

PROSECUTING INTERNATIONAL CRIMES AND WHITE COLLAR CRIMES

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Examining the Legal Implications of the Reparations Regime Principles of The Impugned Decision of The International Criminal Court in Thomas Lubanga's Case

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Abstract: *The Prosecutor v. Thomas Lubanga's* case remains a notable decision that gave rise to the first reparative justice regime of the Trial Chambers of the International Criminal Court (ICC) on war crimes of child soldiering. In line with the provisions of Art. 75(1) of Rome Statute of International Criminal Court (ICC), this work notes that ICC established several relevant principles related to reparations along with its application. It examines the implications of the evolved principles developed by ICC with respect to their implementation in International Criminal Law (ICL). The article touches on the impediments affecting the court as it relates to the enforcement of the emerged principles. The work argues amongst others that the legal consequences of the slow development of reparations principles under the ICL architecture through case-by-case analysis, unclear definition of collective reparation, large number of victims, unsettled view on causation, large beneficiary factors,

financial constraints of the convicted persons, are some challenges facing the development of reparations regime of the ICC. Significantly, the work identified the existing gaps that affect the reparations process. It concludes by making recommendations capable of enhancing the growth of reparations principles in ICL.

Keywords: Reparations; Victim’s Principle; Impugned Decision; Thomas Lubanga; International Criminal Court (ICC)

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I. Introduction

Thomas Lubanga born on 29 December 1960, was a brutal non-state armed group commander during the crises that embroiled the Democratic Republic of Congo (DRC) in Africa (Kurt, 2013, p. 431; Yuvaraj, 2018, p. 69). He remained a notable figure convicted by the ICC through a State party referral of war crimes.¹ Lubanga was a principal actor in the non-international armed conflict that existed in the period of 1999–2007 in the Ituri Province of the DRC. In the month of July 2001, upon the emergence of the DRC crises, Thomas Lubanga formed a separatist organization named the Union of Congolese Patriots (UPC) (Wagner, 2013, p. 180) known as one of the armed organizations that festered their agony in the region of Ituri noted as mineral rich region in DRC. In the month of September 2002, Lubanga created a separatist armed organization which is an arm of the UPC known as “Patriotic Force for the Liberation of Congo” (PFLC).²

In February 2003, at the upsurge of the war, the UPC engaged about 15,000 military personnel in pursuance of its military objectives and unleashed several unwanted attacks on civilian populations that resulted in rapes, abductions, mutilations, maiming as well as conscription of children under 15 years old as soldiers to augment its ailing military powers. At the end of the hostilities, the DRC referred Lubanga for trial to the ICC. Lubanga’s prosecution for the war crime of recruiting and using children of under 15 years to participate actively in war commenced in 2009 (Squares, 2015, p. 567; Hynd, 2021, p. 74). He was found guilty by the Trial Chamber of the ICC on the above charges in the month of March 2012, and was sentenced to imprisonment on 10 July 2012 for a jail term of 14 years.³ In the computation of time, the Trial Chamber of ICC ordered that the period from Lubanga’s surrender to ICC in the year 2006 till sentencing should be deducted from the

¹ Prosecutor v. Thomas Lubanga Dyilo, Judgment Pursuant to Art. 74 of the Rome Statute of ICC. On 04-01/06-2842. TC on the 4 March 2012. Available at: <http://www.jcc.cpi-int/icc.docs/doc/doc1379838.pdf> [Accessed 23.03.2024].

² In early 2003, Lubanga emerged the Senior Commander of the FRPL, a Militia Group which was involved in the conflict in Ituri.

³ RS of ICC, Art. 8(2)(e)(vii) and 25(3)(a) and Art. 74 Para. 1358.

14 years jail period of imprisonment as pronounced by the court (Stahn, 2015; Wlarsing, 2012, p. 22). On 15 March 2020, Lubanga regained his freedom after a period of 14 years term of imprisonment.

Interestingly, this development emerged as the Court's first reparation regime in the history of the ICC. These reparations proceedings commenced in 2012, while in the year 2016, the Trust Fund for Victims (TFVs) endorsed the execution plans for victims (Dwertmann, 2010, pp. 1–9; Stahn, 2015, p. 10). In this regard, the Court calculated Lubanga's liabilities for collective reparations in the sum of ten million USD as an equivalent of the harm perpetrated against the children. Moreover, a total number of 427 persons were victims of Lubanga's criminal acts. The reparation process was executed by ICC's TFV at the end of the appeal session.⁴ Evidently, these reparations processes took the form of physical along with mental reformation, acquisition of technical skills as well as capital management skills acquisition programs.

