37.

607 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 249 f.; ICC, *Lubanga Reparations Order (Appeals Decision)*, ICC-01/04-01/06-3129, para 120, 129; ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 162; ICC, *The Prosecutor v. Germain Katanga, Judgment on the Appeals Against the Order of Trial Chamber II of 24 March 2017 Entitled "Order for Reparations Pursuant to Article 75 of the Statute"*, ICC-01/04-01/07-3778 (AC), 2018, para 49; ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 44; ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 132 f.

understanding of harm.<sup>608</sup> Under the subcategories of damage, loss, and injury, established by Rule 97(1) RPE, it recognized, among others, physical and psychological suffering, financial loss, as well as a loss of reputation, rights, and opportunities.<sup>609</sup>

The form and the general process to identify survivors varies subject to the circumstances of each case.<sup>610</sup> Survivors need to prove their eligibility for reparation on a balance of probabilities.<sup>611</sup> The standard of evidence is lower than in criminal proceedings but the highest standard the court exacts in all survivor participation modes.<sup>612</sup> Evidentiary questions are treated flexibly to take into account the difficulties survivors face in procuring evidence.<sup>613</sup>

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608 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 229 f.; ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 74 ff.; ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 42 ff.; ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 68 ff. For the notion of harm in international law generally see above, ch. 1, B.

609 ICC, *Situation in the Democratic Republic of the Congo, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public Redacted Version)*, ICC-01/04-101-tEN-Corr (PTC I), 2006, para 116, 147; ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 230; ICC, *Lubanga Reparations Order (Appeals Decision)*, ICC-01/04-01/06-3129, para 191; Dwertmann, *The Reparation System of the ICC*, 83; ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeals Against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for Which Thomas Lubanga Dyilo is Liable - Separate Opinion of Judge Luz del Carmen Ibáñez Carranza*, ICC-01/04-01/06-3466-AnxII (AC), 2019, para 96 ff.

610 ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi, Public Redacted Version of "Trust Fund for Victims' Submission of Draft Application Form"*, ICC-01/12-01/15-289 (TFV), 2018, para 10; Contreras-Garduno/Fraser, *The Identification of Victims Before the Inter-American Court of Human Rights and the International Criminal Court and its Impact on Participation and Reparation - A Domino Effect*, 2014 Inter-Am. Eur. Hum. Rts. J. 7(1), 174, 187 f., in relation to the participation process, which can influence the reparation application process. See also the studies on specific cases below, D.III.2.b.aa., 3.b.cc, 4.b.aa.

611 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 252 f.; ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 46 ff.; ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 44; ICC, *Katanga Reparations Order (Appeals Judgment)*, ICC-01/04-01/07-3778, para 42; ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 136; Benzing, *Das Beweisrecht vor Internationalen Gerichten und Schiedsgerichten in Zwischenstaatlichen Streitigkeiten*, 2010, 508.

612 Delagrange, *The Path Towards Greater Efficiency and Effectiveness in the Victim Application Processes of the International Criminal Court*, 2018 Intl. Crim. L. Rev. 18(3), 540, 547 f.

613 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 198; ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 58; ICC, *Katanga Reparations Order*,

To apply for reparation, survivors need to fill out an application form in conformity with Rule 94 RPE, which requires establishing a survivor's identity and address; injury, loss or harm; location and date of the incident, and – if possible – the identity of perpetrators. Furthermore, survivors shall describe lost assets, property, or other items, if they seek restitution and include claims for compensation, rehabilitation, or other forms of remedy, as well as supporting documentation to the extent possible.

Reparation must respect several principles: It must be appropriate, adequate, and prompt.<sup>614</sup> Reparation must respect survivors' dignity and rights, avoid further discrimination or stigmatization, and address previously existing discriminatory structures. The principle of non-discrimination also obliges the court to proactively facilitate access to reparation for all survivors, especially the most vulnerable ones.<sup>615</sup> Survivors shall participate in the process, and the court must take measures to ensure their safety, physical and emotional well-being, and privacy.<sup>616</sup> Particularly vulnerable survivors may be prioritized over others.<sup>617</sup> Lastly, if possible, reparation should contribute to self-sustaining programs.<sup>618</sup>

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ICC-01/04-01/07-3728, para 47, 53, 57 ff., 185; ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeals Against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for Which Thomas Lubanga Dyilo is Liable - Separate Opinion of Judge Luz del Carmen Ibáñez Carranza*, ICC-01/04-01/06-3466-AnxII (AC), 2019, para 161 ff.

- 614 With that the court, as many other sources on reparation, echoes the Hull formula, controversially used for determining compensation for expropriation, see Antkowiak, *A Dark Side of Virtue – The Inter-American Court and Reparations for Indigenous Peoples*, 2014 Duke J. Comp. Intl. L. 25(1), 1, 69. On the formula see Kriebaum/Reinisch, *Property, Right to, International Protection*, in: Peters/Wolfrum, *Max Planck Encyclopedia of International Law*, Online Edition 2019, para 24; Dickerson, *Minimum Standards*, in: Peters/Wolfrum, *Max Planck Encyclopedia of International Law*, Online Edition 2010, para 14 ff.
- 615 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 188 f., 227; ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 30, 267 f.; ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 29 ff., 105; ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 41 ff., 89 ff.
- 616 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 190, 202 ff.; ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 30; ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 32; ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 46 f.
- 617 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 200; ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 140; ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 92 f.
- 618 ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 268; ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 35.

Based on these principles, the ICC currently runs four distinct yet similar reparation programs. They address the harms caused by Thomas Lubanga Dyilo (2.), Germain Katanga (3.), Ahmad Al Faqi Al Mahdi (4.), and Bosco Ntaganda (5.).

## 2. The Lubanga Reparation Program

Thomas Lubanga Dyilo was the first defendant at the ICC. Accordingly, he was also the first person the court ordered to repair survivors. The trial began on 26 January 2009.<sup>619</sup> On 14 March 2012, Lubanga was convicted of enlisting and conscripting child soldiers under the age of 15 and using them to participate actively in hostilities pursuant to Art. 8(2)(e)(vii) and 25(3)(a) RS.<sup>620</sup> The reparation order was handed down on 7 August 2012.<sup>621</sup> As the first reparation proceeding before the court, the Lubanga case was a “pioneer case, associated with judicial and administrative challenges” warranting implementation “in a complex security- and health-context.”<sup>622</sup> The detailed amendment of the reparation order, which the Appeals Chamber issued with considerable delay on 3 March 2015, further evinced the challenges.<sup>623</sup> Implementation suffered severe delays and became increasingly difficult because of the Covid-19 pandemic and a worsening security situation in Ituri.<sup>624</sup>

### a. Case and Harm

The ICC convicted Thomas Lubanga Dyilo for enlisting, conscripting, and using child soldiers during the Ituri Conflict in the DRC between early

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619 ICC, *Launch of the Information Campaign on the Opening of the Trial of Thomas Lubanga Dyilo in Ituri*, 2009.

620 ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Judgment Pursuant to Article 74*, ICC-01/04-01/06 (TC I), 2012.

621 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904.

622 ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Décision Faisant Droit à la Requête du Fonds au Profit des Victimes du 21 Septembre 2020 et Approuvant la Mise en Œuvre des Réparations Collectives Prenant la Forme de Prestations de Services*, ICC-01/04-01-06-3495 (TC II), 2021, para 114, translation by the author.

623 ICC, *Lubanga Reparations Order (Appeals Decision)*, ICC-01/04-01/06-3129.

624 ICC, *Décision Faisant Droit à la Requête du Fonds au Profit des Victimes du 21 Septembre 2020*, ICC-01/04-01-06-3495, para 1 ff., 26 f., 39, 41, 109; ICC, *The Prosecutor v. Bosco Ntaganda, Trust Fund for Victims’ Observations on the Impact of Covid-19 on Operational Capacity*, ICC-01/04-02/06-2517 (TFV), 2020, para 11 ff., 21.

September 2002 and 13 August 2003. The conflict between the Hema and Lendu in the eastern province of the DRC had an ethnic dimension and was fought over political power and resources.<sup>625</sup> Himself a former child soldier, Lubanga presided over the Union des Patriotes Congolais (UPC, later Union de Patriotes Congolais/Reconciliation et Paix, UPC/RP) and was the Commander-in-Chief of its military wing, the Forces Patriotiques pour la Liberation du Congo (FPLC).<sup>626</sup> The ICC found that Lubanga, together with other senior UPC and FPLC officials, devised and carried out the plan to seek military and political control over Ituri. This plan led to the enlistment and conscription of child soldiers below the age of 15 and their use in combat and as bodyguards.<sup>627</sup> Lubanga played an active role in massive recruitment campaigns and used child soldiers as his bodyguards.<sup>628</sup>

Against this background, the court recognized as survivors the children enlisted, conscribed, and used for hostilities as well as their families and other persons with a close relationship to them.<sup>629</sup> The Appeals Chamber determined that the survivors suffered “with respect to direct [survivors]:

- i. Physical injury and trauma;
- ii. Psychological trauma and the development of psychological disorders, such as, inter alia, suicidal tendencies, depression, and dissociative behavior;
- iii. Interruption and loss of schooling;
- iv. Separation from families;
- v. Exposure to an environment of violence and fear;
- vi. Difficulties socializing within their families and communities;
- vii. Difficulties in controlling aggressive impulses; and
- viii. The non-development of ‘civilian life skills’ resulting in the victim being at a disadvantage, particularly as regards employment.

With respect to indirect [survivors]:

- i. Psychological suffering experienced as a result of the sudden loss of a family member;
- ii. Material deprivation that accompanies the loss of the family members’ contributions;

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625 ICC, *Lubanga Verdict*, ICC-01/04-01/06-2842, para 67, 72 ff.

626 ICC, *Lubanga Verdict*, ICC-01/04-01/06-2842, para 81, 1115.

627 ICC, *Lubanga Verdict*, ICC-01/04-01/06-2842, para 1126 ff., 1351 ff.

628 ICC, *Lubanga Verdict*, ICC-01/04-01/06-2842, para 911, 915, 1356.

629 For details on the definition of survivor in the Lubanga case see below, D.III.2.b.aa.

- iii. Loss, injury or damage suffered by the intervening person from attempting to prevent the child from being further harmed as a result of a relevant crime; and
- iv. Psychological and/or material sufferings as a result of aggressiveness on the part of former child soldiers relocated to their families and communities.”<sup>630</sup>

## b. Reparation Efforts

Because of the widespread nature of the crime, the large number of potential survivors, and the contrasting limited number of individual applicants, the chamber decided only to award collective reparation.<sup>631</sup> The reparation order focused on rehabilitation, namely medical services, healthcare, psychological, psychiatric, and social assistance. Reparation should help reintegrate former child soldiers and therefore included education, vocational training, and sustainable work opportunities. Further, the chamber ordered symbolic reparation, including commemorations, tributes, and the wide publication of the ICC’s verdict.<sup>632</sup>

Reparation must be appropriate for survivors of sexualized violence, and consider the age-related and gendered harm child soldiers experienced.<sup>633</sup> Survivors who received reparation from a different source remained eligible, but the court could deduct the amount of reparation already received.<sup>634</sup>

Based on these principles, the TFV filed its initial Draft Implementation Plan in 2015, which the Trial Chamber rejected as too vague. The TFV then filed separate implementation plans for symbolic and service-based collective reparations, which the chamber approved in October 2016 and April 2017, respectively.<sup>635</sup> Due to significant rises in the expected number of

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630 ICC, *Lubanga Reparations Order (Appeals Decision)*, ICC-01/04-01/06-3129, para 191.

631 ICC, *Lubanga Reparations Order (Appeals Decision)*, ICC-01/04-01/06-3129, para 140, 153.

632 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 233 ff.

633 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 207, 210.

634 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 201.

635 ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Order Approving the Proposed Plan of the Trust Fund for Victims in Relation to Symbolic Collective Reparation*, ICC/01/04-01/06-3251 (TC II), 2016; ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Order Approving the Proposed Programmatic Framework for Collective Service-Based Reparations Submitted by the Trust Fund for Victims*, ICC-01/04-01/06-3289 (TC II), 2017.

eligible survivors, the plans may still be subject to change.<sup>636</sup> The complicated process resulted in a complex reparation program. Its assessment is further complicated by the fact that parts of the relevant documents are redacted. The chamber and the TFV devised a detailed and controversial process to enter the program (aa.). The program comprised symbolic (bb.) and service-based reparation (cc.)

#### aa. Program Entry

To start the program, the TFV conducted outreach activities to identify potential survivor populations beyond those who participated in the trial. To that end, it consulted with relevant stakeholders, including local governments, community leaders, and civil society.<sup>637</sup> The TFV took a proactive approach to enable marginalized survivors, especially women, to enter the reparation program.<sup>638</sup> Identified potential survivors were subject to an eligibility-screening interview. Survivors could establish their identity through official or unofficial identification documents, other documents, or a statement signed by two credible witnesses. They could prove their status as a former child soldier through records of the DDR-program, knowledge about the armed group the survivor allegedly had fought for, or military effects, among others.<sup>639</sup> The Victims Participation and Reparations Section (VPRS) conducted a preliminary examination of all applications. It transmitted dossiers of complete applications to the TFV, whose Board of Directors determined each applicant's eligibility. Its decisions were transmitted to the

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636 ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Observations in Relation to the Victim Identification and Screening Process Pursuant to the Trial Chamber's Order of 25 January 2018*, ICC-01/04-01/06-3398 (TFV), 2018, para 33 ff. See below, D.II.2.b.bb.

637 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 200, 205; ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Draft Implementation Plan for Collective Reparations to Victims*, ICC-01/04-01/06-3177-AnxA (TFV), 2015, para 42 f.; ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Thirteenth Progress Report on the Implementation of Collective Reparations*, ICC\_01/04-01/06-3512-Red (TFV), 2021, para 32; ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Fifteenth Progress Report on the Implementation of Collective Reparations*, ICC-01/04-01/06-3524 (TFV), 2021, para 24.

638 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 198; ICC, *Lubanga Draft Implementation Plan*, ICC-01/04-01/06-3177-AnxA, para 45 ff.

