



**Reparations to Victims:
The Recent International Criminal Court Decision and Beyond**

**Rapid-response Seminar Report
British Institute of International and Comparative Law
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On 12th September 2012, the British Institute of International and Comparative Law held a rapid-response seminar to discuss the International Criminal Court ('ICC') decision of 7 August 2012, the first concerned with the procedures and principles of reparations within the structure of the ICC. This decision followed the March decision of its Trial Chamber I which found Thomas Lubanga Dyilo guilty of conscripting and enlisting children under the age of 15 years and using them in armed conflict. Mr Lubanga then became the first person to be convicted for war crimes at the ICC.

Following his conviction and sentence by the ICC for the conscription of child soldiers during his time as leader of the Union of Congolese Patriots ('UPC'), Thomas Lubanga became the subject of a number of individual claims seeking reparations in respect of the criminal acts he performed whilst within the Democratic Republic of Congo ('DRC'). In line with the procedure of the court, numerous representations in respect of the reparations' claims were made to the court. The prosecution and the defence, the representatives of the victims, other organs of the court and some interested NGOs provided their opinion upon how the structure of reparations at the ICC should be formulated. The court then had to engage with its obligation under Article 75(1) of the Rome Statute and, 'establish principles relating to reparations to, or in respect of, victims'. This ICC decision is therefore the first to deal with its own system of reparations and is important to understand the ever increasing role of the victim within International Criminal Law, the objectives of reparations as understood by the ICC and more practically, the structure and delivery of reparations within the ICC.

Carla Ferstman, Director of REDRESS, and Dr Mia Swart, Research Fellow at the Bingham Centre, were invited to share their views upon the impact that this decision would have upon those victims seeking reparations in respect of the crimes of Thomas Lubanga and, more generally, upon the overall structure of reparations within the ICC. Dr Duncan Fairgrieve, Fellow in Comparative Law and Director of the Tort Law Centre at the BIICL, chaired the event, during which some of the case's contentious issues were discussed in turn, with an opportunity for questions from the audience throughout.

The five separate topics to be discussed were:

- 1) The Methodology of the Decision
- 2) The Beneficiaries of Reparations
- 3) The Issue of Causation

- 4) The Dichotomy of Individual or Collective Reparations
- 5) The Next Steps following the Decision

1. METHODOLOGY and INTRODUCTORY REMARKS

Carla Ferstman first mentioned that anticipation was extremely high, particularly when the narrowness of the trial charges were considered. Article 75(1) of the Rome Statute requires the judges to develop principles on reparations. These were not determined in advance of the case; indeed, judges in plenary session decided that the principles would best be determined by individual chambers in the context of particular cases. This decision meant that the principles enunciated within the decision applied to the Lubanga case, rendering any principles identified by the court, although 'beautiful', as limited in scope. She considered the case-specific approach, identified within paragraph 181 of the decision, as not only an unfortunate approach but an approach which appears contrary to the wider principles that Art. 75(1) of the Rome Statute had envisaged.

Despite the court having given an unprecedented amount of attention to the submissions of the interested parties within the decision and having correctly identified those legal principles on reparations which represented 'best practice' within international law, she concluded that the decision had lots on principle but little on the implementation of those principles.

Mia Swart stated that despite giving the judges the benefit of the doubt, she still considered the decision of the court to be disappointing. She believed that the extended consideration of the submissions made to the court within the decision was itself, disconnected from the actual determinations of the court; indeed, this regurgitation of the submissions may suggest a certain hesitancy within the court to truly own the judgement.

Mia Swart then identified what she considered to be some of the more interesting issues within the decision; the ICC's failure to outline the principles in respect of reparations prior to this case (the timing on the decision on reparations principles) and the unwarranted focus of the court upon sexual offences within the decision.

The chair suggested that the extensive coverage of the submissions within the court's decision, despite being normal practice within a domestic setting, may be considered surprising at the level of the ICC; especially when the gravity of the court's findings is considered.