Though this work briefly looked at the meaning of reparation and its mechanism within the ICC, it centered on the first decision of the Court and the principles of reparation developed through cases. Such principles like the relevant laws to reparations, scope and modalities, causation and proof, roles of the judiciary were looked into. The work also addressed some gaps identified with some principles of reparations within the ICC regime. The author also examined the issues such as the slow development of the principles of reparation, no clear definition of collective reparation, unsettled view on causation, inadequate publicity, compromised fair trial procedure, difficulty in gender imbalance evaluation, likely non-cooperation of member states, financial constraint of convicts. The paper draws conclusions and recommendations relevant to the improvement of the ICC's reparation principles.

⁴ Prosecutor v. Thomas Lubanga Dyilo, Reparation Order, ICC-01/06-3229; Prosecutor v. Bosco Ntaganda, Reparation Order, ICC-01/04-02/06-2568, 8 March 2021, and The Prosecutor v. Germain Katanga, Order for Reparations, ICC-01/04/07-3728 24 March 2017.

II. The Concept of Reparations

Reparations is making amends, repair, compensation, restitution, apology on the harm caused to another. Black's Law Dictionary defines "reparation" as "The act of restitution aimed at remedying a wrong through compensatory action for an act which results to an injury or wrongs during war time situations or an act which breaches a global responsibility (Wenger, 2007, p. 241). Therefore, reparations is a fundamental principle of law that enhances justice by reducing consequences of a wrongful act, preventing and stopping violations of law.

Specifically, reparations refer to the procedure and processes of remedying the loss, injury and damage inflicted by a perpetrator through unlawful means. The aim is to bring the current bad situation back to the *status quo* before the injury took place. It serves as an instrument for reconciliation or restoration of breaches in order to stop future occurrences by healing fast the wounds of war. It may take an immediate effect and may be for a long-term repair. This foretells those reparations take different forms or modalities and a victim or victims must have suffered harm, injury or harm (Blanchi, 1994, pp. 9–10).

To this end, reparations address restorative justice to the victim and it is purely victim centered. It seeks to make remedy, ignite remorse, assuage, correct, retribute, reduce differences, and stop offences, crimes and damages in the society. It replaces punishment with restitution in order to restore the offender and the victim back to the society as better persons (Roach, 2000, p. 253).

Reparations as a concept entail appropriate healing measures to prevent violations. It calls for adequate post-war investigation of violations on victims. By this, the end result is to promptly, exhaustively and impartially take action on the perpetrators in favor of the victims after conviction. It provides effective justice system delivery as it looks beyond the limited nature of criminal trial as per the number of complainants. It encompasses victims that did not participate in the trial. On this note, it supports activities that encouraged self-reliance in order to improve the conditions of the victims, family members along with common ties that may be beneficial to the victims as well as being sustainable. Though a reparations award may be done either on personal or group basis, its main essence is to restore justice to the victims.

III. Reparation Mechanism of the International Criminal Court

Unarguably, the provisions on reparations contained in the Rome Statute of the ICC reflect a salutary development on the glorious coloration of the victims' rights in ICL proceedings centering on individual responsibility. Varied provisions of the Rome Statute starting with the preamble acknowledge victims as stakeholders attest to this.⁵ The wide discretion and authority of the court to exercise its reparative powers on the award of damages to aggrieved victims or to those who are entitled to it shows its importance in ICL. Thus, Art. 75 of Rome Statute of ICC provides for the application of reparations under the regime of the ICC.⁶

Aside from determining who a "victim" is, Art. 75 expressly made it clear on issues of reparations to aggrieved parties. However, it also affirms the recognition of relatives or members of the family of the aggrieved parties who may have suffered damages, injury and losses. Also, Section 85 of the Rules of Procedure and Evidence of the ICC specifically defines a victim as a person who is adversely affected by the conduct of another resulting to grievous bodily harm within a geographical location upon which a court can exercise its powers of adjudication.⁷ Who actually is a victim within the reparations regime of ICC is a key contention (Wenger, 2007, p. 241). This is because a victim is one who has suffered harm and losses within the jurisdiction of ICC. This suggests that such a crime should not be one under investigation ordered by ICC, but can hang on the presumption of innocence of the victim. To this end, victims are not required to refer to a particular investigation in their reparations cause of action. The claim must relate to the charges against the perpetrators.

The reparation orders of the ICC are applied in direct and specific terms because the Court's reparative orders are made against persons

⁵ The Preamble of the Rome Statute, Available at: www.icc.cpi.int [Accessed 25.03.2024].

⁶ The Rome Statute of the ICC, Art. 75.