639 ICC, *Lubanga Draft Implementation Plan*, ICC-01/04-01/06-3177-AnxA, para 45 ff.



chamber and the Legal Representative for Victims (LRV).<sup>640</sup> Survivors had judicial recourse to the Trial Chamber if the Board denied their eligibility.<sup>641</sup> During the screening process, the TFV also identified vulnerable survivors and those who require urgent assistance for prioritization. Reasons for prioritization were the presence of injuries or harm, requiring an immediate response; the lack of assistance or rehabilitation so far; as well as being a woman, young mother, widow or widower, an orphan, elderly, disabled person, or a single parent head of household.<sup>642</sup> The TFV proposed a deadline for applying to the reparation program six months before the program ended because a later entry was impossible to process. The Trial Chamber followed that suggestion with the exact cut-off date being redacted.<sup>643</sup>

The eligibility screening procedure was subject to a hard-fought controversy. In the beginning, the Trial Chamber demanded that the TFV compiled much more detailed dossiers of potential survivors to assess the scope of Lubanga's liability.<sup>644</sup> The TFV strongly rejected that approach, especially after employing it in one field mission. According to the TFV, the level of detail the chamber required made the process slow, costly, and cumbersome for survivors. An interview took 4-5 hours, sometimes even more than a day. Since many survivors incurred travel costs and could not earn a living during the interview, the process placed a tremendous burden on them. Accordingly, some potential survivors did not conclude the process. The interview attained

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640 ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Annexe A au Sixième Rapport sur le Progrès de la Mise en Œuvre des Réparations Collectives Conformément aux Ordonnances de la Chambre de Première Instance II des 21 Octobre 2016 (ICC-01/04-01/06-3251) et 6 Avril 2017 (ICC-01/04-01/06-3289) et la Décision du 7 Février 2019 (ICC-01/04-01/06-3440-Red)*, ICC-01/04-01/06-3467-AnxA-Red (TFV), 2019, para 44 f.

641 ICC, *Observations on the Victim Identification and Screening Process*, ICC-01/04-01/06-3398, para 16; ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Decision Approving the Proposals of the Trust Fund for Victims on the Process for Locating New Applicants and Determining Their Eligibility for Reparations*, ICC-01/04-01/06-3440-Red-tENG (TC II), 2019, para 34 ff.

642 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 200; ICC, *Lubanga Draft Implementation Plan*, ICC-01/04-01/06-3177-AnxA, para 29 ff., 56 f.; ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Eighteenth Progress Report on the Implementation of Collective Reparations*, ICC-01/04-01/06-3537-Red (TFV), 2022, para 39(i), (ii).

643 ICC, *Observations on the Victim Identification and Screening Process*, ICC-01/04-01/06-3398, para 23 ff.; ICC, *Decision Approving the Process for Locating New Applicants*, ICC-01/04-01/06-3440-Red-tENG, para 41 f.

644 ICC, *Order to Supplement Lubanga Draft Implementation Plan*, ICC-01/04-01/06-3198, para 17; Brodney, *Implementing International Criminal Court-Ordered Collective Reparations*, 24 ff.

an adversarial dynamic, and the detailed questions retraumatized many interviewees. The slow pace and high costs put a strain on the TFV's limited resources and further delayed the start of the reparation program.<sup>645</sup> These complications exacerbated existing challenges. The trauma experienced by many survivors impeded their ability to describe their harm, express needs, and emotions. Many survivors voiced security concerns. Some communities exerted pressure on survivors not to come forward because they still supported Lubanga. Shame and stigma kept more survivors from accessing the program. These concerns and the pressure affected female survivors in particular. They made it hard, if not impossible, to go through with the detailed and comprehensive determination of eligibility the chamber demanded. The procedure likely negatively affected survivors and the reparation program as a whole. Despite these concerns, the chamber stood by its order and only allowed for the less strict procedure described above after setting Lubanga's liability.<sup>646</sup> In practice, the survivor identification process became increasingly difficult due to the worsening security situation in Ituri.<sup>647</sup> Even though the Covid-19 pandemic and local containment measures had halted the process for a while,<sup>648</sup> the Trial Chamber ordered that the last reparation applications should be transmitted to the VPRS on 31 December 2020.<sup>649</sup> It since twice extended the deadline for identifying potential survivors until it was reached on 1 October 2021.<sup>650</sup>

Once deemed eligible – be it through the original demanding or the later simplified procedure – each survivor automatically began the reparation process with a local counselor. In their first session, the counselor oriented

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645 ICC, *First Submission of Victim Dossiers*, ICC-01/04-01/06-3208, para 16, 39 ff., 46, 60 ff., 78 ff.

646 ICC, *Order on Request of OPCV*, ICC-01/04-01/06-3252, para 11 ff.; ICC, *Decision Approving the Process for Locating New Applicants*, ICC-01/04-01/06-3440-Red-tENG, para 19.

647 ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Further Information on the Reparations Proceedings in Compliance With the Trial Chamber's Order of 16 March 2018*, ICC-01/04-01/06-3399-Red (TC II), 2018, para 18 ff. and above, fn. 624.

648 ICC, *TFV Observations on the Impact of Covid-19*, ICC-01/04-02/06-2517 (TFV), 2020, para 16.

649 ICC, *Décision Faisant Droit à la Requête du Fonds au Profit des Victimes du 21 Septembre 2020*, ICC-01/04-01-06-3495, para 36.

650 ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Decision on the Submissions by the Legal Representative of Victims V01 in its Response to the Twelfth Report of the Trust Fund for Victims on the Implementation of Collective Reparations*, ICC-01/04-01/06-3508 (TC II), 2021, para 15 ff. and operative paragraphs; ICC, *Lubanga, Fifteenth Progress Report*, ICC-01/04-01/06-3524, para 10 ff.

the survivor in the reparation process. The survivor and the counselor discussed the reparation process and the measures available, collected basic information about the survivor, their experiences, and coping strategies. In further sessions over several months, the counselor gained a deeper understanding of the survivor's harm. As a result, the program counted with the necessary information. The survivor, on the other hand, enjoyed enhanced mental health, better thought, and coping capacity, as well as tools to manage stress. Without such preparation, the TFV feared that highly traumatized survivors could not take full advantage of service-based reparation measures, which followed the counseling.<sup>651</sup> The staff involved in the process had to behave in a way to prevent further stigmatization, victimization, and re-traumatization.<sup>652</sup> Beyond counseling upon entry into the program, the TFV's implementation plan foresaw a range of collective symbolic (bb.) and service-based reparation measures (cc.).

#### bb. Symbolic Reparation

The symbolic collective measures served to raise awareness about the consequences of recruiting child soldiers, enabling their reintegration and rehabilitation. The measures encompassed three fixed and five mobile community centers.<sup>653</sup> The former were supposed to be a space for dialogue about Lubanga's crimes, the harm they caused, and survivors' reintegration. The communities should actively shape the spaces themselves. The Fund envisioned that the centers would host exhibitions and other artistic events relating to the crimes. The communities were to choose certain design features of the buildings. The centers should be built preferably by local builders and masons, especially those which employed former child soldiers. The TFV chose the fix centers' location based on the views survivors expressed, the hosting communities' connection to the crime, their size, and their importance.<sup>654</sup>

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651 ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Information Regarding Collective Reparation*, ICC-01/04-01/06-3273 (TFV), 2017, para 92 ff.

652 ICC, *Lubanga Draft Implementation Plan*, ICC-01/04-01/06-3177-AnxA, para 87; ICC, *Information Regarding Collective Reparation*, ICC-01/04-01/06-3273, para 89.

653 ICC, *Filing Regarding Symbolic Collective Reparations*, ICC-01/04-01/06-3223, para 29.

654 ICC, *Filing Regarding Symbolic Collective Reparations*, ICC-01/04-01/06-3223, para 31 ff.

The mobile community centers should cover communities outside the reach of the fix centers. They, too, should host awareness-raising events, the highlight of which would be a yearly commemoration week. In preparation for that event, the TFV would train local leaders, including young people, in memorialization and reconciliation activities, children’s rights, the harms suffered by former child soldiers, and mediation techniques. Leading up to the event, local leaders and experts, e.g., psychologists, would conduct radio broadcasts. They would discuss the harm child soldiers experienced and how to reintegrate them into the communities. During the commemoration week, other radio programs would be broadcasted, artistic events organized, and the communities would hold open debates about the crimes and how they had affected them.<sup>655</sup>

Symbolic reparation measures served to create an enabling climate for the service-based reparation measures that should follow them. By increasing awareness about former child soldiers’ suffering and their challenges, symbolic reparation should reduce stigma, discrimination, and resentment. Without these measures, the TFV feared that a hostile and discriminatory environment for former child soldiers could undermine the success of the subsequent therapeutic and socio-economic reparation measures.<sup>656</sup>

The worsening security situation in Ituri challenged the implementation of symbolic reparation measures. The TFV wanted to halt its call for tender for symbolic reparation in April 2018. It evaluated the possibility of reopening it in October 2018. By then, however, three years had passed since survivors had been consulted. Given the worsened security situation and Lubanga’s release from prison, they now objected to the planned symbolic reparation measures, especially the commemoration centers. Hence, the TFV planned to consult the affected communities anew and restart identifying implementing partners.<sup>657</sup> It did so in 2022 and formed committees of survivors, civil society, and authorities of the relevant community to monitor the construction of the centers and the implementation of symbolic reparation measures. Constructions are currently set to begin in March 2023.<sup>658</sup>

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655 ICC, *Filing Regarding Symbolic Collective Reparations*, ICC-01/04-01/06-3223, para 38 ff.

656 ICC, *Filing Regarding Symbolic Collective Reparations*, ICC-01/04-01/06-3223, para 13.

657 ICC, *Décision Faisant Droit à la Requête du Fonds au Profit des Victimes du 21 Septembre 2020*, ICC-01/04-01-06-3495, para 27, 109.

658 ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Seventeenth Progress Report on the Implementation of Collective Reparations*, ICC-01/04-01/06-3533-Red (TFV), 2022,

## cc. Service-Based Reparation

Service-based reparation measures should enhance survivors' psychological and physical health and rebuild their socio-economic opportunities.<sup>659</sup> The TFV operated on the presumption that all eligible survivors suffered psychosocial harm, making potentially damaging in-depth inquiries into their mental health unnecessary.<sup>660</sup> To remedy this harm, the Fund wanted to offer the psychological counseling described above to all survivors who entered the program.<sup>661</sup> In response to the enormous caseload, a limited number of health care professionals would train local non-professional counselors. The counselors should be recruited with an eye to gender parity. They received two weeks of intensive training on the psychosocial impacts of the crimes, how to carry out interventions and psychosocial assessments as well as gender sensitivity training.<sup>662</sup> In a so-called life skill program for all survivors, the counselors met weekly with groups of ten survivors for roughly three months. After a one-on-one psychosocial assessment, they counseled them on coping with their traumatic experiences, communicating effectively, managing daily life, and dealing with interpersonal conflicts, among others. Survivors with more severe psychological ailments should receive additional weekly counseling of approximately three months in groups of eight to ten people. Here, the group focused on coping strategies, tackling traumatic experiences, coping with the loss of loved ones, and other interventions.<sup>663</sup> After the life skill program and group counseling had ended, the counselors would mentor the participants and provide follow-up.<sup>664</sup> In addition, survivors was provided with a phone number after the intake

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para 28 ff.; ICC, *Lubanga Eighteenth Progress Report*, ICC-01/04-01/06-3537-Red, para 43 ff.

659 ICC, *Information Regarding Collective Reparation*, ICC-01/04-01/06-3273, para 81.

660 ICC, *Information Regarding Collective Reparation*, ICC-01/04-01/06-3273, para 86; ICC, *Lubanga Draft Implementation Plan (General Part)*, ICC-01/04-01/06-3177, para 271; ICC, *Lubanga Draft Implementation Plan*, ICC-01/04-01/06-3177-AnxA, para 71, 80.

661 ICC, *Information Regarding Collective Reparation*, ICC-01/04-01/06-3273, para 85 ff. See above, D.III.2.b.aa.

662 ICC, *Information Regarding Collective Reparation*, ICC-01/04-01/06-3273, para 98; ICC, *Lubanga Draft Implementation Plan*, ICC-01/04-01/06-3177-AnxA, para 116 ff.

663 ICC, *Lubanga Draft Implementation Plan*, ICC-01/04-01/06-3177-AnxA, para 125, 138 ff.

664 ICC, *Lubanga Draft Implementation Plan*, ICC-01/04-01/06-3177-AnxA, para 125, 130 ff., 147 ff.

procedure they could reach in case they needed to reach a psychologists.<sup>665</sup> All psychological interventions were to be adapted to the survivors' beliefs.<sup>666</sup>

To remedy the bodily harm survivors endured, the TFV would provide subsidized access to health care based on contracts with local doctors and hospitals. The implementing partner should discuss a treatment plan with the survivor and adjust it to their needs and employment obligations.<sup>667</sup> The TFV helped with admittance, attaining treatment, managing bills, transport costs, counseling during treatment, and follow-up. It supported survivors with physiotherapy and assistive mobility devices such as wheelchairs and crutches.<sup>668</sup>

Educational and material benefits would even out socio-economic harm. The TFV would develop training courses based on a local market analysis it would conduct together with survivors. The courses would include accelerated literacy and numeracy classes. These would enable survivors to fully benefit from more advanced training afterward, such as masonry or carpentry. To offer the courses, the TFV planned to conclude memoranda of understanding with local accredited vocational schools and institutes. Every survivor would have an individual consultation with a social worker to choose the best available training option based on their education level, experience, interests, and other factors. The training schedules would be flexible to allow survivors to meet other commitments. Survivors would also receive payments for their training duration to ensure that they could meet other obligations. The program would facilitate transport and admittance of survivors, manage bills, provide follow-up and mentoring after the training had concluded.<sup>669</sup> In addition, the Fund would offer training on improved agricultural techniques. It would help select suitable and profitable crops based on market analysis, facilitate access to markets and provide pricing data. Home visits ensured follow-up.<sup>670</sup> After conducting studies and in-depth need assessments, the TFV started implementing the vocational training at the end of 2021. Survivors

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665 ICC, *Lubanga Eighteenth Progress Report*, ICC-01/04-01/06-3537-Red, para 23

666 ICC, *Décision Faisant Droit à la Requête du Fonds au Profit des Victimes du 21 Septembre 2020*, ICC-01/04-01-06-3495, para 150 ff.

667 ICC, *Information Regarding Collective Reparation*, ICC-01/04-01/06-3273, para 102 ff.

668 ICC, *Information Regarding Collective Reparation*, ICC-01/04-01/06-3273, para 103.

669 ICC, *Information Regarding Collective Reparation*, ICC-01/04-01/06-3273, para 111 ff.; ICC, *Lubanga Draft Implementation Plan*, ICC-01/04-01/06-3177-AnxA, para 160 ff.; ICC, *Décision Faisant Droit à la Requête du Fonds au Profit des Victimes du 21 Septembre 2020*, ICC-01/04-01-06-3495, para 141 f., 144 f.