Mia Swart noted a word of warning upon the alleged 'inclusiveness' that may be perceived by such an extensive coverage of the submissions made to the court; such representations to the court are quite probably politicised (as they form only a sample of the views on the matter) and it was worth considering the views of those groups that have not been heard by the court. Carla Ferstman replied that Art 75(3) does implore the court to take account of submissions made by interested persons and states to the court and that a sufficiently interested party may apply to the court to make representations. Indeed, more generally, the judgement, she states, is only a framework judgement; the court is aware that the entire reparations process at the ICC requires

further consultation but at least, in principle, the court assumed the correct contemporary legal position on the types of awards to be given.

- A question from the audience considered the deficiencies mentioned by the panel and wondered whether these deficiencies were contingent upon the expertise of the judges. It was suggested that perhaps, a broader recruitment process was necessary.

Carla Ferstman considered that the bench consisting of a British, a Costa Rican and a Bolivian judge was a good composition. Each judge was said to have different expertise but all ICC judges were supported by a body of legal clerks. She suggested that perhaps the more important question in respect of the bench's composition comes from the decision of the court in paragraph 260 to allow a differently constituted bench to oversee and rule upon the implementation of the reparations programme in the Lubanga case.

Mia Swart seconded that concern and suggested that the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) would be unlikely to change the composition of a bench within a single case or create a new trial chamber to hear the same case. She further added that she thought it right that the bench should remain consistent throughout the case.

- A further two-part question concerning the limitations of the court came from the audience. Firstly, did the impoverished lack of funding, the key mandate of the court to end impunity and the guiding logic of the court which seems to suggest that 'something done is better than nothing done' undermine any attempt to provide victims with effective reparations? And secondly, as a result of those limitations, would the decisions of the court negatively affect victim groups whose experience of the court would appear arbitrary?

Carla Ferstman indicated that in respect of the first part of the question, mass victimisation and the idea that 'something done is better than nothing done' does tend to mean that individual rights are sometimes forgotten. As an example, she considered the reparations decision of the Extraordinary Chambers in the Courts of Cambodia (ECCC); this decision ignored the large body of human rights law concerning victim reparations and it did so by simply stating that it was a court 'sui generis'. Thankfully, she added, the Lubanga judgement does not ignore this body of law.

In respect of the second part of the question, Carla Ferstman considered that the negative perception among victim's groups will arise later when the court's decision to avoid a consideration of the individual reparations impacts upon the claimants. She considers that the delegation of the matter to the Trust Fund for Victims ('TFV') may lead to a negative perception of the court for those individual claimants.

Mia Swart agreed with the scepticism of the question and suggested that the over inclusive nature of the reparations and the wide range of reparation modalities cited will detract from the quality of the reparations and lead to the appearance of arbitrariness. She further suggested that the wide range of reparation modalities should be reduced; instead, the focus of the court should be upon improving a few key modalities.

2. THE BENEFICIARY OF REPARATIONS

Mia Swart was sceptical of the definitions used by the court when defining who is and who is not in a position to claim reparations before the ICC. The definition of harm that the court espoused could be considered too broad and unmanageable; indeed, Mia Swart rejected somewhat the Office of Public Counsel for Victims' (OPCV) submission that psychological harm should fall within the definition of harm, at least to the extent that it creates practical issues. On a practical level, it was her belief that such an extended definition of harm may be frustrated by the court's inability to finance investigations into that type of injury such as psychological injury. Furthermore, Paragraph 194, which accepts 'indirect victims' as viable beneficiaries of reparations, may detract from the effectiveness of reparations; instead Mia Swart suggests that, due to practical constraints, the Court should (at least initially) focus on direct victims. Lastly, the potential inclusion of victims of sexual offence within the class of beneficiaries is an extension beyond the remit of the court; the reparations proceedings should only deal with those injuries caused by the actions for which the defendant was charged.

Carla Ferstman states that the classification of the beneficiaries of the reparations reflects the prior jurisprudence of the court in respect of victim participation; direct victims are to be considered the child soldiers themselves and indirect victims are to be considered the family members of those child soldiers and others who suffered harm when intervening to protect the direct victims. Despite some *obiter dicta* within the earlier jurisprudence that suggested the definition of victim may be expanded at the reparations stage, (quite possibly in an attempt to cure the failure of the prosecutor to expand the trial charges to include sexual offences) the court has merely reflected its prior jurisprudence on the matter.

Whereas the definition of victim remains largely the same, Carla Ferstman believes that there may be an attempt to widen the class of beneficiaries through the causation testing. She suggests that the inclusion of a 'but for' test along side a 'proximate cause' test and the constant references to sexual offences within the judgement indicate that causation may be the gate through which the victims of sexual offences are redressed.