⁷ The Rome Statute of ICC Rules of Procedure and Evidence, adopted by the Assembly of States Parties, New York. *Report on the Impact of Rome Statute System on Victims and Affected Communities* (The Redress Trust 2010), pp. 1–3.

who have been convicted in line with their criminal liability on behalf of a direct or indirect victim (Evans, 2012, pp. 39–43, 117–128; Gaeta, 2011, pp. 305–327).

In contrast, human rights reparation can be made against a state with the aim of remedying a proven harm, injury or loss. While the growth of reparations regime in ICC gears towards victims' rights, aligning development to measures towards state responsibility to victims is evolving (Nollkaemper, 2003, pp. 615–620; Rivas, 2006, p. 311). This does not impugn on the powers of the ICC in making reparative orders via individual along with collective means, or through Trust Fund for aggrieved parties.

Basically, TFFV's responsibilities arise from the need to regulate the Trust Fund for victims of harmful practices arising from war situations, and as a regulatory framework, it was adopted in 2005. The major role of TFFV is to complement or take over the award made against a convict on behalf of victims when the convict is declared indigent. It can also carry out assistance measures to victim. The role of the TFFV makes it easier for the court to complement reparations order with voluntarily assessed resources not deriving from the coffers of the perpetrators, is germane especially when the convicted is declared indigent.

IV. The Reparation Principles Laid Down in Thomas Lubanga's Case

Notably, the first reparative orders of the ICC arose from the convictions made by the Court in *Prosecutor v. Thomas Lubanga*.⁸ In this case, the Trial Chamber in its declarative order, and in line with Art. 75(1) of Rome Statute of the ICC, developed several guidelines relating to issues of reparations and their enforcement procedures.⁹ These guidelines outline the processes, procedures and laws followed to arrive at a successful reparation order for the victim of war. The essence of reparation principles is to bring lasting reconciliation and succor to those who have suffered harm.¹⁰ Hence, they are to be

⁸ *Prosecutor v. Thomas Lubanga*, ICC — 01/04-04/06-2872, Para. 210.

⁹ *Prosecutor v. Thomas Lubanga*, Para. 181.

¹⁰ *Prosecutor v. Thomas Lubanga*, Para. 65.

administered in a flexible, broad and general manner that is altruistic to victims.¹¹ The below issues were addressed by the Court culminating in the development of reparations principles. Notwithstanding the fact that the judgment was impugned on appeal, these principles were developed by the ICC for the first time, and they had a huge impact on the restorative justice of the Court. The principles formed the basis for the growth of the Court's case law in its reparative regime. They were derived from the first reparation trial of Thomas Lubanga before the ICC. They are discussed in the next section below.

V. Laws Relating to Reparations Regime

The Trial Chamber adduced the use of legal frameworks and standards that cut across many regimes of international criminal law, human rights law, labor law, etc., in the treatment of reparation matters. In its ruling on reparations, the Court relied heavily on Art. 21(1)(a) of the Rome Statute of the ICC in addressing the concerned issues bordering on the element of crime along with the Rules of Evidence and the Regulations of the TFV.¹² Drawing from the provisions of Art. 21(3) of the Rome Statute of the ICC, reparative orders should be devoid of discrimination based on the person's age, ethnic origin, color, language, religious beliefs, political affiliation, and social status in line with the internationally recognized basic human rights principles.¹³ Moreover, the Trial Chamber recognized the contribution of the regional basic rights instruments, as well as case-law and international custom that have evolved on reparation regime.¹⁴ On this note, laws outside criminal law are requisite in taking decisions bordering on issues of reparative orders.

¹¹ Prosecutor v. Thomas Lubanga, Para. 180.

¹² UDHR 1948, Art. 8, ICCPR 1966, Art. 6, UNCAT, Art. 14(1), ACHPR Art. 21(2), ACHR, Article art 63(1) among others.

¹³ The Rome Statute of ICC, Art. 31(3).

¹⁴ Note that while IACtHR and ECtHR have jurisdiction towards reparation orders on States, the ICC is limited to individual persons.

V.1. Impartial Treatment of Victims

Generally speaking, the Court advised the use of the principle of impartiality to victims, which centered on fair hearing and trial in reparation trials. To this end, victims are to be treated equally in all aspects of reparations programs despite whether they were parties to the trial proceedings. They are to be part of the plan and design of the reparation process. On this note, they are to enjoy unlimited and equal access to information and assistance in the reparation regime.¹⁵ This being said, vulnerable persons such as children, elderly, females, victims of sexual and gender assault are not to be discriminated against during trial.¹⁶

When making the decisions on reparation, the victims should not be maltreated as an object of humiliation, but should be humanely treated by means of implementing measures capable of ensuring their safety, social and physical needs, privacy, emotional and psychological status.¹⁷ In the midst of limited resources for the reparation of large number of victims, the process should be handled through community-based approach due to illiteracy and poverty. However, unlike criminal trial that emphasizes fair hearing and fair trial for all the parties, the principles of reparation developed by the ICC center on the victims' rights mainly, disregarding the defendant or the convict.