670 ICC, *Information Regarding Collective Reparation*, ICC-01/04-01/06-3273, para 118 ff.

were trained, inter alia for setting up taxi-services, selling food, or being a mechanic.<sup>671</sup> The TFV wanted to help create savings and loan associations. In these, 20-30 survivors pooled their savings to give microcredits to each other in turn. To obtain a loan, applicants must present a business plan, which the group subsequently voted on.<sup>672</sup> Later, the TFV also planned to give pensions to certain vulnerable survivors.<sup>673</sup> Lastly, based on wishes survivors relayed to the Office of the Public Counsel for the Victims (OPCV), the TFV planned a project for the localization and identification of missing child soldiers. However, until the date of writing, the TFV was unable to identify an organization or individuals suitable to deliver such a project in Ituri.<sup>674</sup>

The TFV deemed it vital to build upon existing infrastructure when delivering service-based reparation.<sup>675</sup> A potential problem was the geographical reach of the measures. The TFV demanded that potential implementing partners suggested how they could include survivors living in more isolated locations.<sup>676</sup>

Implementation of service-based reparation seemed to progress faster than the collective reparation projects. Still, it was not without detours. Newly identified survivors changed what the TFV perceived as survivors' expectations and wishes for service-based reparation measures. They also came up with their own ideas for reparation measures, which the TFV wanted to support. Accordingly, the TFV adapted its search for implementing partners and the projects it defined together with them.<sup>677</sup> In January 2021, the TFV identified implementing partners and evaluated four proposals for service-based collective reparation projects. The Trial Chamber approved the project

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671 ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Information Provided Pursuant to Regulation 28 of the Regulations of the Court in Relation to the Trust Fund's "Fifteenth Progress Report on the Implementation of Collective Reparations"*, ICC-01/04-01/06-3527 (TFV), 2021, para 10; ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Sixteenth Progress Report on the Implementation of Collective Reparations*, ICC-01/04-01/06-3530-Red (TFV), 2022, para 20.

672 ICC, *Information Regarding Collective Reparation*, ICC-01/04-01/06-3273, para 123 ff.

673 ICC, *Décision Faisant Droit à la Requête du Fonds au Profit des Victimes du 21 Septembre 2020*, ICC-01/04-01-06-3495, para 143, 146.

674 ICC, *Lubanga Information on Fifteenth Progress Report*, ICC-01/04-01/06-3527, para 17.

675 ICC, *Information Regarding Collective Reparation*, ICC-01/04-01/06-3273, para 54.

676 ICC, *Information Regarding Collective Reparation*, ICC-01/04-01/06-3273, para 36.

677 ICC, *Further Information on the Reparations Proceedings*, ICC-01/04-01/06-3399-Red, para 23 ff.

proposals in March 2021 with some minor modifications.<sup>678</sup> Roughly 30 % of the direct project costs were allocated to psychological support, 15 % to physical rehabilitation, and 55 % to socio-economic measures. These measures were supposed to be implemented in parallel.<sup>679</sup>

Generally the difficult security situation in Ituri and the Covid-19 pandemic continued to hinder the effective implementation of the reparation program.<sup>680</sup> Because of that and the long time that passed since the beginning of the survivor identification process, the TFV encountered great problems reaching eligible survivors.<sup>681</sup> Additionally, the TFV had problems coming up with the envisaged funds.<sup>682</sup>

### 3. The Katanga Reparation Program

The ICC's second reparation program redressed the harm Germain Katanga had caused by committing crimes against humanity and war crimes pursuant to Art. 7(1)(a), 8(2)(c)(i), (e)(i), (e)(v), (e)(xii), 25(3)(d) RS.<sup>683</sup> His trial began on 24 November 2009.<sup>684</sup> He was convicted on 7 March 2014. Trial Chamber II handed down the reparation order on 24 March 2017.<sup>685</sup> As in the Lubanga case, implementation likely became more difficult in 2020 due to Covid-19 and a worsening security situation in Ituri.<sup>686</sup>

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678 ICC, *Décision Faisant Droit à la Requête du Fonds au Profit des Victimes du 21 Septembre 2020*, ICC-01/04-01-06-3495, para 38, 87, 122 ff.

679 ICC, *Décision Faisant Droit à la Requête du Fonds au Profit des Victimes du 21 Septembre 2020*, ICC-01/04-01-06-3495, para 88, 135.

680 ICC, *Lubanga Thirteenth Progress Report*, ICC-01/04-01/06-3512-Red, para 11 ff., 32; ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Fourteenth Progress Report on the Implementation of Collective Reparations*, ICC-01/04-01/06-3519-Red (TFV), 2021, para 17 ff.; ICC, *Lubanga Sixteenth Progress Report*, ICC-01/04-01/06-3530-Red, para 9 f.; ICC, *Lubanga Eighteenth Progress Report*, ICC-01/04-01/06-3537-Red, para 8 ff.

681 ICC, *Lubanga, Fifteenth Progress Report*, ICC-01/04-01/06-3524, para 19; ICC, *Lubanga Sixteenth Progress Report*, ICC-01/04-01/06-3530-Red, para 21.

682 ICC, *Lubanga Eighteenth Progress Report*, ICC-01/04-01/06-3537-Red, para 39.

683 ICC, *The Prosecutor v. Germain Katanga, Judgment Pursuant to Article 74 of the Statute*, ICC-01/04-01/07-3436, 2014.

684 ICC, *Opening of the Trial in the Case of Germain Katanga and Mathieu Ngudjolo Chui on 24 November, 2009*, 2009.

685 ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728.

686 ICC, *TFV' Observations on the Impact of Covid-19*, ICC-01/04-02/06-2517 (TFV), 2020, para 11 ff., 21.



a. Case and Harm

Germain Katanga led the Force de Résistance Patriotique d'Ituri (FRPI),<sup>687</sup> a Ngiti militia in the abovementioned Ituri conflict – the Ngiti being a subgroup of the Lendu.<sup>688</sup> Katanga's trial concentrated on his responsibility for the attack on the village of Bogoro on 24 February 2003. During the attack, the Ngiti militia – which gradually adopted the name FRPI – committed a series of crimes against humanity and war crimes. Among those were indiscriminate killings mostly of the Hema, sexualized violence, destruction of civilian buildings, and pillaging. Furthermore, the FRPI used child soldiers under the age of 15 in the attack.<sup>689</sup> Katanga was convicted pursuant to Art. 25(3)(d) RS for having provided logistical support to the attack.<sup>690</sup> The chamber acquitted him of responsibility for sexualized violence and the use of child soldiers.<sup>691</sup>

In the reparation proceedings, the chamber found that the attack on Bogoro caused significant economic and moral harm. Different property categories were destroyed or pillaged, including housing, personal effects, livestock, and houseware.<sup>692</sup> Survivors experienced psychological harm from witnessing the attack and especially from the deaths of relatives. They suffered losses of opportunity, standard of living, and forced departure.<sup>693</sup>

b. Reparation Efforts

The Trial Chamber deemed 297 survivors of the attack on Bogoro eligible for reparation. Considering the manageable caseload, it awarded both individual and collective reparation.<sup>694</sup> Individual reparation consisted of 250 USD for each survivor as a symbolic acknowledgment of their suffering.<sup>695</sup> The

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687 Patriotic Resistance Force in Ituri.

688 ICC, *The Prosecutor v. Germain Katanga, Judgment Pursuant to Article 74 of the Statute*, ICC-01/04-01/07-3436 (TC II), 2014, para 702, 1360 ff. On the Ituri conflict see also above, D.III.2.a.

689 ICC, *Katanga Verdict*, ICC-01/04-01/07-3436, para 817, 824, 828, 833, 849, 924, 932, 1032, 1084.

690 ICC, *Katanga Verdict*, ICC-01/04-01/07-3436, para 1360 ff., 1671 ff.

691 ICC, *Katanga Verdict*, ICC-01/04-01/07-3436, para 1085, 1664.

692 ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 77, 87, 95 ff.

693 ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 122, 129, 139.

694 ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 168, 281 ff., 287.

695 ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 300. For a critique see Moffett/Sandoval, *Tilting at Windmills*, 759.

chamber ordered collective reparation measures in housing, income generation, education, and psychological support. Within these areas, the reparation measures should provide some flexibility to accommodate different needs.<sup>696</sup> The chamber allowed prioritizing some survivors based on their vulnerability or urgent need for care.<sup>697</sup> The Appeals Chamber largely confirmed the order.<sup>698</sup> Based on the chamber's determination, the TFV drafted an implementation plan, which contained the ICC's most complex reparation program to date.<sup>699</sup> For survivors who proved their eligibility following a special procedure (aa.), it offered complex reparation measures (bb.), which made a special intake procedure necessary (cc.)

#### aa. Eligibility

The 297 survivors had to prove their eligibility on a balance of probabilities. Recognizing the passage of time, the ample destruction, and unavailability of evidence, the chamber allowed circumstantial evidence. It established far-reaching presumptions in favor of the applicants. For example, based on general information about Bogoro and the attack, the chamber presumed that anyone who lived in Bogoro at the time in question suffered pillaging. It also presumed a minimum amount of harm of pillaging of livestock based on the per capita consumption of that good in Bogoro at the time the crime was committed.<sup>700</sup>

#### bb. Reparation Measures

Survivors should choose whether they received their individual compensation of 250 USD in installments or as a lump sum payment. They were guaranteed a “timely, confidential and discrete transfer,” which could include assistance with setting up a bank account. The TFV had to account for gender

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696 ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 301 ff.

697 ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 310.

698 ICC, *Katanga Reparations Order (Appeals Judgment)*, ICC-01/04-01/07-3778.

699 ICC, *Katanga Draft Implementation Plan*, ICC-01/04-01/07-3751, para 113.

700 ICC, *Katanga Reparations Order*, ICC-01/04-01/07-3728, para 45 ff., 68 ff., 76 ff.

and power dynamics when meting out individual compensation.<sup>701</sup> The TFV implemented this measures fairly quickly.<sup>702</sup>

The Fund proposed measures for each of the four collective reparation areas targeted at different needs within the survivor population. In housing assistance, the TFV wanted to aid with purchasing or constructing and furnishing a new home, expanding an existing home, buying land, or paying rent. In education, the Fund planned to award two years of school fees on a primary or secondary level for two children or minor dependents of survivors, as well as a school material kit. As an income-generating activity, the TFV sought to offer vocational training, e.g., in animal husbandry, small business, and agriculture, as well as training on developing business plans and budgets. It would provide business kits – e.g., a sewing machine and material to make clothes – or livestock and veterinary kits. The TFV wanted to assist survivors seeking higher education with the payment of university fees and enrolment. Assistance with creating savings and loans associations<sup>703</sup> should facilitate small business opportunities. In the last area of psychological support, the TFV wanted to offer individual and group therapy and a referral procedure for individuals requiring specialized intensive treatment.<sup>704</sup> Since psychological services were unavailable in the region, the TFV liaised with a local psychologist who identified persons well-placed to receive training on managing PTSD. These could counsel survivors under the psychologist's supervision. The TFV further educated survivors and other members of the community on how to recognize PTSD through a pamphlet and other measures.<sup>705</sup>

While this collective reparation program should benefit the survivors who continued to live in the DRC, a second, similar program should aim at those who had fled to Uganda. It could differ slightly because of legal limitations related to survivors' refugee status. Several survivors participated in resettlement programs to Europe or the US. Because a comparable collective reparation program for them would exceed budgetary capacities,

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701 ICC, *Katanga Draft Implementation Plan*, ICC-01/04-01/07-3751, para 115.

702 ICC, *The Prosecutor v. Germain Katanga, Report on the Trust Fund's Execution of the Payment of the Individual Reparations Awards*, ICC-01/04-01/07-3772 (TFV), 2017, para 28.

703 These associations were described above, D.III.2.a.cc.

704 ICC, *Katanga Draft Implementation Plan*, ICC-01/04-01/07-3751, para 105 f., 124 ff.

705 ICC, *The Prosecutor v. Germain Katanga, Public Redacted Version of the Fifth Quarterly Update Report*, ICC-01/01-04/07-3885-Red (TFV), 2021, para 44 ff.; ICC, *The Prosecutor v. Germain Katanga, Third Quarterly Update Report*, ICC-01/04-01/07-3870-Red2 (TFV), 2021, para 34 ff.

they would receive another symbolic monetary award. Publicly available documents did not specify its amount.<sup>706</sup> In the implementation phase, the TFV learned that implementing the planned reparation program in refugee settlements in Uganda would present too many obstacles and that some survivors there were in the process of resettlement. For these reasons, it decided to treat the survivors in Uganda as those in other countries, providing them with compensation.<sup>707</sup>

Not all survivors were to receive all collective reparation measures. The TFV categorized survivors based on harm. The five survivor categories were eligible for different reparation packages<sup>708</sup>:

<b>Survivor Category</b>	<b>Reparation Package</b>
(1) Loss of home and live-stock	<ul style="list-style-type: none"> <li>– Housing</li> <li>– Education</li> <li>– Income-generating activity (one cow and a veterinary kit, plus additional activities chosen by the survivor. Details were redacted)</li> <li>– Psychological rehabilitation</li> </ul>
(2) Loss of home or equivalent material loss	<ul style="list-style-type: none"> <li>– Housing</li> <li>– Education</li> <li>– Income-generating activity</li> <li>– Psychological rehabilitation</li> </ul>
(3) Loss of immediate family member	<ul style="list-style-type: none"> <li>– Housing <i>or</i></li> <li>– Education <i>and</i></li> <li>– Income-generating activities (one cow and a veterinary kit) <i>and</i></li> <li>– Psychological rehabilitation</li> </ul>
(4) Loss of personal affairs and minor material loss	<ul style="list-style-type: none"> <li>– Housing <i>or</i></li> <li>– Education <i>or</i></li> <li>– Income-generating activities <i>and</i></li> <li>– Psychological rehabilitation</li> </ul>
(5) Moral Harm only partially covered by the individual award	<ul style="list-style-type: none"> <li>– Psychological rehabilitation</li> </ul>

Figure 2: *Katanga Reparation Measures (created by the author)*

706 ICC, *Katanga Draft Implementation Plan*, ICC-01/04-01/07-3751, para 60 ff.

707 ICC, *The Prosecutor v. Germain Katanga, Information Relevant to the Modalities of Implementation of Collective Reparations*, ICC-01/04-01/07-3811 (TFV), 2018, para 9 v.

708 Based on ICC, *Katanga Draft Implementation Plan*, ICC-01/04-01/07-3751, para 99.

Categories one, two, four, and five contained two subcategories for survivors who lost one family member or several family members in addition to the harm in the respective main category. They should receive augmented reparation packages containing one and two additional cows and veterinary kits, respectively.<sup>709</sup> A third subcategory encompassed survivors who lost a family home. It covered cases where a family, not individual survivors, suffered the harm grouped in main category one or two.<sup>710</sup> Survivors in this subcategory were to receive additional reparation based on the size of the home lost. Details were redacted.<sup>711</sup> The program also gave survivors a degree of flexibility. They could forgo the benefit of one category to increase the benefits received under another. For example, a childless survivor could substitute their education assistance with more housing assistance or an additional cow under the income-generating activity category. Survivors could also designate their individual award of 250 USD to top up collective awards. They could, for example, build additional rooms in the housing category, receive additional livestock or school fees for additional children.<sup>712</sup>

During implementation, the TFV frequently had to adjust the program. Survivors chose the purchase motorcycles, produce and the opening of small restaurants and bakeries as income-generating-activity.<sup>713</sup> The TFV chose an approach to allow maximum survivor participation in choosing the products for purchase.<sup>714</sup> As reaction to supply chain problems and price increases, the TFV allowed survivors to shift from originally chosen motorcycles to other options or cheaper models.<sup>715</sup> When procuring housing proved difficult, some survivors also shifted to other reparation modalities.<sup>716</sup> When the government announced in 2019 that basic education would be

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709 ICC, *Katanga Draft Implementation Plan*, ICC-01/04-01/07-3751, para 96 f.