Mia Swart suggests that instead of distorting the judgement to provide for an extended class of beneficiaries which incorporates victims of sexual offences, the matter could be cured by placing the victims of sexual offences within the jurisdiction of the TFV's assistance mandate. To this end, the court could deal with the reparations that result from the actions which have produced the charges before the court and the TFV could deal with additional victims within the situation externally.

3. CAUSATION

In response to the courts' acceptance of a 'but for' and 'proximate cause' test in paragraph 246, Mia Swart outlined the dangers of a 'but for' test in two ways; firstly she stated that the 'but for' test is always difficult to reconcile with the notion of numerous perpetrators performing a single crime and secondly, 'but for' testing could lead to unlimited liability. She similarly dismissed the 'proximate cause' test, which she equated with the 'direct or immediate cause'.

Duncan Fairgrieve suggested that 'but for' testing can extend causation too widely and yet, simultaneously exclude inappropriately. He criticises the judgement for its lack of reflection upon causation; the four paragraphs (247-50) in which the court deals with causation are surprisingly light.

- A member of the audience questioned how the 'but for' test may be applied in the situation of a crime committed with a co-perpetrator. They further ask how this may differ from the use of 'but for' within the ICTY's understanding of crimes committed by numerous perpetrators, namely, Joint Criminal Enterprise (JCE).

Mia Swart suggests that the co-perpetrator test is a relaxed test which connotes a common purpose or motive. Carla Ferstman suggests that in relation to the ICC's reparations judgement the more important question is whether criminal or civil causation principles should be applied. She notes that the judges appear to be introducing civil causation principles for the civil component of the case, which is appropriate as the liability of the accused is already determined.

- Speaking in relation to the assessment of harm, an audience member stated that the court's decision to follow the implementation plan outlined by the TFV in the TFV's First Report on Reparations provided for the assessment of harm to be undertaken at the implementation stage of reparations. As such, the audience member was perplexed as to why the assessment of harm did not come before the implementation stage of a reparations programme.

Carla Ferstman agreed that an assessment of harm in relation to the individual reparations claims within the implementation plan is strangely placed. The decision is however being appealed by the victim's representation because the court had failed to deal with the merits of the individual applications for reparation; instead, the court had delegated this job to the TFV. Mia Swart directly suggested that positioning the assessment of harm at the implementation stage suggested that the court and indeed, the TFV favoured collective reparations above individual reparations.

4. INDIVIDUAL AND COLLECTIVE REPARATIONS

Carla Ferstman stated that the decision allowed for both collective and individual reparations however, the approach of the court suggested a certain level of neglect for individual reparations. The delegation of the consideration of the individual reparation claims to the TFV, an organ evidently in favour of collective reparations, has meant that the individual applications are likely to remain unconsidered. She considered this to be a missed opportunity for a decision of the court considering an individual claim may assist in developing the law; such additions to the jurisprudence would ultimately improve our overall understanding of reparations.

Mia Swart stated that paragraph 44 of the judgment evidently shows that the TFV was against an individualistic approach towards reparations. She stated that individual reparations should remain for two reasons; firstly, although logistically difficult, such reparations recognised the harm of the individual vis-à-vis an individual and secondly, individual reparations provided a financial autonomy that collective reparations could not. She went on to reject the judgement's reasoning that individual reparations may

offend the wider community by unjustly benefitting some over others. She questioned whether this was being culturally sensitive or purely a means of avoiding dealing with individual reparations.

- An audience member questioned whether one modality of reparation, rehabilitation, so seemingly prized by the judgement, could ever be purely collective; they suggested that rehabilitation must surely be tailored to an individual's needs.

Carla Ferstman stated that in respect of rehabilitation, the TFV has been particularly useful especially in relation to its work in Uganda.

Mia Swart reconsidered the practical difficulties surrounding individual reparations; she pointed out that where individual reparations are awarded, the money available for reparations can disseminate within a matter of a few settlements. In this respect she questioned why, if the TFV envisaged a reparations proceeding as the entire ICC must have done, it had not been fundraising in anticipation of providing future collective reparations.