V.2. Direct and Indirect Beneficiaries of Reparations

As was ruled in Lubanga's reparations decision, the palliative should be carried out as contained in Rule 85 of the Regulations of ICC to direct and indirect victims who participate in the process. To this end, direct victims who are ones that took part in the trial that led to conviction and indirect victims who did not participate are entitled to take part the reparation process of the Court.¹⁸ Indirect victims can be family

¹⁵ The Rome Statute of the ICC, Art. 85, UNBPs, 11, 12, 24.

¹⁶ The Rome Statute of the ICC, Art. 68 and Rule of Evidence 86.

¹⁷ See Rule of Evidence, 87 and 88.

¹⁸ Prosecutor v. Thomas Lubanga Dyilo, ICC 601/04601/06, Pre-Trial Chamber I, Decision on Confirmation of Charges, 29 January 2007. Para. 32, on "indirect victims". Available at: <http://www.icc-cpi.int>. [Accessed 24.03.2024].

members, friends, well-wishers who have lost a beloved or have suffered harm or injury not directly.¹⁹ Besides, reparations in some cases may be granted to legal entities under Rule 85(b) of the Regulations.²⁰ While identifying the beneficiaries, formal and informal means can be used. Aside the above, the court may approve a declaration attested by two known witnesses pointing to their relationship to the beneficiaries.²¹ If it is an organization, any document of its incorporation suffices.²²

The Trial Chamber recognizes as a principle that certain groups need be given priority and special treatment. These includes child victims, victims of gender or sexual assault and severely traumatized victims. The Court may adopt special procedures such as affirmative action to guarantee equal, fair and effective security. In light of the provisions of Art. 75 of the Rome Statute of ICC, organizations like schools, villages, markets, etc., where the children were recruited to serve as soldiers can benefit reparations packages.²³ To this end, direct, indirect victims are potential beneficiaries. In general, it was submitted that it will be appropriate for the Trial Chamber to maintain open list of applicants for reparations to the best interest of children that were affected by the war and their relations. This brings about long list of victims to reparation in the ICC.

V.3. Scope and Modalities of Reparations

The Trial Chamber developed numerous principles on the scope and modalities of reparation. It was decided that the regime of reparations grew from international human rights obligations,²⁴ and in line with Rule 97(1) of the Regulations of ICC, the Court is obliged to award reparations on an individual basis or, where necessary, on the basis of

¹⁹ Prosecutor v. Thomas Lubanga Dyilo, ICC 601/04601/06, Pre-Trial Chamber I, Decision on Confirmation of Charges, 29 January 2007. Para. 32–34.

²⁰ Standard Application Form for Organizations, Part A. Available at: <http://www.ICC.CPI.int/MENUS/ICC/structure+of+the+court+victims/forms.htm> [Accessed 24.03.2024].

²¹ See Prosecutor v. Thomas Lubanga, Para. 104–107.

²² See Prosecutor v. Thomas Lubanga, Para. 136–142, 153–159.

²³ ICC Rule, 97 and 98.

²⁴ The Rules and Reparations of the TFV, Rule 98(5).

collective interest, or both. It should be noted that a combination of the provisions of Art. 21(3) of the Rome Statute of the ICC along with Rule 85 of the Regulations of ICC, give impetus to the Trial Chamber in authorizing individual or group reparations. The implications of the above is that these provisions seem not to be mutually independent as they exist simultaneously.²⁵ The Rome Statute's provisions clearly provide for individual reparations and impliedly provided for collective reparations.²⁶ The non-definition of the meaning of "collective" creates ambiguity (McCarthy, 2009, p. 250).

On the modalities, the Trial Chamber is of the view that despite the entire provisions of Art. 75 of the Rome Statute which lists the restitutions, compensation along with rehabilitation as measures of reparations, the said list remained inexhaustive as the case may be. There are other types of reparation that may have symbolic and preventive transformative values. For example, they may include the publication of the court's convictions and sentences in Radios and Newspapers.²⁷ Another may include the public apology of the convicts to the reparation beneficiaries and their acceptance.

V.4. Causation and Standard of Proof in Reparations

The position of the Trial Chamber is clear on issues of damages, loss or injury sustained by the victims. The form and structure of a reparative claim must be related to the crimes convicted of. In this sense, the Court can apply proximate cause in relating the loss, harm or injury to the crime convicted of.²⁸ Hence, in situating a balance in the relationship between harm and crime, the court must be satisfied of the nexus between both on causation.