710 ICC, *Katanga Draft Implementation Plan*, ICC-01/04-01/07-3751, para 81 ff.

711 ICC, *Katanga Draft Implementation Plan*, ICC-01/04-01/07-3751, para 99 f.

712 ICC, *Katanga Draft Implementation Plan*, ICC-01/04-01/07-3751, para 100 ff.

713 ICC, *The Prosecutor v. Germain Katanga, Update Report on the Implementation of the Collective Reparations Awards*, ICC-01/04-01/07-3836-Red, 2019 (TFV), para 35; ICC, *The Prosecutor v. Germain Katanga, Second Quarterly Update Report*, ICC-01/04-01/07-3865-Red (TFV), para 11 ff.

714 ICC, *Katanga Update Report July 2019*, ICC-01/04-01/07-3836-Red, para 26, 28.

715 ICC, *Katanga Second Quarterly Update Report*, ICC-01/04-01/07-3865-Red, para 26 f.; ICC, *The Prosecutor v. Germain Katanga, Update Report on the Implementation of the Collective Reparations Awards*, ICC-01/04-01/07-3857-Red (TFV), 2020, para 50 ff.

716 ICC, *The Prosecutor v. Germain Katanga, Fourth Quarterly Update Report*, ICC-01/04-01/07-3878-Red (TFV), 2021, para 15 ff.

free, the education component of the reparation program lost much of its value. Therefore, the TFV allowed survivors to shift that reparation modality towards an income-generating-activity.<sup>717</sup> Generally, the dwindling security situation in Ituri coupled with the Ebola- and Covid-19-outbreak impeded implementation.<sup>718</sup>

cc. Intake

Given the complexity of awards and options provided, the TFV suggested a particular intake procedure for eligible survivors. They should meet, among other things, with TFV staff and the implementing partner, a financial advisor, and a counselor. First, the survivor and the financial advisor should discuss the transfer of the money and whether it should be paid in installments or as a lump sum. They should explore possible uses of the individual award, including coupling it with collective reparation measures. Those survivors who received education assistance should devise a plan with the financial advisor to ensure that survivors could cover school fees beyond the two years supported by the reparation program. Then, the survivor could select the measures suitable to their situation and confirm them with the TFV and implementing partner staff. Lastly, the survivor would meet with the counselor to discuss available therapy options. They were to assess the survivor's needs and – if warranted and wanted – could schedule individual or group therapy sessions. The counselor should further inform the survivor that they could access therapy at any point during the reparation program. The TFV planned to take special measures to meet the needs of women and girl survivors and mitigate the challenges they faced when accessing reparation measures.<sup>719</sup> The TFV and LRV conducted this process in the beginning of 2018.<sup>720</sup>

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717 ICC, *Katanga Update Report July 2020*, ICC-01/04-01/07-3857-Red, para 39 ff.; ICC, *Katanga Second Quarterly Update Report*, ICC-01/04-01/07-3865-Red, para 8 ff.

718 ICC, *The Prosecutor v. Germain Katanga, Update Report on the Implementation of the Collective Reparations Awards*, ICC-01/04-01/07-3836-Red (TFV), 2019, para 15 ff.; ICC, *Katanga Update Report July 2020*, ICC-01/04-01/07-3857-Red, para 18 ff.; ICC, *Katanga Fourth Quarterly Update Report*, ICC-01/04-01/07-3878-Red, para 11, 26.

719 ICC, *Katanga Draft Implementation Plan*, ICC-01/04-01/07-3751, para 114 ff.

720 ICC, *Katanga Information Relevant to the Modalities of Implementation of Collective Reparations*, ICC-01/0401/07-3811, para 12 ff.

#### 4. The Al Mahdi Reparation Program

The ICC's third reparation program followed the trial against Ahmad Al Faqi Al Mahdi, which began on 22 August 2016.<sup>721</sup> Due to Al Mahdi's admission of guilt, it was the shortest trial before the ICC to date, the verdict and sentence being rendered on 27 September 2016.<sup>722</sup> The reparation order was issued on 17 August 2017 and was largely confirmed by the Appeals Chamber on 8 March 2018.<sup>723</sup>

##### a. Case and Harm

Ahmad Al Faqi Al Mahdi played crucial roles in the insurgent government in northern Mali in 2012 of the radical Islamist groups Ansar Dine and Al-Qaeda in the Islamic Maghreb. The groups had established a strict administration over the area following their interpretation of sharia law. Al Mahdi was deemed an expert in religious matters. The newly established "Islamic Tribunal" consulted him frequently, and he headed the morality brigade "Hesbah", which regulated the people's morality.<sup>724</sup> In mid-2012, the "governor" of northern Mali ordered Al Mahdi to destroy religious buildings in Timbuktu because the local population used them for prayer and pilgrimage. Nine mausoleums and the door of one mosque were destroyed under Al Mahdi's control and supervision. The United Nations Educational, Scientific and Cultural Organization (UNESCO) listed all sites except for one mausoleum as world heritage.<sup>725</sup> Al Mahdi bought and distributed tools for their destruction, gave moral support, and participated in five of the ten attacks. He explained and justified the attacks to journalists.<sup>726</sup> On 27 September 2016, Al Mahdi was sentenced to nine years in prison as a co-perpetrator of the war crime of attacking historic and religious buildings and monuments pursuant to Art. 8 (2)(e)(iv) and 25 (3)(a) RS.<sup>727</sup>

721 ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi, Judgment and Sentence*, ICC-01/12-01/15-171 (TC VII), 2016, para 7.

722 ICC, *Al Mahdi Judgment and Sentence*, ICC-01/12-01/15-171.

723 ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236; ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi, Public Redacted Judgment on the Appeal of the Victims Against the "Reparations Order"*, ICC-01/12-01/15-259-Red2 (AC), 2018.

724 ICC, *Al Mahdi Judgment and Sentence*, ICC-01/12-01/15-171, para 31 ff.

725 ICC, *Al Mahdi Judgment and Sentence*, ICC-01/12-01/15-171, para 39.

726 ICC, *Al Mahdi Judgment and Sentence*, ICC-01/12-01/15-171, para 34 ff.

727 ICC, *Al Mahdi Judgment and Sentence*, ICC-01/12-01/15-171, para 46, 62 f., 109.

In the reparation proceedings, the Trial Chamber found that these crimes caused, first and foremost, the destruction and damage to property.<sup>728</sup> The chamber also recognized individual economic harm suffered by those whose livelihood depended on the destroyed monuments and the moral injury of those whose ancestors' graves were destroyed.<sup>729</sup> The chamber acknowledged that the destruction caused collective moral suffering to the Timbuktu community in the form of mental pain and anguish, disruption of culture, and a sense of insecurity since the community believed that the mausoleums offered protection.<sup>730</sup> Further, the Timbuktu community suffered collective economic loss due to loss of tourism and hindrance of other economic activity.<sup>731</sup> Persons who fled as a result of the crime experienced loss of childhood, opportunities, and relationships.<sup>732</sup>

## b. Reparation Efforts

The Trial Chamber faced the challenge to devise a reparation order for the destruction of world heritage – a first in the history of the court.<sup>733</sup> In response, the chamber designated the people of Timbuktu, Malians, and the international community as survivors of Al Mahdi's crimes. Immediately scaling back its bold determination, it held that reparation measures aimed at the former also adequately repaired the latter two.<sup>734</sup>

The Trial Chamber ordered individual and collective reparation. It recognized that the harm was mostly collective and would not be adequately reflected by simply aggregating all personal damage. Hence, collective reparation was deemed the primary avenue of redress. However, those survivors, whose livelihood depended exclusively on the monuments and the descendants of the saints buried in the destroyed monuments, suffered exceptional and more acute economic and moral losses. Hence, the chamber awarded them

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728 That UNESCO restored them in the meantime was deemed irrelevant, ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 60 ff.

729 ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 57 ff., 72 ff., 84 ff.

730 ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 85 ff., 90.

731 ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 73, 76, 81.

732 ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 85.

733 Dijkstal, *Destruction of Cultural Heritage Before the ICC*, 369.

734 ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 51 ff.



individual compensation.<sup>735</sup> Due to the more significant harm these survivors suffered, it ordered the TFV to prioritize individual awards.<sup>736</sup>

All reparation measures had to be implemented with due regard to local conditions and after consultation with all stakeholders.<sup>737</sup> The TFV must conduct an outreach campaign to enable all survivors to participate.<sup>738</sup> While survivors must prove their eligibility on a balance of probabilities, the chamber recognized that the dire security situation and lack of official records in Timbuktu greatly complicated that task. It hence allowed for flexible evidentiary standards.<sup>739</sup>

From these principles, the TFV drafted an implementation plan. After a rather chilling response from the chamber, it devised an updated implementation plan based on a consultative process with relevant stakeholders. The implementation plans detailed the intake procedure (aa.) and the administration of individual reparation (bb.). The also contained nine collective reparation projects (cc.). The updated plan was approved on 4 March 2019.<sup>740</sup>

#### aa. Intake

To facilitate proof of eligibility, the TFV and LRV created attestation templates.<sup>741</sup> Given the scarcity of official documentation, the TFV concocted an elaborate attestation system.<sup>742</sup> To be considered for individual reparation for economic harm, survivors had to fill out an *attestation d'activité et de*

735 ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 67, 76, 81 ff., 88 ff. This led to uncertainty whether as of yet unborn descendants of the saints could also become eligible for reparation. The TFV ultimately decided against that, *Lostal, Implementing Reparations in the Al Mahdi Case – A Story of Monumental Challenges in Timbuktu*, 2021 J. Intl. Crim. Just. 19(4), 831, 845 ff.

736 ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 140; Capone, *An Appraisal of the Al Mahdi Order on Reparations*, 645 ff.

737 ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 148.

738 ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 148.

739 ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 58.

740 ICC, *Decision on Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-324.

741 ICC, *Al Mahdi Draft Application Form*, ICC-01/12-01/15-289, para 45; ICC, *Decision on Al Mahdi Implementation Plan*, ICC-01/12-01/15-273-Red, para 168; ICC, *The Prosecutor v. Ahmad al Faqi Al Mahdi, Monthly Update Report on the Implementation Plan With Two Confidential Annexes*, ICC-01/12-01/15-283-Red (TFV), 2019, para 15 ff.

742 ICC, *The Prosecutor v. Ahmad al Faqi al Mahdi, Public Redacted Version of “Trust Fund for Victims’ Submission of Draft Application Form”*, ICC-01/12-01/15-289-Red (TFV), 2018, para 45.

revenue detailing that their revenue drastically declined after the destruction of the mausoleums. To prove their eligibility for enhanced awards when harm derived from the destruction of more than one building, survivors had to submit an *attestation de famille* detailing their involvement in the maintenance of the buildings. The latter questionnaire had to be signed by a witness able to establish their identity and how they know the veracity of the information.<sup>743</sup> The former questionnaire needed to be signed by an authority recognized by the TFV based on their knowledge of the social fabric around the mausoleums and place in the community. The TFV trained the authorities on their role in the attestation process and the eligibility criteria for reparation.<sup>744</sup> Receiving individual compensation for moral harm as a descendant of a buried saint required survivors to fill out an *attestation de filiation*. The TFV identified “prominent families” which are commonly known descendants of the saints by asking persons to generate lists of such families independently from each other and cross-checking the results.<sup>745</sup> An application by a member of such a family must be signed by an official authority or traditional leader recognized as such by the TFV. These needed to attest to survivors’ identity and how they know the truthfulness of the information provided. An applicant not belonging to a prominent family must submit the questionnaire signed by a member of a prominent family or must supply documents proving direct descendancy.<sup>746</sup> The TFV also mapped the social fabric around the mausoleums itself to obtain additional information on potentially eligible survivors.<sup>747</sup> If deemed ineligible based on

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743 ICC, *The Prosecutor v. Ahmad al Faqi al Mahdi, Public Redacted Version of “Fourth Monthly Update Report on the Updated Implementation Plan”*, ICC-01/12-01/15-299-Red2 (TFV), 2018, para 13 f.

744 ICC, *The Prosecutor v. Ahmad al Faqi al Mahdi, Public Redacted Version of “Tenth Update Report on the Implementation Plan”*, ICC-01/12/01-15-335-Red2 (TFV), 2019, para 17 ff.; ICC, *The Prosecutor v. Ahmad al Faqi al Mahdi, Public Redacted Version of “Eleventh Update Report on the Implementation Plan”*, ICC-01/12/01-15-336-Red2 (TFV), 2019, para 11 ff.

745 ICC, *The Prosecutor v. Ahmad al Faqi al Mahdi, Public Redacted Version of “Eighth Update Report on the Updated Implementation Plan”*, ICC-01/12-01/15-331-Red (TFV), 2019, para 21 ff.

746 ICC, *Al Mahdi Fourth Update Report*, ICC-01/12-01/15-299-Red2, para 18.

747 ICC, *The Prosecutor v. Ahmad al Faqi al Mahdi, Public Redacted Version of “Thirteenth Update Report on the Updated Implementation Plan”*, ICC-01/12-01/15-346-Red2 (TFV), para 23; ICC, *The Prosecutor v. Ahmad al Faqi al Mahdi, Trust Funds’s Submission on the Amendment of the Screening Process*, ICC-01/12-01/15-372-Conf (TFV), 2020, para 13.

that information survivors could appeal the unfavorable decision before the Trial Chamber.<sup>748</sup>

The TFV and LRV jointly and separately collected applications.<sup>749</sup> To facilitate filling out the attestations and collecting them, the TFV selected and trained intermediaries it identified through contacts in Mali.<sup>750</sup> It also conducted outreach in Mali and other countries and maintained continuous contact with relevant families.<sup>751</sup> Once the majority of applications was collected did the TFV stop the active process and only passively accepted new applications.<sup>752</sup> The TFV ensured that women and girls were not discouraged from applying. To that end, it included a gender dimension in its staff guidelines and train relevant staff on gender issues.<sup>753</sup> It placed special emphasis on women in its outreach.<sup>754</sup> The TFV wanted to ensure that eligibility criteria would not reproduce discriminatory practices present in the Timbuktu community. For example, when determining individual compensation eligibility for descendants of a saint buried in a mausoleum, the Fund considered male- and female-based lineage, even though Malian law did not recognize the latter. It implemented such approaches in close cooperation with the relevant families.<sup>755</sup> When the list of authorities contained only men

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748 ICC, *Al Mahdi Implementation Plan*, ICC-01/12-01/15-265, para 169 ff.; ICC, *Decision on Al Mahdi Implementation Plan*, ICC-01/12-01/15-273-Red, para 35 ff.

