

KEY POINTS

- The International Criminal Court (ICC) has a restorative mandate that includes providing reparations to victims of mass atrocities. With Thomas Lubanga Dyilo's conviction on March 14, 2012, the ICC now faces the first test of its reparations regime.
- As it is currently stated, the ICC's reparation regime is positioned to fail. Therefore, there is an urgent need to manage expectations of what the reparations regime, as set out in the Rome Statute, can achieve.
- The exclusion of victims of sexual violence from receiving reparations in the *Lubanga* trial is an example of the system's limitations.
- The ICC must adopt a minimalist approach in its reparation mandate in order for it to be functional, meaningful and effective.

THE FUTURE OF REPARATIONS AT THE INTERNATIONAL CRIMINAL COURT: ADDRESSING THE DANGER OF INFLATED EXPECTATIONS

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INTRODUCTION

The key innovation of the Rome Statute¹ is that the ICC has both a retributive and restorative mandate. Retributive justice is based on proportional punishment that aims to deter individuals from committing future injustices. The ICC fulfills its retributive mandate through the prosecution of individuals. Restorative justice seeks to restore relationships in communities by addressing the needs of both victims² and offenders. As a tool of restorative justice, reparations are compensation measures distributed to victims as redress and acknowledgement of their suffering. Reparations are made through restitution, compensation and rehabilitation (Rome Statute of the International Criminal Court, 1998). The ICC's restorative mandate is realized through victim participation and reparations, and it is this pillar of the mandate that is set to be a critical test of the ICC's commitment to victim-centred justice.

1 The Rome Statute was created in 1998 and establishes the basis for the ICC that entered into force in 2002. The Rome Statute establishes the Court's structure, mandates and jurisdiction.

2 The term "victim" may be considered disempowering but is employed by the ICC. This brief will use the term to ensure consistency.

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This policy brief addresses the future of the ICC's reparations regime and argues that the ICC adopt a minimalist approach in order to fulfill its restorative mandate. It examines the *Lubanga* trial as a case study to expose the practical and financial difficulties that challenge the future of the ICC reparations regime. To address these limitations, five recommendations for a minimalist reparations regime are provided.

Now is a timely opportunity to assess the future of the ICC's reparations regime. The ICC has just reached its 10-year mark and is being judged by its ability to fulfill its two-fold mandate. The ICC secured its first conviction in 2012 and now faces its first reparations decision. Responding to the challenges of reparations at this critical juncture will communicate the feasibility and legitimacy of the ICC as a court of international justice and set the stage for all future reparations.

CASE STUDY: LESSONS LEARNED FROM REPARATIONS IN THE LUBANGA TRIAL

On March 14, 2012, Thomas Lubanga Dyilo was convicted of the war crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities in the Democratic Republic of Congo (DRC) between 2002 and 2003, and was sentenced to 14 years imprisonment. Following the guilty verdict and sentencing, the ICC issued its first ever decision on reparations for victims in August 2012.³ The guilty verdict against Lubanga marks the closure of the ICC's first trial. It provided the first test of formal victim participation in an international criminal setting and it is precedent setting for all future reparations decisions at the ICC.

³ As of spring 2013, the Court is still determining what type of reparations will be awarded in *Lubanga* and how these reparations will be distributed among victims.

Although judgments made in *Lubanga* should be celebrated, this case reveals limitations of the current framework for reparations. The following section highlights the practical and financial challenges that have arisen in *Lubanga* and, if not addressed, will threaten the future of the reparations regime and undermine the legitimacy of the ICC.

PRACTICAL CONSIDERATIONS

Lubanga was charged and convicted of enlisting and conscripting child soldiers in the Ituri region of the DRC. In addition to being forced to actively participate in warfare, these children were subjected to and forced to inflict sexual violence. Crimes of sexual violence were not charged, however, despite evidence that was presented throughout the trial concerning the widespread nature of sexual violence.