To this end, it should be noted that at the stage of the reparation trial, the Prosecution is obliged to prove the relevant facts of their case

²⁵ Redress, Report on the Impact of Rome Statute System on Victims and Affected Communities (The Redress Trust 2010), pp. 1–3.

²⁶ RS Art. 75(1) and Rule 97 (1).

²⁷ ACtHR, Veldsquez Rodriguez v. Hundred and Costs, Judgment of 21 July 1989, Para. 2004.

²⁸ Rule 97(3) of Rules of Procedure and Evidence.

to a standard required in criminal prosecution, though a less exacting standard of application as per different nature of the reparations proceedings.²⁹ The standard of proof, in line with Rule 94(1) of the Regulations of the ICC along with Art. 74 of the Rome Statute, is that of a balance of probabilities.³⁰ That said, this implies that both the standard along with the burden of proof must be applied in a more flexible manner, relaxing the law along with the facts. In support of the above, a lower evidentiary standard to proof beyond reasonable doubt should be applied. This is because reparations proceedings differ from criminal trial and they do not lead to another conviction.

VI. Reparative Orders against Convicted Persons

Lubanga's conviction by the ICC remained a celebrated one as he was at the same time declared indigent for the purposes of reparations. The Trial Chamber was of view that he may be made to contribute non-financial reparations in the form of symbolic nature of public or private apology to the aggrieved parties. In this regard, this clearly suggests that the above may not constitute part of the decision of the Court.

The foregoing called for the concept of reparation via the TFFV.³¹ The Trial Chamber ruled that when convicted person is indigent, and reparations are ordered via the TFFV, such restitutive measures should not be restricted to the resources or assets seized and deposited to the TFFV, but can be supported by the TFFV.³² On this note, the court has the right to confiscate the present and future properties of the person whom the order for reparations is made against. Even if he is a declared indigent, his financial records should be kept under review.

²⁹ At the debate of the drafting of the Rome Statute, it was agreed that the standard of proof must be lower.

³⁰ This is in line with overriding evidence in reparations claims programs.

³¹ The Rome Statute of the ICC, Art. 75(2).

³² The Rome Statute of the ICC, Art. 75.

VII. Implementation of the Reparation Plan and the Role of Judiciary

In the reparation's regime, the Court institutes a five-step enforcement plan as suggested by the TFV through which reparations shall be received by victims.³³ The first is the identification of localities of parties or victims, while the second consists of a consultation process in the localities identified. The third step is the assessment of harm suffered by beneficiaries of reparations. Public debates in communities, education and advocacy on reparation principles modalities is the fourth stage, while the last involved collection of proposals for general reparations.³⁴

The Trial Chamber deemed it necessary that applications so far made to it should be transferred to the TFV for appropriate consideration. To this end, they have independence to carry out the reparation assessment vide experts as provided by Rules 47 of the Regulation of ICC along with 48 of the Regulations of the TFV. In conclusion, the Trial Chamber issued the aforesaid guidelines on reparative orders as contained in Art. 75(1) of the Rome Statute of ICC. It is imperative to note that notwithstanding the aforesaid was appealed upon, the principles developed formed classical precedent for future decisions in the ICC reparative regime on victims' restitutions.

VIII. Challenges to the Applications of ICC's Reparations Principles

It is generally noted that the ICC's first decision on reparations in the matter of Thomas Lubanga unfolded a lot of issues bordering on the development of reparations principles in a criminal matter (Wlarsing, 2012, pp. 29–38). It made a magnificent precedent in ICL within the context of regime of victims, indigency of the perpetrator and the application of the TFV as an alternative succor. However, the principles

³³ Decision establishing the principles and procedures to be applied to reparations. ICC-01/04-01/06-2904. Para. 173.

³⁴ Decision establishing the principles and procedures to be applied to reparations. ICC-01/04-01/06-2904. Para. 173.

brought out by the court which covered the law, practice, purpose and procedure within the court's reparations order, have a long way to go in ICL. Reparation proceedings being different from criminal trial, the Lubanga's reparations decision principles face numerous impediments in application. Some of the clogs on the enforcement principles are discussed hereunder.

VIII.1. Slow Growth of Precedents of Reparations Principles in ICL

Reparations provisions is a novel development of the ICC. The mandates and powers of *ad hoc* tribunals that predate the ICC like the International Criminal Tribunal of Yugoslavia and International Criminal Tribunal of Rwanda do not have provisions of reparation (Mumba, 2001, pp. 359–371; Cassese, 2005, p. 429). It is trite that reparations under ICL is a borrowed concept from International Humanitarian Law (IHL) and International Human Rights Law (IHL) practices. Although they are separate regimes, there are relevant interconnections between them as the criminalization of serious human rights violations bring forth criminal responsibilities and war crimes (Moffett and Sandoval, 2021, p. 750). It remained an undisputed fact that reparative principles of ICC rely on the jurisprudence of IHL and IHRL. However, in terms of application, it operates on a narrower level.³⁵ This is in sharp contest with the human rights regime of reparation, where it can be ordered against the State in respect to proof of victim's injury and harm.