749 For details on that process see ICC, *Al Mahdi Thirteenth Update Report*, ICC-01/12-01/15-346-Red2, para 21 ff.

750 ICC, *Al Mahdi Eighth Update Report*, ICC-01/12-01/15-331-Red, para 14 ff.

751 ICC, *Al Mahdi Eleventh Update Report*, ICC-01/12-01/15-336-Red2, para 31; ICC, *Al Mahdi Thirteenth Update Report*, ICC-01/12-01/15-346-Red2, para 19; ICC, *The Prosecutor v. Ahmad al Faqi al Mahdi, Public Redacted Version of "Eighteenth Update Report on the Updated Implementation Plan"*, ICC-01/12-01/15-377-Red (TFV), 2020, para 23 f.

752 ICC, *The Prosecutor v. Ahmad al Faqi al Mahdi, Public Redacted Version of "Nineteenth Update Report on the Updated Implementation Plan"*, ICC-01/12-01/15-381-Red (TFV), 2021, para 17; ICC, *The Prosecutor v. Ahmad al Faqi al Mahdi, Public Redacted Version of "Twenty-First Update Report on the Updated Implementation Plan"*, ICC-01/12-01/15-405-Red (TFV), 2021, para 10.

753 ICC, *Al Mahdi Draft Application Form*, ICC-01/12-01/15-289, para 17.

754 ICC, *The Prosecutor v. Ahmad al Faqi al Mahdi, Public Redacted Version of "Twenty-Third Update Report on the Updated Implementation Plan"*, ICC-01/12-01/15-438-Red (TFV), 2022, para 36 f.

755 ICC, *Al Mahdi Draft Application Form*, ICC-01/12-01/15-289, para 38; ICC, *Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291, para 54; ICC, *Al Mahdi Implementation Plan*, ICC-01/12-01/15-265, para 144 f.; Lostal, *Implementing Reparations in the Al Mahdi Case*, 847 ff.

at first, the TFV set out to remedy that imbalance.<sup>756</sup> To further facilitate access to reparation, the TFV recommended not to impose any deadline for applications. It is unclear whether the chamber followed that proposal since it redacted the relevant parts of its decision.<sup>757</sup> Lastly, the TFV would prioritize survivors who demonstrated an urgent need for individual compensation.<sup>758</sup>

## bb. Individual Reparation

The amount of compensation survivors received was redacted. The TFV calculated the amount of compensation for economic harm based on salary statistics and the cost of living in Timbuktu. The TFV relied on statistics on men's salaries for both genders to not reproduce a gender pay gap. The amount of compensation for economic harm seemed to differ based on the different revenues the destroyed buildings had created. At the same time, the TFV stressed the need to avoid tension in the Timbuktu community because of the varying amounts of compensation.<sup>759</sup>

To assess the amount of compensation for moral harm, the TFV took a fine from the Malian Cultural Heritage Act as a baseline and multiplied it to ensure that the amount provided survivors some relief and reflected the international dimension of the crime, its symbolic and emotional features as well as the religious discriminatory intent. The resulting sum was not supposed to remedy all harm incurred. Instead, it should be proportionate to the harm considering the circumstances of the case, Al Mahdi's limited liability, and the availability of funds.<sup>760</sup> While the exact amounts were redacted, in a discussion about comparable human rights jurisprudence, the TFV remarked that 1.000 – 50.000 USD “would grossly overstate the amount that would be

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756 ICC, *The Prosecutor v. Ahmad al Faqi al Mahdi, Public Redacted Version of “Third Monthly Update Report on the Updated Implementation Plan”*, ICC-01/12-01/15-288-Red2 (TFV), 2018, para 26.

757 ICC, *Al Mahdi Implementation Plan*, ICC-01/12-01/15-265, para 161; ICC, *Decision on Al Mahdi Implementation Plan*, ICC-01/12-01/15-273-Red, para 34; ICC, *Decision on Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-324, para 33 ff.

758 ICC, *Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291, para 83.

759 ICC, *Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291, para 61 ff., 67 ff.

760 ICC, *Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291, para 44, 50 ff.

appropriate to set in the present case.<sup>761</sup> It reserved 500.000 USD in total for individual compensation.<sup>762</sup>

For security reasons, TFV staff disbursed the money via mobile banking apps after a detailed agreeing with each recipient on safe and convenient modalities for disbursement and explaining the reparation award in a phone call. The TFV chose such individual notifications to avoid survivors being pressured into sharing their award.<sup>763</sup> Women got special attention during the process to ensure that they were free to use their award as they saw fit.<sup>764</sup> The recipients were prioritized based on age and vulnerability.<sup>765</sup> Also, the first recipients were chosen to represent a gender-balanced selection of all eligible families to avoid tensions. The TFV chose leaders from those families as first recipients as they were best-placed to spread information on the process.<sup>766</sup>

#### cc. Collective Reparation

The chamber concentrated its collective reparation efforts at the protected sites and the community of Timbuktu. Since UNESCO had already rebuilt the sites, the chamber ordered measures for their protection, maintenance, rehabilitation, and – a first in the ICC reparation jurisprudence – guarantees of non-repetition.<sup>767</sup> To rehabilitate the Timbuktu community, it ordered education and awareness campaigns, return and resettlement programs, and a microcredit system to help the population generate income.<sup>768</sup> The chamber deemed symbolic measures adequate to relieve the collective emotional distress. It proposed a memorial, or commemoration and forgiveness ceremonies.<sup>769</sup> Lastly, Al Mahdi's apology should be translated into Timbuktu's primary languages, distributed via the court's website, and – if requested by individual survivors – in paper. The chamber also ordered the TFV

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761 ICC, *Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291, fn 52.

762 ICC, *Lesser Redacted Version of Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291-Red3, para 76.

763 ICC, *Al Mahdi Nineteenth Update Report*, ICC-01/12-01/15-381-Red, para 35 ff.; ICC, *Al Mahdi Thirteenth Update Report*, ICC-01/12-01/15-346-Red2, para 62.

764 ICC, *Al Mahdi Eighteenth Update Report*, ICC-01/12-01/15-377-Red, para 55.

765 ICC, *The Prosecutor v. Ahmad al Faqi al Mahdi*, "Twentieth Update Report on the Updated Implementation Plan", ICC-01/12-01/15-386-Red (TFV), 2021, para 31.

766 ICC, *Al Mahdi Nineteenth Update Report*, ICC-01/12-01/15-381-Red, para 39.

767 ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 67.

768 ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 83.

769 ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 90.

to explore further possibilities to utilize the apology.<sup>770</sup> However, after survivors expressed reservations against or outright rejected the apology in consultations with the TFV, the chamber and the Fund agreed that they must respect the survivors' wishes in this regard.<sup>771</sup> Apart from these main measures, the chamber awarded one symbolic Euro each to the Malian State and UNESCO in lieu of the international community.<sup>772</sup>

Based on this order, the TFV proposed four projects to restore and protect the rebuilt sites and five projects aimed at rehabilitating the Timbuktu community. The TFV wanted to renovate the cemetery walls surrounding the rebuilt sites to protect them from the elements and unwanted human or animal access.<sup>773</sup> The TFV also proposed planting trees around the locations to shield them from desertification, winds, and sand.<sup>774</sup> Lighting should increase visibility, security, and surveillance. This project also had a community dimension because it should increase pride in the Timbuktu community, enhancing its resilience.<sup>775</sup> An unnamed organization should receive two motorbikes and 50 plastic chairs. The former should increase its capacity to monitor the sites periodically and rapidly respond to dangers. The plastic chairs were supposed to provide infrastructure for community training.<sup>776</sup> As the last rehabilitation project, the TFV wanted to create measures for the sites' maintenance. These included creating a fund that supported traditional community-based forms of maintenance impeded by the crimes.<sup>777</sup> The TFV partnered with UNESCO for the rehabilitation and maintenance measures, whose proposals were developed together with representatives from the Malian government and survivor representatives.<sup>778</sup>

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770 ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 71.

771 ICC, *Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291, para 167; ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi, Decision on the Updated Implementation Plan From the Trust Fund for Victims*, ICC-01/12-01/15-324 (TC VIII), 2019, para 98 f.

772 ICC, *Al Mahdi Reparations Order*, ICC-01/12-01/15-236, para 106 f.

773 ICC, *Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291, para 89.

774 ICC, *Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291, para 97.

775 ICC, *Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291, para 100 ff.

776 ICC, *Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291, para 103 f.; ICC, *Decision on Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-324, para 75.

777 ICC, *Lesser Redacted Version of Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291-Red3, para 108 ff.

778 ICC, *Al Mahdi Tenth Update Report*, ICC-01/12-01/15-335-Red2, para 28 f.; ICC, *Ahmad al Faqi al Mahdi, Public Redacted Version of "Twelfth Update Report on the Updated Implementation Plan"*, ICC-01/12-01/15-340-Red (TFV), 2019, para 22 ff.

The remaining five projects aimed at rehabilitating the Timbuktu community. To counter its moral harm, the TFV would offer workshops and a psychological support program. The latter seemed to include a referral process to existing specialized services and regular training and capacity-building for staff. A second program explicitly aimed at women and girls. It would create safe spaces for group therapy, which featured discussions on cultural heritage.<sup>779</sup> Lastly, the Fund would rebuild one mausoleum, which fell outside UNESCO's competence and was therefore not rebuilt by the organization.<sup>780</sup>

Two projects sought to redress collective economic harm. First, the TFV wanted to create an Economic Resilience Facility, which offered financial support and advisory services to local economic initiatives. The advisory services were to encompass support for crop and livestock farming, handicraft, and activities contributing to the preservation of Timbuktu's cultural heritage. The facility should offer basic accounting and administrative training as well as training on drafting business plans, investment, and management strategies. Lastly, the facility should lend support in business registration and tax issues. If possible, members of the Timbuktu business community should conduct all training. In addition, the Economic Resilience Facility should help farmers around the sites and thereby increase social surveillance. It was supposed to support activities that maintain the traditional architecture and celebratory cultural activities related to the sites' maintenance. To ensure that all activities of the facility met local needs, the TFV would conduct a baseline market study.<sup>781</sup> The last proposed collective reparation project should facilitate the return of displaced survivors. Within a timeframe of two and a half years, it would cover their transportation costs and provide funds to facilitate their proper and permanent return. Further details of the project were redacted.<sup>782</sup> The TFV would prioritize elderly survivors and

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779 ICC, *Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291, para 106, 142 f., 148 ff.

780 ICC, *Lesser Redacted Version of Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291-Red3, 113 ff.

781 ICC, *Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291, para 120 ff.; ICC, *Al Mahdi Twenty-Third Update Report*, ICC-01/12-01/15-438-Red, para 31 f.

782 ICC, *Lesser Redacted Version of Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291-Red3, 117 ff.; ICC, *Decision on Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-324, para 79 f.; ICC, *Al Mahdi Eighth Update Report*, ICC-01/12-01/15-331-Red, para 48.

women for these collective reparation projects due to their dire financial circumstances.<sup>783</sup>

The ceremony to award symbolic euros to the Malian State and UNESCO took place on 30 March 2021. The Chair of the TFV Board of Directors handed one Euro framed together with abstracts from the preamble of the Rome Statute to the Malian President of the Transition and the Deputy General Director of UNESCO each. The Prosecutor, members of the Timbuktu community, and government and diplomatic representatives attended. This was accompanied, among others, by speeches and the screening of films the TFV produced that summarized the case and illustrated the importance of the mausoleums for the community. The ceremony was live-streamed. Parallel activities included side events on topics of international justice, the inauguration of a memorial stone, and a work of art commemorating survivors.<sup>784</sup> The ceremony only proceeded after other reparation measures had commenced avoiding offending survivors.<sup>785</sup> Afterwards, the TFV conducted further outreach and follow-up activities to maximize the ceremony's impact. This included the wider screening of the two movies.<sup>786</sup> Before the ceremony, some persons raised the issue that one Euro would not evoke much symbolic value, since it was foreign currency and money had little symbolic value in Mali.<sup>787</sup> It is unclear whether or how the TFV reacted to that. As another symbolic reparation measure, the TFV would support a memorialization project. Since survivors did not have a uniform opinion about how to memorialize best what happened, the TFV developed a strategy based on the concept of "restorative agency" that let the local community steer all memorialization efforts according to local customs, rules, and practices. It would form committees of young adult men, young adult women, elderly men, elderly women, and children. Each would develop their own suggestion on memorialization. A joint committee consisting of one representative of each group would determine whether some proposals could be joined. If not, they would be implemented separately. That way, the TFV ensured the inclusion of marginalized groups in the process.<sup>788</sup> This resulted in four

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783 ICC, *Al Mahdi Implementation Plan*, ICC-01/12-01/15-265, para 245.

784 ICC, *Al Mahdi Twentieth Update Report*, ICC-01/12-01/15-386-Red, para 44 ff.

785 ICC, *Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291, para 157 ff.

786 ICC, *Al Mahdi Twenty-Third Update Report*, ICC-01/12-01/15-438-Red, para 39.

787 ICC, *Al Mahdi Eighteenth Update Report*, ICC-01/12-01/15-388-Red, para 61.

788 ICC, *Lesser Redacted Version of Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291-Red3, para 160 ff.; ICC, *Decision on Al Mahdi Updated Imple-*



committees being established in Timbuktu and one in Bamako.<sup>789</sup> Generally, the deteriorating security situation and Covid-19 impeded implementation of the reparation program on many levels.<sup>790</sup>

## 5. The Ntaganda Reparation Program

The latest ICC reparation program followed the conviction of Bosco Ntaganda as a direct and indirect perpetrator of multiple crimes against humanity and war crimes.<sup>791</sup> Ntaganda was convicted on 8 July 2019 and sentenced on 7 November 2019.<sup>792</sup>

### a. Case and Harm

Ntaganda was the third defendant tried for his role in the Ituri conflict.<sup>793</sup> He was first Deputy and then interim Chief of Staff in charge of Operations and Organisation of the FPLC.<sup>794</sup> Together with other members of the armed group, he devised a plan to take control of Ituri.<sup>795</sup> The plan led to the targeting of civilians and their property, rape, sexualized violence, and displacement.<sup>796</sup> In his role within the FPLC, Ntaganda devised the tactic behind an attack and fulfilled other essential functions. He gave orders to target and kill civilians and supported child recruitment. He also took part in attacks and killed persons himself.<sup>797</sup>

The chamber recognized as direct survivors of these crimes those who suffered harm from the attacks, child soldiers, children born out of rape

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*mentation Plan*, ICC-01/12-01/15-324, para 97; Lostal, *Implementing Reparations in the Al Mahdi Case*, 849 ff.