The ICC will not and cannot investigate and prosecute all crimes that fall under its jurisdiction (Wiersing, 2012: 34). The prosecutorial strategy necessarily limits charges and case selection due to financial constraints and to secure convictions. The question arises whether this selective approach toward perpetrators and crimes should also govern the reparations phase (ibid.). In *Lubanga*, the narrow scope of charges laid did not reflect the totality of crimes committed or the extent of victimization suffered.

Determining who qualifies as a victim and what reparations are appropriate for each crime is undoubtedly a difficult task. As it is currently stated in the Rome Statute, court-ordered reparations are to be awarded to victims who have directly suffered harm related to the crime(s) under prosecution. This approach leaves a considerable number of victims disregarded, as evidenced in *Lubanga*.

The Court is neither designed nor in a position to provide reparations to the unimaginable number of victims of crimes under the ICC's jurisdiction. There is a "reparations gap" between what the ICC *should* do and the reality of what it *can actually* accomplish (Mégret, 2012). A broad and inclusive reparations framework would set a dangerous precedent considering the practical limits of the reparations regime. Yet, creating a hierarchy of victims by singling out certain individuals and not others for redress fragments the reparations process and excludes a large number of victims (ibid.).

The Existing Reparations Regime: What is the Trust Fund for Victims (TFV)?

The TFV* was established in 2002 by the international community's desire to provide an instrument of restorative justice for victims of the gravest international crimes. It is funded entirely by voluntary contributions.

The TFV has two mandates:

- Reparations: It implements court-ordered reparations.
- General assistance: Providing interim assistance to victims as soon as possible, irrespective of their involvement in the specific charges of each case.

When an individual is convicted, the ICC may order the TFV to distribute the criminal's assets as reparations for victims of his or her crimes. When the convicted criminal is indigent, the Court may order the TFV to use its limited reserves to finance reparations, as is the case in *Lubanga*.

* For more information see www.trustfundforvictims.org/.

FINANCIAL CONSIDERATIONS

The fundamental principle underlying court-ordered reparations is that the perpetrator must pay compensation for the crimes committed. However, in *Lubanga* this principle was proven unrealistic when Thomas Lubanga was found to be indigent and without assets for the purpose of reparations. As a result, the Court has ordered that the TFV use its own resources to provide reparations to the victims of his crimes.

The TFV's reparations reserve is intended to *complement* reparations awards granted by the Court, not provide a *substitute* for them. The TFV's modest reserve for reparations amounts to an estimated 1.8 million euros, which is a little over one-third of its total resources (TFV, 2012). Due to the TFV's limited financial means, supplementing court-ordered reparations will compromise the TFV's general assistance mandate that currently provides assistance to 80,000 victims of crimes under the ICC's jurisdiction in northern Uganda and the DRC (*ibid.*). Acting as a "piggy bank" to the Court compromises the TFV's legitimacy as an independent organ and severely undermines its principal strength — the ability to provide interim relief and support to victims of international crimes long before reparations decisions will be made by the ICC (Mégret, 2012).

CHALLENGES IN CONTEXT: REPARATIONS AND THE ICC'S LEGITIMACY

The *Lubanga* case is only the first conviction of 18 cases currently before the ICC in eight different countries.⁴ There are five remaining cases to be tried in the DRC alone. Considering the ICC's heavy caseload, the length

of prosecutions, the high number of victims, and minimal financial and political backing, the ICC's restorative mandate is unlikely to succeed as currently stated in the Rome Statute. It is already criticized for its high costs, trial length and a singular focus on crimes committed in Africa. A failure to deliver reparations and fulfill its restorative mandate will undermine the ICC's legitimacy even further.

It is critical that the ICC establish its legitimacy to mobilize support and to function as an effective instrument of international criminal justice. By addressing the needs of victims through reparations, the ICC will prove their restorative role beyond their retributive mandate. Providing meaningful redress to victims of mass atrocities can legitimize its work, particularly in Africa, where the majority of victims are located. Victims of sexual violence are one such group that needs restorative measures beyond retributive justice in order to rebuild their lives and communities. Validating the ICC's promise of victim-centred justice will confirm the ICC as an institution of justice and not a tool of Western imperialism.