Though, Art. 25(4) of the Rome Statute maintained that no provisions of the Statute relating to individual criminal responsibility shall affect the responsibility of States under international law, as most member States are wary of the collective or state responsibility syndrome in reparations award. Notwithstanding that the ICC limited its reparations process to individual criminal liability, the extensive nature of state responsibility as utilized in human rights regime of reparation provokes a lot of jurisprudential debates. Worst, the growth of the principles of criminal reparation is slow unlike other regimes like the IHL.

³⁵ Prosecutor v. Thomas Lubanga, Decision Setting the Size of the Reparations Award, Para. 118, 269.

VIII.2. Principles Limited by Case-by-Case Analysis

Article 75(1) of the Rome Statute vested the ICC with extensive powers in establishing and developing guidelines relating to aggrieved parties who may be directly or indirectly affected by the act that requires restitutions, compensations or rehabilitations.³⁶ Unlike trial proceedings, in which a court decides that a case forms a precedent to be followed by lower courts, principles do not follow such a sequence. Precedents per se are binding on lower courts and can be referred to or utilized in a similar matter. The established principles as ordered by Art. 75(1) of the Rome Statute do not have a binding effect on other cases. Hence, the approaches of its implementation are relevant to the present case at hand. To this end, the evolved principles developed in Lubanga's case do not bind any other case. However, the principles can be used or referred to by the Court in other cases are not binding precedents in other cases of reparations before the ICC, domestic, regional or international criminal law legal institutions³⁷ Suffice it to say that binding precedents do not exist within the evolved principles developed by the Court. On this note, it can be developed subjectively on a case-by-case circumstantial condition.

VIII.3. No Clear Definitions of Collective Reparations

It must be admitted that several principles have evolved from the decisions of the Court in Lubanga's case with specific emphasis on the modalities of reparation which may be specific or collective in nature.³⁸ While individual reparation is clear, collective reparation is wide and contentious. Although the latter is adjudged a salutary means of reaching large number of victims in the face of limited resources of the perpetrator and the ICC, the absence of its definition in law is a big snag, because it is a mechanism of reaching a large number of people other than identified specific victims.³⁹ The absence of a clear definition of collective reparations drowns the principle in the mud of ambiguity and uncertainty.

³⁶ The Rome Statute of the ICC, Art. 75(1).

³⁷ Prosecutor v. Thomas Lubanga, Para. 181.

³⁸ The Rome Statute of the ICC Art. 64(2) and 3(a).

³⁹ Prosecutor v. Thomas Lubanga, Para. 10, 11, 13–15, 17, 35–42.

VIII.4. Unsettled View on Causation

Damage, loss and injury suffered by victims must have a connection with the offence convicted of. Such a connection or relationship implies causation. Article 75 of the Rome Statute appears to favor the reparative regime in such a manner that it could be applicable to the victims either directly or indirectly, and does not impugn on causation proof to get the palliative remedy. Thus, causation is not defined by the Rome Statute. Hence, the specific conditions of the causal relationship in the face of the offence or the harm suffered by the victim is not precisely provided for the purposes of reparations. On this note, if the direct cause is not satisfied for the court, a proximate cause may suffice. The non-precise definition of causation leaves the process subjective.

VIII.5. Large Victims Participation

A look at recent armed hostilities around the globe suggests that mass violations of IHL through war crimes entail several casualties wherein the affected person or persons may not be part of the trial proceedings that warrants conviction under Art. 74 of the Rome Statute. However, Art. 75 of the Rome Statute made a clarification on the misconceptions on whether victims appear under direct or indirect victims. The provision “in respect of” compounds and expands the geography of beneficiaries in reparations regime of ICL. This builds up uncertainty in expectation as reparations orders are made against individuals and not States under the ICC and ICL in general. The indigency of the perpetrator and the lack of resources by the ICC through its TFV leave the massive numbers of victims with their individualized harm under the mercy of collective reparations (Balta et al., 2018; Cassese, 2005, p. 429). This goes along in dwindling the palliative justice of the ICC.