789 ICC, *Twenty-Third Update Report*, ICC-01/12-01/15-438-Red, para 34 f.; ICC, *Al Mahdi Twenty-First Update Report*, ICC-01/12-01/15-405-Red, para 30.

790 See e.g., ICC, *Al Mahdi Tenth Update Report*, ICC-01/12-01/15-335-Red2, para 10 ff.

791 ICC, *The Prosecutor v. Bosco Ntaganda, Judgment*, ICC-01/04-02/06-2359 (TC VI), 2019, disposition.

792 ICC, *Ntaganda Judgment*, ICC-01/04-02/06-2359; ICC, *The Prosecutor v. Bosco Ntaganda, Sentencing Judgment*, ICC-01/04-02/06-2442 (TC VI), 2019.

793 See above, D.III.2.a., 3.a.

794 ICC, *Ntaganda Judgment*, ICC-01/04-02/06-2359, para 321 ff.

795 ICC, *Ntaganda Judgment*, ICC-01/04-02/06-2359, para 787.

796 ICC, *Ntaganda Judgment*, ICC-01/04-02/06-2359, para 493 ff.

797 ICC, *Ntaganda Judgment*, ICC-01/04-02/06-2359, para 830 ff.

and sexual slavery.<sup>798</sup> When identifying categories of indirect survivors, the chamber oriented itself at the Lubanga case. Based on the broader notion of family in the DRC, it included extended family members of direct survivors in its definition. The principle of non-discrimination led it to include further unmarried partners and children born out of wedlock. If they suffered the requisite harm, persons in whose lives a direct survivor had significant importance, and persons who witnessed the crimes could also qualify as indirect survivors.<sup>799</sup> Apparently, the chamber also recognized persons intervening to prevent harm to direct survivors as indirect survivors. Confusingly, the chamber determined such a situation to be a kind of harm instead of a distinct survivor category.<sup>800</sup>

The chamber listed in detail different types of harm suffered by four categories of survivors: One, direct survivors of the attacks; two, child soldiers; three, direct survivors of rape or sexual slavery and children born out of rape or sexual slavery; and four, indirect survivors. Each suffered different kinds of psychological, physical, and material harm. Direct survivors of the attack and child soldiers sustained a loss of childhood, life plans, educational opportunities, productive capacity, socio-economic opportunities, and a reduced standard of living, among others. The Trial Chamber recognized that direct survivors of the attack also suffered damage to a health center and the consequent loss of healthcare provision. The chamber also recognized transgenerational harm of indirect survivors – a type of harm the Katanga Trial Chamber had rejected before based on doubts about the causality of the violation.<sup>801</sup> These last two determinations were quashed by the Appeals Chamber. It held that the Trial Chamber did not assess whether the concept of transgenerational harm was established to the requisite degree of scientific certainty. It ordered the Trial Chamber to make that assessment and, if it

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798 ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 109 ff.

799 ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 124 ff. The AC upheld that persons to whom a direct survivor had significant importance could qualify as indirect survivors but cautioned that more guidance needed to be given to the TFV in administering the criteria of importance, ICC, *The Prosecutor v. Bosco Ntaganda, Judgment on the Appeals Against the Decision of Trial Chamber VI of 8 March 2021 Entitled "Reparations Order"*, ICC-01/04-02/06-2782 (AC), 2022, para 625 ff.

800 ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 183.

801 ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 183; ICC, *The Prosecutor v. Germain Katanga, Public Redacted Version of Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018*, ICC-01/04-01/07-3804-Red (TC II), 2018, para 141.

found that such certainty existed, to give more guidance to the TFV on how to assess this kind of harm in the eligibility determination. It also deemed the damage to the health center insufficiently proven.<sup>802</sup>

## b. Reparation Efforts

The Ntaganda reparation effort is still very much in flux. At the time of writing, the Appeals Chamber had just released its judgment on the appeal against the reparation order, tasking the Trial Chamber to reconsider several parts of its decision.<sup>803</sup> It is not clear yet, how this will change the program that is partially already being planned and implemented.

The Trial Chamber ordered collective reparation with individualized components.<sup>804</sup> It held that such measures would be collective but focused on individual members of the group and resulted in personal benefits.<sup>805</sup> The chamber deemed them more cost-effective, quicker, and better to deliver in the volatile security situation in Ituri. Collective measures also reduced community tensions and the risk that reparation would expose survivors of rape and sexual slavery or child soldiers and subject them to further discrimination. The individualized component paid tribute to survivors' preferences for individual financial measures.<sup>806</sup> The reparation measures should be sensitive to the unique needs of survivors who were victimized as children and employ a gender-sensitive, intersectional lens. They should have transformative value by addressing "the cultural meaning of violence" and structural violence.<sup>807</sup> The Trial Chamber concentrated on rehabilitation and satisfaction. It deemed restitution impossible and left it to the TFV to determine whether compensation would be feasible and adequate.<sup>808</sup>

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802 ICC, *Ntaganda Reparations Appeal*, ICC-01/04-02/06-2782, para 439 ff., 535 ff. It hence remains to be seen, whether the TFV's proposals to deal with transgenerational harm will be implementend. See, ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 215 ff. On the reparation plans for the Sayo Health Center see below, bb.

803 ICC, *Ntaganda, Reparations Appeal*, ICC-01/04-02/06-2782.

804 ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 186 ff., 191 f.

805 ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 81.

806 ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 191 ff.

807 ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 53 ff., 60 ff., 209.

808 ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 201 f.

As a novelty in ICC reparation proceedings, the Chamber ordered the TFV to hand in an initial implementation plan to be implemented before the main reparation program for priority survivors in a particularly vulnerable situation. Among those were survivors who require immediate physical or psychological care, survivors with disabilities, elderly or homeless survivors, and survivors experiencing financial hardship. Survivors of sexual or gender-based violence, child soldiers, and children born out of rape and sexual slavery should also receive prioritized care.<sup>809</sup>

The TFV handed in its initial implementation plan for prioritized survivors on 8 June 2021, which the Trial Chamber approved on 23 July 2021. The Draft Implementation Plan followed in April 2022.<sup>810</sup> The initial implementation plan covered the time until the Draft Implementation Plan would be approved.<sup>811</sup> Survivors would stay in the initial reparation program until the main program can offer them the same level of benefits.<sup>812</sup>

aa. Intake

The Trial Chamber significantly eased the burden of proof for survivors. Any official or unofficial document or other means sufficed to establish their identity. Absent documentation, they could provide a statement signed by two credible witnesses. With that, the chamber tried to offset the frequent loss of documents during pillaging. The chamber employed a “gender-inclusive and sensitive approach” to evidence. It acknowledged that survivors of rape

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809 ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 214, 252. Further details on prioritization are provided in ICC, *The Prosecutor v. Bosco Ntaganda, Annex A to the Public Redacted Version of “Report on Trust Fund’s Preparation for Draft Implementation Plan”*, ICC-01/04-02/06-2676-AnxA-Corr-Red (TFV), 2021, para 77.

810 ICC, *The Prosecutor v. Bosco Ntaganda, Corrigendum of Public Redacted Version of Annex I to the Trust Fund for Victims’ Second Submission of Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr (TFV), 2022.

811 ICC, *Ntaganda Initial Draft Implementation Plan*, ICC-01/04-02/06-2676-AnxA-Corr-Red, para 2b; ICC, *The Prosecutor v. Bosco Ntaganda, Decision on the TFV’s Initial Draft Implementation Plan With a Focus on Priority Victims*, ICC-01/04-02/06-2696 (TC II), 2021.

812 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 250 ff.

and/or sexual slavery faced challenges procuring evidence. Hence, their coherent and credible account should be sufficient to establish their eligibility.<sup>813</sup>

The chamber established far-reaching presumptions of harm. It presumed psychological, physical, and material harm of former child soldiers, direct survivors of rape or sexual slavery, and their family members living in the same household. Direct survivors of attempted murder and crimes committed during the attacks who personally experienced the attacks were presumed to have suffered psychological harm. Lastly, psychological harm was presumed for survivors who lost their home or important assets and close family members of murder victims.<sup>814</sup> The Appeals Chamber sacked another presumption of physical harm for survivors of the attacks the Trial Chamber established due to insufficient reasoning.<sup>815</sup>

The TFV suggested several eligibility determination processes for different groups covered by the initial implementation plan for priority survivors and the general reparation program under the later implementation plan. The details are not of relevance to this study.<sup>816</sup> Determination of eligibility for the priority program was based on a special questionnaire survivors filled out with the help of implementing partners which received special training to that effect.<sup>817</sup> The eligibility determination was envisaged as a purely administrative one without involvement of the Trial Chamber in decision-making. The Appeals Chamber found that to be erroneous.<sup>818</sup> The

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813 ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 137 ff. The AC upheld these changes to the evidentiary standards, it emphasized that survivors still needed to meet the balance of probabilities test, ICC, *Ntaganda Reparations Appeal*, ICC-01/04-02/06-2782, para 511 ff.

814 ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 143 ff.

815 ICC, *Ntaganda Reparations Appeal*, ICC-01/04-02/06-2782, para 701 ff.

816 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 327 ff.; ICC, *Ntaganda Draft Initial Implementation Plan*, ICC-01/04-02/06-2676-AnxA-Corr-Red, para 58, 84 ff.; ICC, *Ntaganda Decision on Draft Initial Implementation Plan*, ICC-01/04-02/06-2696, para 23 ff.; ICC, *The Prosecutor v. Bosco Ntaganda, Public Redacted Version of "Trust Fund First Progress Report on the Implementation of the Initial Draft Implementation Plan"*, ICC-01/04-02/06-2710-Red (TFV), 2021, para 44 ff.

817 ICC, *Ntaganda Third Update Report*, ICC-01/04-02/06-2741-Red, para 15 ff.; ICC, *The Prosecutor v. Bosco Ntaganda, Public Redacted Version of Trust Fund for Victims' Sixth Update Report on the Implementation of the Initial Draft Implementation Plan*, ICC-01/04-02/06-2775-Red (TFV), 2022, para 27.

818 ICC, *Ntaganda Decision on Draft Initial Implementation Plan*, ICC-01/04-02/06-2696, para 382 f.; ICC, *The Prosecutor v. Bosco Ntaganda, Public Redacted Version of Decision on the TFV's First Progress Report on the Implementation of the Initial Draft Imple-*

processes should be complemented by outreach campaigns throughout the life cycle of the reparation programs.<sup>819</sup> Given that, as will be detailed below, the plan for priority survivors foresees that they receive benefits through an existing assistance program of the TFV, the outreach for that part of the reparation program should focus especially on the fact that survivors receive access to that program as part of their right to reparation, not as assistance and on explaining why only certain survivors receive reparation at that point in time.<sup>820</sup>

## bb. Reparation Measures

The chamber suggested several inter-disciplinary rehabilitation measures aimed at survivors, their families, and communities. These included psychological, psychiatric, psychosocial, and medical services, with particular attention given to addiction and trauma. Psychological support should be integrated into the program from the beginning. Housing assistance should also be part of the program. Rehabilitation should reintegrate survivors, address the shame some of them feel, help prevent future conflicts, and raise awareness that their “effective reintegration [...] requires eradicating their victimization, discrimination, and stigmatisation.”<sup>821</sup>

The TFV proposed to ensure rehabilitation of priority survivors through two programs, one for former child soldiers, one for survivors of the two attacks. The latter were to be incorporated into an existing project under the TFV’s assistance limb in Ituri that provided physical and psychosocial rehabilitation through, inter alia, an assessment of the survivors’ psychological state, group and individual therapy, psychoeducational sessions for families, and training of community leaders on psychotherapy. The program

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mentation Plan, ICC-01/04-02/06-2718 (TC II), 2021, para 17; ICC, *Ntaganda Reparations Appeal*, ICC-01/04-02/06-2782, para 387.

819 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 338 ff.; ICC, *Ntaganda Draft Initial Implementation Plan*, ICC-01/04-02/06-2676-AnxA-Corr-Red, para 93.

820 ICC, *Ntaganda Decision on Draft Initial Implementation Plan*, ICC-01/04-02/06-2696, para 26; ICC, *Ntaganda Draft Initial Implementation Plan*, ICC-01/04-02/06-2676-AnxA-Corr-Red, para 26 ff., 80 ff.; ICC, *Ntaganda First Progress Report*, ICC-01/04-02/06-2710-Red, para 55 ff.; ICC, *Ntaganda Second Update Report*, ICC-01/04-02/06-2723-Red, para 34 ff.

821 ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 203 ff.

should achieve socio-economic reintegration through vocational and other training based on a study on economic opportunities in areas in which survivors lived, as well as microfinance associations.<sup>822</sup> The adequate priority reparation of the former group was subject to a longer dispute between the TFV and the Trial Chamber.<sup>823</sup> In the end, former child soldiers that were subject to sexualized and gender-based violence could enter a project under the assistance limb. That project referred girl-mothers and other vulnerable female beneficiaries to health screenings and provided psychosocial care also on a family level. The project supported social reintegration through community centers and economic reintegration through microcredits, kits and vocational training for income-generating-activity, literacy and school recovery courses, sensitization courses inter alia on early marriage, peace education, and conflict management. For children of beneficiaries it provided school referrals and temporary nurseries to enable attendance of classes.<sup>824</sup> Other former child soldiers were provided with similar services through another service provider.<sup>825</sup>

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822 ICC, *Ntaganda Draft Initial Implementation Plan*, ICC-01/04-02/06-2676-AnxA-Corr-Red, para 91; ICC, *Ntaganda First Progress Report*, ICC-01/04-02/06-2710-Red, para 29 ff.

823 The TFV proposed their incorporation into the Lubanga collective service-based and symbolic reparation program that it would extend to cover survivors' specific needs and further relevant geographical areas, ICC, *Ntaganda, Draft Initial Implementation Plan*, ICC-01/04-02/06-2676-AnxA-Corr-Red, para 4, 21 ff., 31 ff., 41, 47 ff., 67 ff.; ICC, *The Prosecutor v. Bosco Ntaganda, Public Redacted Version of "Trust Fund's Second Update Report on the Implementation of the Initial Draft Implementation Plan"*, ICC-01/04-02/06-2723-Red (TFV), 2021, para 29 f. The TC rejected that approach ICC, *Ntaganda Decision on Draft Initial Implementation Plan*, ICC-01/04-02/06-2696, para 22; ICC, *The Prosecutor v. Bosco Ntaganda, Decision on the TFV's Second Progress Report on the Implementation of the Initial Draft Implementation Plan*, ICC-01/04-02/06-2730-Conf (TC II), 2021, para 14 ff.; ICC, *The Prosecutor v. Bosco Ntaganda, Public Redacted Version of "Trust Fund for Victims' Third Update Report on the Implementation of the Initial Draft Implementation Plan"*, ICC-01/04-02/06-2741-Red (TFV), 2022, para 26 ff.