Carla Ferstman stated that there was debate at the ICC over whether the court could require the TFV to use the money it had received from voluntary contributions in a court ordered reparations settlement; the TFV was more inclined to understand that it had full discretion to decide how best to deploy the resources. Carla Ferstman considered that although the court strongly suggests that the TFV uses its funds to complement the reparations awards in its judgement, it falls short of ordering the TFV to apply its voluntary income in a particular way, and this may be part of the reason why the court is so deferential to the TFV.

- One audience member was concerned that any decision to provide reparations anywhere on the spectrum between the ultra-collective approach or the ultra-individualist approach is purely a political decision; a decision chosen and then implemented within a reparations' programme.

Carla Ferstman stated that the extension of International Criminal Law to incorporate a role for the victim was precisely to mitigate against a political decision in respect of reparations.

- Although conceding that the question was a little off topic, one audience member wished to bring up the issue of gender-based violence and the role of women within the prosecution of Thomas Lubanga. Firstly, she wanted to know why there had not been charges concerning sexual offences. Secondly, she wished to know what role feminist NGOs played within the proceedings; what were their strategies and lobbying methods? Thirdly and more broadly, what limitations were there on international criminal justice? Could individual claims get lost within the bigger picture of prosecutions?

Mia Swart made the brief point that the Women's Initiatives for Gender Justice ('Women's Initiatives') were extensively cited within the decision and surmised that the lobbying of the court must have had some impact. Carla Ferstman stated that the Prosecutor has indicated, in response to the early critiques of the narrow charges brought in the Lubanga case, that his office was continuing to investigate allegations of

sexual violence. However, ostensibly as a result of the deteriorating security situation in Eastern DRC, the Prosecutor decided to suspend the investigation into those allegations, and no charges were ever brought. Without those charges ever having been brought, the efforts of the Women's Initiatives to intervene during the confirmation of charges hearing on the issue of the narrow scope of the charges was disallowed by the judges on the basis of the cyclical reasoning that the submissions they would seek to make would not concern the charges brought by the Prosecutor.

5. NEXT STEPS FOLLOWING THE DECISION

Carla Ferstman outlined three issues that would be of interest to observe in the coming months. Firstly, with the appeals pending, it would be interesting to see whether the TFV will start work on implementing the decision of the court. Secondly, the TFV's need to fundraise in order to fulfil the mandate it had received from the court, was now far more immediate. She stated, that REDRESS and others had encouraged the TFV to consider donations from sources other than states although evidently there needed to be some vetting process in respect of the donations to ensure their legitimacy.

Mia Swart focused on the appeal; she suggested the unlawfulness and impracticality of allowing a differently constituted bench to oversee the TFV's implementation programme.

CONCLUSION

Carla Ferstman stressed the need to safeguard the right of victims to participate within the ICC proceedings; a lack of funding should not be allowed to prejudice these rights of participation.

Mia Swart concluded that from a comparative law perspective the judgement was positive; the range of jurisdictions that the court cited was to be commended. This strength was somewhat mitigated by the poor structure of the decision and its lack of accessibility.

- An audience member asked whether in providing reparations provisions and rights for a victim's participation, International Criminal Law was trying to cure the deficiencies of the toothless human rights courts.

Mia Swart did not disagree with this point, in fact, she stated that in dealing with these new provisions, new theoretical possibilities arise; an entirely new form of institution may be being created at the ICC and this should not be considered as a negative.

- An audience member raised the issue of cultural considerations within the judgement and considered whether the court had done enough within this area.

Mia Swart suggested that the court would be creative in this area whilst Carla Ferstman cited a couple of areas within the decision that suggested the court had been culturally sensitive; in respect of its indirect victim testing, the court had accepted that conceptions of family would vary culturally. Similarly, the domestic consultation provided for within

the TFV's implementation plan would safeguard the usurpation of a culture's precepts. Notwithstanding this, the decision, she added, consistently refers to principles of non-discrimination.

- An audience member is concerned that because the principles found within the decision are considered case-specific that victim outreach and evidence gathering will become less worthwhile; as principles vary case by case, the public could not predict how it is to engage or respond to the ICC.

Carla Ferstman agreed, citing the caution that certain NGOs expressed in respect of extensively encouraging potential victims within the DRC to claim for individual reparations before the principles on reparations were known.

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