In order to fulfill a restorative mandate it is necessary to reprioritize and develop a functional reparations strategy. Reparations carried out through a minimalist but effective framework will help legitimize the reputation of the ICC. The following five recommendations establish the basis for a sustainable reparations regime that member states of the Rome Statute can endorse.

⁴ These countries are Uganda, Central African Republic, Côte d'Ivoire, Kenya, Darfur, Libya, the DRC and Mali.

RECOMMENDATIONS FOR THE FUTURE OF THE ICC REPARATIONS REGIME

All reparations must be awarded collectively to represent the full scale of victimization.

Currently, the ICC may award either individual reparation to specific victims involved in cases or collective reparations that are distributed non-specifically to a broad range of victims. Such reparations can take the form of rebuilding infrastructure, community programming or other initiatives targeting the welfare of the collective rather than individuals. Collective measures distribute benefits within a community without requiring victims to identify themselves individually. This is particularly important for victims of sexual violence who often face extreme stigmatization if they come forward.

The crimes prosecuted by the ICC are gross violations that naturally involve a vast number of victims. The reparations regime will not be able to satisfy all victims, but by choosing collective over individual reparations the ICC prevents the prioritization of victims and the commodification of suffering (Mégret, 2012). Singling out individuals for reparations from among mass suffering creates “super victims” whose suffering is elevated above all other victims (ibid.). For example, the victimization of child soldiers in *Lubanga* may be prioritized over the suffering of their victims, many who were subject to sexual violence. This exclusion, in turn, can exacerbate tensions and incite conflict within communities.

Being a tool of restorative justice, reparations should seek to rebuild relationships and stability within communities rather than to compensate specific individuals. However, it is still necessary to acknowledge the personal impact of trauma on individuals. Affected individuals should play an active role in the design of collective reparations and

every effort should be made to acknowledge individual experiences. As the ICC’s reparations regime will always be limited compared to the extent of victimization, reparations must be dispensed collectively in the best interests of the majority of victims.

Broaden the understanding of reparations to include non-monetary and symbolic measures that better reflect the totality and extent of victimization.

There is not, and likely never will be, sufficient funding to provide meaningful monetary compensation for all direct and indirect victims of mass crimes under the jurisdiction of the ICC. There will likely be many times when monetary relief will either be inadequate or unreasonable, depending on the crime and the potentially large number of victims seeking reparation. Therefore, future reparation initiatives should consider the multiple types of reparations that are available to victims under the jurisdiction of the ICC.

The impact of the ICC’s reparations regime can be best maximized by focussing on *satisfaction* and *non-repetition* measures that are forward looking and transformative. Reparation measures in the form of satisfaction may include public apologies, tributes to victims, verification of facts, and full and public disclosure of the truth. Guarantees of non-repetition, such as strengthening the independence of the judiciary and training law enforcement officials, is another form of reparation that promotes greater peace and security in post-conflict states.

The TFV and the ICC are but two actors among many involved in post-conflict reconstruction (Wiersing, 2012: 35). While the reparations regime cannot provide monetary redress for all victims, the Court has the potential to symbolically acknowledge harm suffered by victims. This is their added value as an actor

in post-conflict reconstruction. In the DRC, non-monetary reparations that acknowledge the full extent of harm suffered by victims of sexual violence would be instrumental to the post-conflict transition. Through these types of symbolic measures and others, the Court and the TFV can maximize its scarce resources and increase the impact of its reparations.

Court-ordered reparations should be channelled through existing state and/or non-governmental reparation programs. If domestic capacity to administer reparations is problematic, the funds will be entrusted to the ICC'S TFV, consistent with the recommendations above.

This recommendation is based on two considerations: best practices in post-conflict reconstruction and minimizing the administrative burden on the TFV. Deferring to domestic systems⁵ builds local capacity and autonomy in post-conflict states (International Dialogue on Peacebuilding and Statebuilding, 2011). Domestic systems may also have a better understanding of the local context, such as women's organizations in the DRC who are already working with survivors of sexual violence. It is also important not to duplicate or undermine existing reparations programs that may be already providing compensation to victims. The ICC should not operate in isolation but in coordination with existing domestic systems to maximize effective aid. By channelling funds domestically, the reparations regime will strengthen the legal and institutional capacity of those domestic actors that are best suited to facilitate the reparations process.