824 ICC, *Ntaganda First Progress Report*, ICC-01/04-02/06-2710-Red, para 16 ff.

825 ICC, *The Prosecutor v. Bosco Ntaganda, Public Redacted Version of „Trust Fund for Victims' Fourth Update Report on the Implementation of the Initial Draft Implementation Plan"*, ICC-01/04-02/06-2751-Red (TFV), 2022, para 30 ff. This decision came after some back and forth about whether these survivors could also be included in the aforementioned program, ICC, *Ntaganda Decision on First Progress Report*, ICC-01-/04-02/06-2718, para 10(i); ICC, *Ntaganda Second Update Report*, ICC-01/04-02/06-2723-Red, para 29 f.; ICC, *The Prosecutor v. Bosco Ntaganda, Decision on the TFV's Fourth Update Report on the Implementation of the Initial Draft Implementation Plan*, ICC-01/04-02/06-2761-Conf (TC II), 2022, para 9.

The chamber proposed for satisfaction, inter alia, campaigns to improve survivors' position and reduce the stigmatization and marginalization of survivors of rape and sexual slavery, children born out of rape, and child soldiers. Measures raising awareness about the crimes and their consequences should aid survivors' rehabilitation and reintegration and reduce stigma.<sup>826</sup>

The main program should enable survivors through different rehabilitation services to overcome their harm and achieve resilience in three areas: mental health and social functioning; physical health and mobility; socio-economic status, and outlook.<sup>827</sup> Survivors should choose between an array of available measures. Additional measures should be directed at the community to raise awareness and understanding for certain behaviors of survivors.<sup>828</sup> Early on in the program, possibly at the intake, survivors would receive a modest starter sum in cash to cover the most basic needs, put them in the mental space to benefit from further measures, and develop trust in the TFV and the court after waiting for reparation for a long time. If they wished, they could receive advice on how to invest the money.<sup>829</sup>

For mental health and social functioning, the TFV planned to couple the intake process with an assessment of psychological needs of the survivors and their family. Ideally slightly before other interventions, survivors could avail themselves of group or family sessions, discussion groups and support networks to exchange trauma and recovery experience, and, in case of need, intensive group or individual therapy or psychosomatic treatment.<sup>830</sup> Measures for physical health and mobility should primarily consist of medical interventions and referrals coupled with assistance with transport and admission. Individual discussions on treatment options and modalities should precede the interventions, also to ensure that the treatment would collide as little as possible with other obligations.<sup>831</sup> To enhance survivors' socio-economic status and outlook, the TFV planned to first assess their

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826 ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 207.

827 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 136 f.

828 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 158.

829 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 182 ff.

830 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 162 ff.

831 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 172 ff.



priorities and develop an individual response plan.<sup>832</sup> They should then have access to social counsellors helping to reintegrate into society,<sup>833</sup> as well as educational measures and income-generating activities. Depending on their educational level to be assessed in the beginning of the component, survivors could receive a refresher training enabling them to get professional training, university scholarships, or English or French language courses. They could also receive school kits and a fix budget covering school fees of dependants of their choice from 1<sup>st</sup> to 6<sup>th</sup> grade.<sup>834</sup> As income-generating activities, survivors would be eligible to receive vocational training coupled with a kit containing necessary supplies, financial assistance during the training, and a starter kit with basic materials necessary to set up the chosen business. Advisors should stand ready to help survivors choose their preferred vocational path. The TFV would further assist with setting up cooperatives and saving and credit associations among survivors.<sup>835</sup>

In implementing the program, the TFV plans to uphold the distinction between reparation programs for former child soldiers and the survivors of the two attacks.<sup>836</sup> Former child soldiers should receive the mentioned services through the already existing Lubanga reparation program.<sup>837</sup> That program would be amended to train employees specifically on treatment methods for and approaching survivors of sexualized and gender-based violence. The TFV would ensure that such survivors have life-long access to treatment beyond the existence of the reparation program. It would also lay a particular focus on the creation of support network groups.<sup>838</sup> The program for the attack victims would still need to be created. This raised the problem that former child soldiers would likely receive reparation much earlier given that the structures to implement reparation for them already existed. The TFV

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832 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 179.

833 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 197.

834 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 188 ff.

835 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 133 ff.

836 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 143.

837 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 206 ff. On the Lubanga program see above, 2.

838 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 211 ff.

planned to counter this through a strong outreach campaign explaining the reasons for the different timelines.<sup>839</sup> In addition to these two programs, the TFV opted to award survivors living outside Ituri a lump sum payment with the possibility to get advise on how to invest it, since offering them the services foreseen for the other programs would produce disproportionate costs.<sup>840</sup>

In addition to the rehabilitation component, the TFV proposed several satisfaction measures. Former child soldiers should benefit from the community centers to be built through the Lubanga program.<sup>841</sup> Direct survivors of sexualized and gender-based violence and children born out of rape or sexualized violence should receive a symbolic sum of money. The TFV would advocate for lacking identification and other legal documents to facilitate reintegration into society. Immediate family members and community workers should receive training in gender sensitivity, ethical standards and other topics.<sup>842</sup> The TFV also wanted to hire a consultant to search for missing persons.<sup>843</sup>

In addition, the Trial Chamber suggested several symbolic measures tailored to two high-profile violations. Following survivors' preferences, it sought to ensure that such symbolic measures served a practical purpose.<sup>844</sup> As in previous reparation orders, the chamber suggested that a voluntary apology by Ntaganda to individual or groups of survivors after their consultation could contribute to the reparation process.<sup>845</sup> A newly constructed community center could be named after Abbé Bwanalunga, an influential priest whom Ntaganda killed.<sup>846</sup> After consultations with the clergy and local authorities, the TFV confirmed that to be a viable reparation measure. The adequate placement of the center and other details were still subject to further

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839 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 218, 143.

840 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 154, 198 ff.

841 See above, 2.b.bb.

842 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 135, 238 ff.

843 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 241. On the problems with that see above, 2.b.cc.

844 ICC, *Ntaganda Judgment*, ICC-01/04-02/06-2359, para 506.

845 ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 210; ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 244 ff.

846 ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 208; ICC, *Ntaganda Judgment*, ICC-01/04-02/06-2359, para 737 ff.

consultations.<sup>847</sup> Lastly, it proposed to attach a plaque to the Sayo health center, damaged in an attack, indicating that the building enjoys special protection under international humanitarian law.<sup>848</sup> The TFV proposed to implement that after consultations with the local community through a ceremony.<sup>849</sup> However, given the appeals judgment's doubts about the harm to the health center, it remains to be seen, whether that reparation measure can remain in the program.<sup>850</sup> As in the other programs, the security situation in Ituri and the Covid-19 pandemic posed severe problems in the implementation of the program.<sup>851</sup>

#### IV. Critique and Challenges

The ICC's institutional and legal structure makes the implementation of reparation programs extremely challenging. As Moffett noted, reparation proceedings are "copy-and-pasted onto the end of the trial,"<sup>852</sup> resulting in

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847 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 228 ff.

848 ICC, *Ntaganda Judgment*, ICC-01/04-02/06-2359, para 506.

849 ICC, *Ntaganda Draft Implementation Plan*, ICC-01/04-02/06-2750-AnxA-Red-Corr, para 232 ff.

850 See above, a.

851 ICC, *Ntaganda Second Update Report*, ICC-01/04-02/06-2723-Red, para 7 ff.; ICC, *Ntaganda Third Update Report*, ICC-01/04-02/06-2741-Red, para 8 ff.; ICC, *Ntaganda Initial Draft Implementation Plan*, ICC-01/04-02/06-2676-AnxA-Corr-Red, para 32 ff., 43.

852 Moffett, *Reparations for Victims at the ICC*, 1204.

853 Carayon/O'Donohue, *The ICC's Strategies in Relation to Victims*, 582 f.; Berkeley Human Rights Center, *The Victims' Court?*, 4 f., 44; ASP, *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, ICC-ASP/19/16, 2020, para 879 ff. For a potential solution delinking the reparation procedure from the criminal procedure and coupling it with measures at other levels see Moffett/Sandoval, *Tilting at Windmills*, 765 f. While complementing ICC-efforts at other levels, especially on the national level pursuant to reparative complementarity certainly is a promising avenue and many other of the authors' suggestions to improve the ICC reparation regime are promising, "delinking" reparation from criminal proceedings could lead to the ICC determining reparation for crimes it then finds the perpetrator before it not guilty of. This would turn the ICC more into a general forum to seek reparation, something it was never intended to and that could overburden it even more with expectations and proceedings. Also, it must be doubted whether such a stand-alone reparation order would really bring the benefits Moffett and Sandoval suggest of being able to claim reparation before domestic fora and raising funds through the TFV. The TFV does not really enjoy an abundance of funds to take on

several difficulties. First, the process is too time-consuming. Even after a trial started, survivors wait for years until reparation programs get off the ground. In the Lubanga case, they waited for more than a decade. This on top of the often considerable time survivors wait until a suspect is apprehended and put on trial. Such delay causes uncertainty, disappointment, resentment, and distrust towards the court.<sup>853</sup> Second, because the reparation process is confined to the crimes a person is convicted for, the court's reparation programs often exclude survivors. Especially in cases of narrow charging, survivors of other crimes the perpetrator likely committed are not eligible for reparation.<sup>854</sup> In the Lubanga case, the decision not to charge sexualized violence excluded survivors of those crimes from reparation.<sup>855</sup> Relatedly, the perpetrators selected, or the sequence in which they appear before the court, can impact delicate post-conflict situations.<sup>856</sup> In the Lubanga case, survivors were predominantly Hema since the UPC mostly recruited child soldiers from its side of the conflict. The TFV feared that the resulting imbalance of the reparation program would exacerbate tensions between the two ethnicities.<sup>857</sup>

Regarding the TFV's structure, its double assistance and reparation mandate can create confusion. Especially collective reparation measures run the danger of being confused with projects under the Fund's assistance

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this additional tasks. Arguably, domestic reparation proceedings rarely fail because damage cannot be proven, but rather because the forum is lacking to begin with or individuals cannot access it. A safer way is to let sentencing and appellate proceedings run in parallel, ASP, *Independent Expert Review*, para 899 ff., although this of course shortens the proceedings much less than Moffett's and Sandoval's.

854 Balta et al., *Trial and (Potential) Error*, 227 ff.; ASP, *Independent Expert Review*, para 885; Owiso, *The International Criminal Court and Reparations – Judicial Innovation or Judicialisation of a Political Process?*, 2019 Intl. Crim. L. Rev. 19, 505, 515.

855 Chappell, *The Gender Injustice Cascade – 'Transformative' Reparations for Victims of Sexual and Gender-Based Crimes in the Lubanga Case at the International Criminal Court*, 2017 Intl. J. Hum. Rts. 21(9), 1223, 1228 ff.

856 Mégret, *Reparations Before the ICC – The Need for Pragmatism and Creativity*, in: Steinberg (ed.), *Contemporary Issues Facing the International Criminal Court*, 2016, 252, 256; Mégret, *Of Shrines, Memorials and Museums – Using the International Criminal Court's Victim Reparation and Assistance Regime to Promote Transitional Justice*, 2010 Buff. Hum. Rts. L. Rev. 16, 1, 14 f., 20 f.; Stahn, *Reparative Justice After the Lubanga Appeal Judgment – New Prospects for Expressivism and Participatory Justice or 'Juridified Victimhood' by Other Means?*, 2015 J. Intl. Crim. Just. 13(4), 801, 812; van den Wyngaert, *Victims Before International Criminal Courts – Some Views and Concerns of an ICC Trial Judge*, 2011 Case W. Res. J. Intl. L. 44(1 and 2), 475, 492; Berkeley Human Rights Center, *The Victims' Court?*, 55, 58.

857 ICC, *Lubanga Draft Implementation Plan*, ICC-01/04-01/06-3177-AnxA, para 21; Moffett, *Justice for Victims Before the ICC*, 161.

mandate.<sup>858</sup> The scarcity of funds creates further problems. So far, the TFV covered the first three reparation programs' costs because all defendants were indigent. The same is likely to occur in the Ntaganda case.<sup>859</sup> Apart from the problem that reparation is then not actually paid for by the liable person, the TFV's budget is not up to the task.<sup>860</sup> Ironically, the ICC itself can create that situation since defendants must pay enormous legal fees and other expenses to conduct their trial. While this problem has not been relevant so far, because all defendants arrived indigently at the court, it is only a matter of time until that changes.<sup>861</sup> Furthermore, the TFV has been criticized as inefficient compared to other reparation implementation bodies.<sup>862</sup>

Conditions in the situation countries further complicated reparation efforts. Security concerns often hamper access to survivor populations. An issue often exacerbated by the ICC's remoteness to the crime sites.<sup>863</sup> For the same reason, survivors often lack access to information about the ICC or fear engaging with the court.<sup>864</sup> Too few resources are available to meaningfully connect to survivor populations, adequately explain to them the court's inner workings, manage their expectations, and ensure their safety. Accordingly, survivors' expectations are often disappointed, which creates distrust towards

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858 Mégrét, *Of Shrines, Memorials and Museums*, 13 ff., 20 f.; Moffett/Sandoval, *Tilting at Windmills*, 762 f.

859 See above, II.

860 ASP, *Independent Expert Review*, para 888 ff.; Moffett, *Reparations for Victims at the ICC*, 1207 ff.; Moffett, *Justice for Victims Before the ICC*, 183 ff.; Moffett/Sandoval, *Tilting at Windmills*, 767 f.; van den Wyngaert, *Victims Before International Criminal Courts*, 490; de Greiff/Wierda, *The Trust Fund for Victims of the International Criminal Court*, 228; Berkeley Human Rights Center, *The Victims' Court?*, 5. However, the Berkeley study also provides the counterexample of Cote D'Ivoire, where apparently, survivors' expectations were managed well, preventing disappointment, 68 f.

861 Mégrét, *Reparations Before the ICC*, 254; Stahn, *Reparative Justice After the Lubanga Appeal Judgment*, 812; van den Wyngaert, *Victims Before International Criminal Courts*, 490. It would probably have changed with the Bemba case, had it arrived at the reparation phase, Owiso, *The International Criminal Court and Reparations*, 527.

862 ASP, *Independent Expert Review*, para 942 ff.; Moffett/Sandoval, *Tilting at Windmills*, 762. It must be doubted though, whether the authors' comparison of the TFV with the 9/11 fund and German forced labour compensations is fair, given that the TFV operates in a entirely different institutional context and must operate several different reparation programs in different countries far removed from its headquarters.

863 Moffett, *Reparations at the ICC - Can it Really Serve as a Model?*, 2019, 1209; Case in point is the fact that the TFV refrained from implementing certain reparation measures because of the dire security situation in northern Mali, ICC, *Al Mahdi Updated Implementation Plan*, ICC-01/12-01/15-291, para 140 f.