VIII.6. Inadequate Publicity of Principles

The wide publicity of reparations principles is pertinent especially in communities festered by illiteracy, ignorance and lack of communication structures like television, newspapers, radio and electricity. Reparations being a transitional period from war, the above

facilities in the communities and emotional balance of the victims may be low. Under the jurisprudence of the ICC, and in line with Rule 96 of the Regulations of the ICC entitled “Display of Reparative Guidelines”, it must be emphasized that it remained the Court Registrar’s responsibilities to make such publication when it becomes necessary. The Registry shall carry out necessary measures which include outreach publication with the national bodies, local authorities on the recent reparation proceedings and principles. The Registrar ensures that reparation proceedings are transparent, open and measures adopted for its altruistic effect are ensured through timely notification and accessibility of awards (Letschert et al., 2011, pp. 1–3). This may not be easy having in mind the distance barrier between the court and member states involved. Without the cooperation, publicity of the principles as ordered on the Registrar to perform fails.

VIII.7. Compromised Fair Trial Procedure

Reparation to victims under the regime of the ICC centers on fairness of proceedings in respect of the victims mainly. This obviously is a compromise as it stifles the rights of the defense in the process. Notwithstanding that the victims’ rights take predominant focus in reparations proceedings, the perpetrators rights must also be guaranteed (McGonigle Leyh, 2011, pp. 2–11). On this note, the large participation of the aggrieved victims should not stop the procedural fairness to be extended to the convicts. The fairness should benefit the victims and the perpetrators. To this end, the victim-centered roles in the ICC should not affect the rights of the convict to be represented and be heard in the proceedings. The justice maxim of “fair trial and hearing” are applicable to the victim-centered reparations proceedings.

VIII.8. Difficulty in Gender Imbalance Evaluation

Gender balancing would achieve a meaningful result on an individually awarded reparations order facilitated by adequate publicity. The Court is enjoined to examine such problematic issues bordering on discriminatory practices on gender in the course of the establishment of

principles and procedures for reparation. This enhances its compliance with obligations in line with Art. 21(3) and 75(6) of the Rome Statute. The Court should avoid preferential and partial treatment in order to ensure that all gain access to the reparations in order to gain wholesome reconciliation.

VIII.9. Likely Non-Cooperation by Member States

To properly enforce reparations orders made to an individual, the Rome Statute requires the Member States to cooperate with the ICC. By Art. 75(4), 75(5) along with Art. 109 of the Rome Statute, contracting parties are instructed to cooperate as regards reparation principles. On this note, the reparation principles highlight firstly the role of contracting parties to abstain from any act capable of stifling the implementation of reparative orders along with the application of the awards made by the ICC. This complementarity principle, entails member states cooperation in identifying, locating, freezing or engaging in seizures of proceeds; properties as well as assets relating to offences committed wherein reparations orders were given by ICC.⁴⁰ The above appears to pose a great challenge in enforcement when such contracting parties are not happy with the decision taken by the ICC. This could be experienced in Africa, for example, where different States have already breached their agreement with the ICC. This stems from the fact that there is a feud between the African Union and ICC on complementarity. More so, the ICC reparative orders against individuals especially non-state armed groups leaders may not be properly enforced without state party members cooperation.

VIII.10. Financial Constraints of the Convicted Persons

On where the money for the reparation orders should come from, Art. 75(2) of the Rome Statute stipulates that the order should be made directly to the convicted individual. Alternatively, when necessary, the Court is obliged to make orders that such award be made via the TFV as stated in Art. 79 of the Rome Statute. Accordingly, by default, it is

⁴⁰ Prosecutor v. Thomas Lubanga, Para. 49, 43–44, 206.

the convicted person who pays for the reparations order. Alternatively, with regard to the Thomas Lubanga's Case, the court viewed him an indigent person, and therefore made an order that his award should be directed to the TFV.⁴¹

The above development suggests that the drafters of the Rome Statute may have foreseen this likely financial constraints from the convicted persons as Rule 98(5) of the TFV prescribed that TFV's other resources should be applied or utilized in such a manner to benefit the victims.⁴² As a way of clarifying the above development, it must be admitted that when a convicted person is indigent and the reparative awards are made via the TFV, such an order may not be restricted to the funds and assets confiscated or put under the TFV's custody, but may be complemented with the TFV resources. Hence, the role of the TFV is first to guarantee availability of funds that may be sufficient to address emergency situations that will likely occur in the Court's reparative orders in line with the provisions of Art. 75 of the Rome Statute.⁴³ It should be acknowledged that TFV is an autonomous arm of ICC as its resources are pooled from the voluntary contributions of the Member States. In the wake of lack of resources from the convicted person and the TFV, the reparations orders would suffer implementation hitch.