If domestic systems are not capable of distributing reparations then the ICC should use the TFV to allocate

⁵ Domestic systems refer here to domestic governments, domestic civil society and international organizations that are already substantially engaged within a country.

awards. Since the TFV is funded entirely by voluntary donations, it does not have adequate infrastructure or the funding necessary to disperse court-ordered reparations. Therefore, the TFV should be secondary to domestic systems so that it does not expend resources that could be better used in implementing its general assistance mandate.

States Parties to the Rome Statute should provide financial and political support to the TFV's general assistance mandate.

The TFV's general assistance mandate is a critical component of the ICC's victim-centred approach. The mandate is designed to provide interim relief and support to affected communities. Working through intermediaries, the TFV funds programming that address victims' physical, psychological and material needs. This assistance is provided before the trial concludes and is not limited to the victims who are involved in the court proceedings. Consistent funding is necessary to ensure this assistance continues.⁶

Member states should support the TFV's general assistance mandate. In doing so, member states can advance their national policy focusses in security and post-conflict reconstruction. For example, since 2011 the United Kingdom has made three voluntary contributions to the TFV, totalling 1.5 million euros, as part of the UK's focus on preventing sexual violence in conflict (TFV, 2013). Voluntary contributions advance state policy interests and provide necessary funding to help victims through the TFV's general assistance mandate. In addition to financial funding, member states can issue public statements

⁶ To date, only 28 of the 121 member states parties have made contributions to the TFV. Of those states that have contributed in the past, less than half have given regularly each year (Amnesty International, 2012).

of support for the TFV that highlight the necessity of supporting the ICC's restorative mandate.

The ICC should manage affected communities and international expectations regarding its reparations regime through strengthened outreach. Outreach strategies should emphasize a minimalist, collective and non-monetary reparations regime.

Public information and outreach are fundamental in managing expectations of what the reparations regime is able to effectively deliver. Ensuring that victims are aware of the options and limitations of reparations is essential for the regime's success. If affected communities' perceptions of the reparations regime are unrealistically high, the ICC's restorative mandate will be viewed as a failure when it is unable to meet these inflated expectations.

Outreach strategies of the ICC must clearly communicate the minimalist, collective and non-monetary nature of its reparations regime in order to ensure that affected communities understand which reparation mechanisms are available. Furthermore, establishing two-way communication with localities through strengthened outreach allows victims' voices to be heard and helps to determine what type of reparation meets the unique needs of affected communities. This process empowers victims to be active participants and involved decision makers in the reparation process (Mégret, 2012). In the DRC, special attention should be directed at reaching female victims who are marginalized through limited access to media outlets, formal education and other outreach strategies.

International expectations regarding the ICC's reparations regime should also be strengthened, particularly to donors who contribute to the TFV's general assistance mandate. To date, the TFV's activities have been characterized by ad hoc and inconsistent decision making. In order to be

accountable to donors as a credible recipient, the ICC must clearly state what its reparations regime seeks to achieve and how it plans to achieve it. The ICC will be better able to attract new donors by clearly communicating its mandate and exactly what types of reparations it will fund through its received donations.

CONCLUSION

The reparations regime is a test of the ICC's restorative mandate and its commitment to achieving victim-centred justice. The challenges of the *Lubanga* trial indicate that the reparations regime is positioned to fail. If it fails, the legitimacy of the ICC as an institution will be severely undermined. There is an urgent need to recognize all forms of victimization through a minimalist and meaningful reparations regime. As shown in the case study, such a regime would provide victims of sexual violence with better access to meaningful reparation. If implemented, this brief's recommendations can guide the ICC toward establishing a functional and sustainable reparations regime that provides meaningful redress to victims of mass atrocities.

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