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Reparations and the Lubanga Case: Learning from Transitional Justice

The conviction of Thomas Lubanga is a milestone for the international criminal justice system established by the Rome Statute, and may make an important contribution to the development and definition of the right to reparations in international human rights law. Article 75(1) of the Rome Statute requires the International Criminal Court (ICC) to “establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation” for victims of war crimes and crimes against humanity. The court’s upcoming decisions involving reparations in the Lubanga case can strengthen the existing recognition of the right to reparations, a right of victims of gross human rights violations acknowledged by the United Nations through the *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, adopted in 2005.¹ As of March 2011, at least 176 persons from the Democratic Republic of the Congo (DRC) have applied for reparations in either the Lubanga case or others before the court.

Practical and Legal Issues Involving Reparations

As the ICC begins reparations proceedings² following the Lubanga conviction, the court and the Trust Fund for Victims (TFV),³ will contend with a range of practical and legal questions, including:

- the definition of victims entitled to reparations;
- whether reparations will be given individually or collectively to victims and whether only material or also symbolic measures can be ordered;
- how “compensation, restitution and rehabilitation”⁴ measures are designed and provided to victims and their families, and what the court can do to support other forms of reparative justice and guarantees of non-repetition;
- how the assets of the convicted person and the resources of the TFV will be used for reparations;
- how victims’ views and needs are recognized in both the process and the outcome of reparations proceedings;
- whether the principle of state responsibility for reparations can be reinforced through the court’s position on relevant international obligations.⁵

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Lessons from Transitional Justice Approaches

Although the ICC’s reparations role is relatively novel—among the *ad hoc* and hybrid criminal courts established by the UN, only the Extraordinary Chambers in the Courts of Cambodia (ECCC) can order the payment of reparations to victims—the court could review transitional

¹ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*: resolution adopted by the UN General Assembly in December 2005, published on 21 March 2006, A/RES/60/147, available at <http://www.unhcr.org/refworld/docid/4721cb942.html>

² Under Article 75(3), “Before making an order (*for reparations*) under this article, the court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested states.”

³ A fund, established by the Assembly of State Parties to implement both court-ordered, and general assistance to victims of crimes under the ICC’s jurisdiction, www.trustfundforvictims.org

⁴ Under Article 75 (1), the court “shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”

⁵ Article One of the Rome Statute says that the ICC “shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.”

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justice mechanisms established in a number of post-conflict or post-dictatorship societies where reparations programs, truth-seeking processes, and domestic prosecutions have offered victims moral recognition, material help, and legal redress.

Through these mechanisms, particularly reparations programs, the experiences of a significantly larger number of victims, and the loss and harm from a wider range of violations, can be acknowledged and repaired. This is particularly true in the DRC, where Thomas Lubanga's crimes were only a small part of atrocities committed between 1993–2003, over several complex armed conflicts for natural resources, identity, and power involving militias, other states, and multinational corporations.⁶

The Rome Statute does not give the ICC jurisdiction over acts that occurred before it came into effect in July 2002; Thomas Lubanga is convicted of forcibly recruiting hundreds of child soldiers between 2002 and 2003. Most of the estimated 10,000 to 20,000 cases of children being forcibly recruited by armed groups fighting in the Congolese conflict occurred from 1993 to 2002. The ICC can still make an important contribution to justice for victims not involved in the Lubanga case by borrowing and applying, within its rules, some of the truth-seeking and reparative measures that have been used elsewhere.

Among the other options the court has under Articles 75 and 93,⁷ are the following:

- The ICC could hold reparations proceedings in the DRC to allow communities affected by the conflict the opportunity to be heard, taking into consideration the safety and interests of those concerned.
- Subject to appropriate security considerations, the court could ask the Office of the Prosecutor, the Registry, and the TFV to assist the relevant states to use records, documents, and physical evidence from the Lubanga case to create an archive or memorial as a symbolic gesture for victims. The same records can also help in designing non-judicial reparations programs in the future that will reach more victims and communities. These could also be used in the Congolese educational curriculum to educate future generations.
- The court could also identify, freeze, and confiscate assets that can be traced to others linked to crimes committed in the DRC, who remain at-large. These could be used for additional reparations measures by the TFV.

These, and similar measures, can help manage the expectations of victims in the Lubanga case and victims outside the case who will not be eligible for reparations through the ICC.

Finally, while not forming a binding order, the court could take the opportunity to reiterate that states involved in the conflict should take responsibility for their complicity in or their failure to prevent violations; and to encourage other states, corporations, and institutions to contribute to the TFV, to acknowledge the irretrievable loss victims have suffered, even if the court cannot legally compel them to do so.

⁶ UN Office of the High Commissioner for Human Rights (OHCHR), *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003* (August 2010): http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf

⁷ Article 93 is entitled "Other Forms of Cooperation" and includes "(a) The identification and whereabouts of persons or the location of items; (g) The examination of places or sites, including the exhumation and examination of grave sites; (i) The provision of records and documents, including official records and documents; (j) The protection of victims and witnesses and the preservation of evidence; (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court."