IX. Conclusion

Our irresistible conclusion is that the reparation principles developed in the impugned decisions of the ICC in Thomas Lubanga's Case remain a reference for any discussion on the reparative regime as it prescribed for the acceptable requirements for an award. Also, the paper has brought to light the important reasoning in the Lubanga Judgment particularly as it relates to novel reparations schemes for victims. This is in the wake of shortage of literature, rules, practices and mechanisms within the domain of ICL reparations regime. Despite the slow growth of the reparation regime within the criminal jurisprudence of the ICC, it remained notable along with a fast-emerging concept that has opened

⁴¹ Prosecutor v. Thomas Lubanga, Para. 49.

⁴² Prosecutor v. Thomas Lubanga, Para. 50.

⁴³ The Rome Statute of the ICC, Art. 75(4), 93(1)(1c).

much debates on several conceptual and theoretical arguments on its acceptability in the international criminal law jurisprudence. Aside from certain restrictions, frailties, inadequacies or controversies, yet unresolved, overhauling of the reparative regime of ICL, particularly, as it relates to aggrieved parties and breaches of the rules of IHL, remained an innovation in the emerging bodies of international law. With the case of Thomas Lubanga as a precedent, improvements and developments on reparations for aggrieved parties in situations of military hostilities within the regime of the ICC along with ICL have been made.

A lot of principles were formulated by the ICC as expressed in Thomas Lubanga's Case on reparations. This development unfolds the following aspects. First, traditionally, the parties aggrieved by the abuse of the rules of IHL, could not ask for reparations within the international law jurisprudence and hybrid criminal courts. It seems to us that ICC became the first amongst all to incorporate rights and models of claims for reparative orders for aggrieved persons who suffers from the effects of war crimes by the convicted persons.

In addition, such reparative awards to aggrieved persons are granted by the ICC centers regarding personal criminal responsibilities for offences committed in situations of military hostilities along with similar offences perpetrated during military hostilities. Hence, the paper revealed that the ICC can only issue reparative orders on a convicted persons and not on States or Non-State Armed Groups or Corporations involved in armed conflicts. Such jurisdictional limitation on individuals alone is a lacuna to be filled. In this context, the large number of claimants, the unclear jurisprudence on nature or kind of reparations, modalities along with execution structure remained restrictively exercised in the ICC regime of reparative justice to individuals alone. However, in the experimental case of Thomas Lubanga, though impugned on appeal, the principles developed have helped the jurisprudence of the ICL.

The development of reparation principles before the ICC being novel and evolving, this work makes some recommendations that are important to the development of the subject. For instance, the ICC should be vested with the jurisdiction and power to order reparations against States, corporations existing in States, non-state armed groups and other culpable entities. This would require amendment to the

provisions of Art. 75 of the Rome Statute in line with the proposition. It cures individual responsibility and the consequential indigency that may harm the reparation program.

The procedural rights of victims due to large numbers are representatively carried out either by lawyers, NGOs, etc. Also, on matters of assessment of harm, experts are employed by the Court and the location of the Court in Hague make the reparations regime far from reality. It is recommended that the victims participate in the making of the principles guiding reparations, or at least an adequate publicity and involvement of beneficiaries help to draw the program from symbolic to reality.

At the ICC, due to large number of victims, collective reparations play a bigger representative role. Collective reparation should be provided in the Rome Statute and defined as follows: collective reparation is a restorative mechanism of providing redress to people that have suffered injury, loss and damage through group process. Moreover, due to beneficiaries and claimants of reparations, symbolic reparation should be encouraged, such as public apology, etc., especially where the loss is irreparable and lacks no equivalent means of material compensation.

To ensure reparation for a wide number of victims, the clause as provided in Art. 75(1) of the Rome Statute with regards to the aggrieved parties should be deleted. This makes the article on reparations concentrates on direct victims. In addition, for reparation awards to be effective, States should be responsible for cooperation with the ICC in line with Art. 93(1) and 109 of the Rome Statute. It is recommended that the ICC cleans up its complementarity regime with Member States.

Justice for victims does not impugn on the right to free expression as well as proceedings for defense. Notwithstanding, reparations programs are victims-centered, the Court should not overlook the rights of an individual or that of the convicted persons to defend himself. The procedure for reparative justice should be clear, consultative and accessible to the victims and to the defense. When characterized by uncertainty, it will predispose dissatisfaction.

The application of reparation principles on individual case-by-case basis makes them subjective as they cannot bind or be used or referred as binding precedent on appeals. Reparation principles as developed

by Trial Chambers of the ICC should be a precedent binding because of appeals. Aside of that, in case a convict is declared indigent and there is a disagreement between the ICC and the TFV on the mode of carrying out reparation orders, it tarnishes the effectiveness of the restorative program. There should be at all times cordial working relationship between the two institutions.

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