864 Berkeley Human Rights Center, *The Victims' Court?*, 4, 21, 45, 56 f., 67 f.

the court.<sup>865</sup> Other issues the court faces are language barriers, which, together with illiteracy, can already pose a significant challenge in filling out survivor application forms.<sup>866</sup>

When it comes to concrete reparation programs, the court's focus on collective reparation seems contrary to many survivors' interests. Survivors expressed fear that collective reparation projects would foster corruption and benefit perpetrators. In general, survivors voiced concern that the court treated communities unequally, giving more reparation to some while ignoring others. This sentiment creates another danger of disappointment.<sup>867</sup> Lastly, few instances of corruption on the part of the court's intermediaries were reported, which, e.g., demanded bribes for filling out the application forms.<sup>868</sup> All this led the Independent Expert Review of the ICC to conclude that the system "has not delivered fair, adequate, effective and prompt reparations to victims of crimes under the jurisdiction of the Court."<sup>869</sup>

### E. Summary: Common Differences

After examining six transitional justice reparation programs in Sierra Leone, Colombia, and at the ICC, their stark differences are most notable. But once one steps back from looking at trees and appreciates the woods, the broader perspective reveals commonalities. All programs followed a transformative<sup>870</sup>-collectivistic logic, which influences their goals (I.), structure (II.), intake procedure (III.), and content (IV.). This logic contrasts with the conservative-individualistic nature of the international law on reparation laid out in chapter one. The following section argues that the resulting deviations from the international law on reparation are reasonable because they respond

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865 Berkeley Human Rights Center, *The Victims' Court?*, 24, 44.

866 Berkeley Human Rights Center, *The Victims' Court?*, 24.

867 Berkeley Human Rights Center, *The Victims' Court?*, 45, 55, 58, 68; Moffett, *Reparations for Victims at the ICC*, 1213; Stahn, *Reparative Justice After the Lubanga Appeal Judgment*, 811. On the danger of intra-community distinction in collective reparation measures Owiso, *The International Criminal Court and Reparations*, 524.

868 Berkeley Human Rights Center, *The Victims' Court?*, 24.

869 ASP, *Independent Expert Review*, para 887.

870 This should not lead to the conclusion that the principle of full reparation needs to be replaced by the often-proposed principle of "transformative reparation". The present section is descriptive, not normative. It will be argued below, why the principle of full reparation suffices to accommodate the transformative logic identified here, see below, ch. 4, E.I.

to defining characteristics of transitional justice situations – namely the large number of survivors, the challenging societal environment, and the transformative aim of transitional justice.<sup>871</sup>

## I. A Different Goal

The international law on reparation seeks to erase all harm an individual suffered as far as possible and place them in the situation they would be in had the violation not occurred. This principal, conservative goal concurs with the private law roots of the international law on reparation.<sup>872</sup> It played no role in the Sierra Leone program and only a subsidiary part in Colombia and at the ICC. Instead, the explicit goal of all programs was to transform survivors' lives and society in general. They expressed this transformative aim as reconciliation, trust, healing, etc. Reparation measures differing from those usually ordered under the corrective justice logic served to realize the transformation. Individual advice, training, and counseling ensured that survivors received the measures best suited for their needs and potential and that they could put their material reparation to its best possible use. The reparation programs worked with communities to reduce stigma and discrimination and ensured that survivors lived in a welcoming environment. Educational campaigns, memorial days, etc., aimed at transforming the entire society. As the subsequent chapter will show, this differing approach has its basis in the very nature of transitional justice as a transformative project and reparation's communicative function within it.<sup>873</sup>

## II. A Different Structure

The international law on reparation is individualistic as it concentrates on individual cases. Usually, judicial or quasi-judicial bodies conduct separate proceedings to verify each survivor's status and assess their complete harm. This allows them to devise reparation measures that erase all the damage

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871 Shelton, *Remedies in International Human Rights Law*, 121. These defining characteristics will receive more detailed treatment in the next chapter, A.II.

872 IACtHR, *Loayza-Tamayo v. Peru (Reparations and Costs)* - Joint Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu-Burelli, para 6.

873 See below, ch. 3.

an individual suffered as far as possible.<sup>874</sup> Sierra Leone, Colombia, and the ICC chose a collectivistic approach over this individualistic one. They created administrative reparation programs instead of relying on the judiciary (1.) and categorized survivors and generalized their harm (2.).

### 1. Administrative vs. Judicial Reparation

Sierra Leone, Colombia, and the ICC created special administrative mechanisms to repair survivors. The ordinary judicial system played – if at all – only a subsidiary role. In Colombia, only the land restitution process relied decisively on courts. Beyond that, they only served as an instance of appeal for certain decisions. In Sierra Leone, courts played no role at all.<sup>875</sup> Even at the ICC, the TFV conceived and administered the bulk of each program. The Trial Chamber again played a supervisory role and acted as an instance of appeal for decisions to the detriment of survivors. Since no continuously existing judiciary repaired survivors, the special mechanisms often instated cut-off dates for application and sometimes end-dates for their termination.

### 2. Categorization and Generalization

The administrative reparation programs generalized different types of harms and categorized survivors on that basis. These categories determined their eligibility, the structure of the reparation program, and the measures it provided.<sup>876</sup> This made individual proceedings and harm assessments either unnecessary or less exacting. Colombia's and the ICC's more elaborate

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874 Malamud-Goti/Grosman, *Reparations and Civil Litigation - Compensation for Human Rights Violations in Transitional Democracies*, in: de Greiff (ed.), *The Handbook of Reparations*, 2006, 539, 542.

875 The Lomé Peace Agreement barred any court action against any combatant from any side, Article IX(3) Lomé Peace Agreement; Schabas, *Reparation Practices in Sierra Leone*, 296. While this did not bar actions against the state, to the knowledge of the author, no such action was pursued in Sierra Leonean courts. Even though they were not accorded a prominent role in most parts of the reparation program Colombian Courts still left a decisive imprint on the program through parallel and appellate proceedings, Sánchez León / Sandoval-Villalba, *Go Big or Go Home?*, 567.

876 Malamud-Goti/Grosman, *Reparations and Civil Litigation*, 541; Falk, *Reparations, International Law, and Global Justice*, 495 f.; ICTJ, *Reparations in Theory and Practice*, 2007, 3 f., 7.; IACoMHR, *Compendium*, OEA/Ser.L/V/II.Doc. 121, para 177.



reparation efforts countered this high level of generalization by providing survivor participation opportunities and an array of measures within each category from which survivors could choose. This collective nature of the examined reparation programs is exemplified best by the Sierra Leone and Katanga programs. In Sierra Leone, the SLTRC devised five highly abstract categories of eligible survivors and tied specific reparation measures to them. The war widow category illustrates their level of generality. It excluded men altogether based on the assumption that widowers did not depend on their deceased partner.<sup>877</sup> In the Katanga reparation program, the TFV devised five categories of survivors and created appropriate reparation measures for these categories. It somewhat countered the generalization by offering various measures among which the survivor chose the most appropriate.

The sheer number of survivors usually present in transitional situations explains the collectivistic approach of using administrative mechanisms that categorize and generalize survivors and their harm. Individual judicial processes would overburden any judiciary. Generalization and categorization make them unnecessary or less exacting. An administrative mechanism can also meet other difficulties of the transitional situation more efficiently, such as scarce evidence or a volatile security situation. Specific cut-off and end dates of such mechanisms are an attractive tool to ensure budget and planning security in light of limited resources and an unknown number of survivors. Furthermore, reparation programs allow a more holistic approach to reparation. They do not split up survivors of systematic human rights violations into individual torts, which is more conducive to transitional justice's transformative aim.<sup>878</sup>

### III. Intake

The transformative-collectivistic approach resulted in a different intake process. Categorization served the state-run programs to restrict survivor eligibility (1.). In return for the resulting programs' limited scope, eligible survivors received support when accessing reparation (2.).

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877 SLTRC, *Witness to Truth*, vol. 2, 244.

878 Malamud-Goti/Grosman, *Reparations and Civil Litigation*, 542 ff.; de Greiff, *Justice and Reparations*, 458 f.; ICTJ, *Reparations in Theory and Practice*, 3, 5; McLeod, *Envisioning Abolition Democracy*, 2019 Harv. L. Rev. 132, 1613, 1645 f.

## 1. Eligibility

To manage the high caseload and the limited resources available, the examined state-run programs restricted eligibility to a limited number of survivor categories. In Sierra Leone, only survivors of sexualized violence, war widows, war-wounded, children, and amputees had access to reparation. With that, the program disregarded, for example, survivors of forced displacement or property destruction. Colombia only comprehensively redressed grave and manifest human rights violations after 1985, even though the conflict started in the 1960s. Neither program redressed violations, e.g., of the right to freedom of expression or economic, social, and cultural rights. At the ICC, all survivors of the crimes a defendant was convicted for have a right to redress. However, survivor eligibility is restricted at earlier stages of the process. Only some systematic human rights violations amount to international crimes, and of those, only some are charged and finally adjudicated upon. The specificities of the ICC reparation system, therefore, eliminate the need for formal limits on eligibility.

These substantial restrictions do not bode well with the international law on reparation, which in principle gives every survivor of any human rights violation a right to reparation.

## 2. Access

All programs – except the Katanga reparation program – were created without knowledge of the exact number and location of survivors. In light of the large caseload and the volatile environment in which they operated, the programs could not count on each eligible survivor to present their claim without assistance. Hence, all examined programs took great care to reach all eligible survivors and allow them to access reparation. First, this required comprehensive outreach activities to inform the survivor population about the existence of the respective programs, eligibility requirements, and modes of access. Second, intake procedures and evidentiary standards were designed to facilitate access. Beyond intake, questions of access permeated all stages of the reparation programs. Sierra Leone ensured that survivors of sexualized violence did not have to identify as such when they received reparation. The TFV offered basic literacy and numeracy courses to allow survivors to access more advanced education measures. Colombia's program provided differential treatment to women, distinct ethnicities, and minorities at all stages of the program, also to facilitate access.

#### IV. Different Content

The high caseload and limited resources available also made it impossible for the programs to award full reparation through restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition, as foreseen by the international law on reparation. Instead, in a collectivistic spirit, the examined reparation programs determined adequate reparation measures by balancing each survivor category's needs and harms with the state's (or Fund's) capacity and the broader society's needs.<sup>879</sup> As a result, survivors received much less than what full reparation would have demanded.<sup>880</sup>

In keeping with the transformative-collectivistic approach, reparation programs emphasized collective reparations, services, and symbolic measures over individual monetary awards. These measures required fewer resources, produced synergy effects with general development, and better served the program's transformative aim. For similar reasons, the programs often rely on existing infrastructure, projects, and partners to implement reparation measures. Examples abound. To provide the most poignant ones, the Katanga Appeals Chamber and the SLTRC explicitly recommended devising reparation measures based on the harms found in the survivor population in general instead of assessing individual damage.<sup>881</sup> The SLTRC balanced multiple factors to develop its reparation recommendations. The resulting Sierra Leone reparation program was largely funded and administered with outside help and relied heavily on existing projects. Colombia remitted survivors to the general health care system for specialized care and granted them prioritized access to pre-existing government housing subsidies. The TFV emphasized the necessity to use existing infrastructure in the Lubanga reparation program and used local partners, existing projects, and NGOs for many, if not most, of its reparation measures.

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879 See OHCHR, *Rule of Law Tools for Post-Conflict States - Reparation Programs*, 2008, 28 f. Only some reparation programs engage in an individual harm assessment at a later stage to choose the reparation measures appropriate for the individual case among all measures offered.

880 This point is difficult to generalize though, mostly because the monetary value of reparation in international law differs to a large degree. Thus, while the difference in monetary value is striking when compared to awards made by the IACtHR, it is less noteworthy, albeit still existent, when the ECtHR is taken as benchmark. Furthermore, one needs to consider difficulties in valuing services, symbolic and collective measures, which at least the ECtHR rarely provides.

881 ICC, *Katanga Reparations Order (Appeals Judgment)*, ICC-01/04-01/07-3778, para 69 ff.

## F. Conclusion

A holistic look at the reparation programs of Sierra Leone, Colombia, and the ICC evinces that transitional justice reparation programs differ fundamentally from the international law on reparation. They employ a transformative-collectivist approach. To that end, special administrative mechanisms administer reparation. These generalize the harm suffered by the survivor population and devise survivor categories on that basis. These categories are the fundamental building blocks of the programs. To manage the high caseload, eligibility for the reparation program is usually restricted to some survivor categories. Eligible survivors then receive support to overcome barriers to access reparation, often present in the transitional justice situation. The appropriate forms of reparation are determined in a broad balancing exercise encompassing each survivor category's needs and harms, the state's capacity, and the needs of society. This exercise results in limited reparation awards. Reparation programs emphasize collective, symbolic, and service-based reparation measures. These are less resource-intensive, produce synergy effects with the general society's needs, and serve the program's transformative aim more efficiently. To further maximize resource efficiency, existing infrastructure is often used to administer reparation.

This approach stands in stark contrast to the individualized and conservative one foreseen by the international law on reparation as laid out in chapter one. Of course, the reality is not as black and white as this raw juxtaposition conveys. Most transitional justice reparation programs and individual proceedings based on the international law on reparation will lie somewhere between the conservative-individualistic and the transformative-collectivistic extremes. However, this chapter still showed that transitional justice reparation programs are difficult to reconcile with the international law on reparation. Changing the transitional justice practice to align with the international law on reparation is not a viable option. The strategies exemplified by the case studies respond to pressing challenges of the transitional justice situation. They are a necessary response to an enormous caseload, volatile environment, and limited resources. Under these circumstances, it is probably impossible to adhere fully to the international law on reparation. At the very least, it would produce unjust results. Without accounting for barriers to access, many marginalized survivors would be unable to obtain reparation. The amounts states had to pay under the international law on reparation would exceed their capacity, just as the caseload would overwhelm their judiciary. Also, disaggregating reparation into individual cases would shift

focus away from collective harm systematic human rights violations produce, thereby hindering the fulfillment of transitional justice's transformative aim.

The danger behind these facts is then not that deviation from the international law on reparation occurs. The fundamental threat is that states could be right in deviating. The international law on reparation was not conceived for transitional justice situations. It risks losing the capacity to provide normative guidance in transitional justice and, with that, its legitimacy. Answering this challenge by abandoning the international law on reparation in transitional justice situation is no option. As argued in the introduction, there is no legal basis to do so, and it would leave reparation to the goodwill of the responsible state. Given that survivors are often not the strongest political actor, they could then easily come away empty-handed.<sup>882</sup> The present study argues that the most promising road is to carefully adjust the international law on reparation to the particular difficulties of the transitional justice situation. But such an endeavor requires a clearer picture of the challenges transitional justice situations pose to reparation efforts. Therefore, the next chapter will elaborate on the purpose of reparation in transitional justice. The theoretical inquiry, together with this chapter's empirical insights, will create guide rails. Along these, chapter four will eventually adjust the international law on reparation to the particular exigencies of transitional justice.

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882 For further detail see above, Introduction and below, Conclusion, C.

