



Defence Perspective on ICC Reparations

Many concerns have been raised in respect of the ICC Reparations scheme. There appears to be consensus that adjustments are necessary so as to make the process more effective, expeditious and fair, whilst affordable and without raising expectations that cannot be met.

From a defence perspective, there are various concerns, including but not limited to:

1. The scope of the reparations is determined on the basis of a low standard of proof and using presumptions.
2. The reparations orders are disproportionately high and far outweigh the ability of indigent convicted persons to pay.
3. The wish to compensate the many victim participants in the ICC proceedings may put pressure on judges to convict.
4. The reparations proceedings are too costly and time-consuming.
5. There is lack of clarity and consistency of the method of assessment.

1. Low Standard of Proof

The defence teams in the different reparations proceedings before the Court have raised concerns about the difficulties to establish by any satisfactory evidentiary standard, the scope of the damage caused by the person convicted of the crimes, so many years after the crimes were committed. In conflict-zones under investigation by the Court, there tend to be many people who have been victimized and impoverished by the conflict. Yet, only a marginal number were victimized by any of the crimes the Prosecutor of the ICC chose to investigate and prosecute. This may tempt victims of crimes committed ‘next door’ to pretend to be victims of the crimes for which a person has been convicted by the ICC, or to exaggerate the damage. The standard which is applied is the standard of probabilities and not ‘beyond reasonable doubt’, and many presumptions are being used to determine the extent of the damage. In addition, the definition of an indirect victim in cases of fatal casualties of family members has been interpreted so widely that any remote family member could claim to be a

victim. Accordingly, there is a genuine risk that the reparations which are to be paid by a person convicted by the Court are significantly higher than the actual damage caused by the convicted person.

The original sin can to some extent be traced back to the way participation requests are being evaluated at the participation phase, where both WVU and the Judges do not show much precision (for example when it is obvious that the damage claimed is unrelated to the charges).

2. Disproportionate Burden on Indigent Convicted Individuals

The Appeals Chamber in Lubanga held that the convicted person is liable to contribute financially to the reparations irrespective of whether he (or she) has the means to do so. The amount that should be reimbursed by the person convicted is determined solely by his (or her) responsibility for the suffering caused. It is a measure to set wrongs right; that is, to compensate the harm caused by the crimes he has been convicted of.

The ICC jurisprudence has determined that reparations before the ICC should not have a punitive character, but only a remedial character. Commentator S. Kabalira put it as follows:¹

[T]he role of reparations under the ICC regime should primarily be to alleviate the consequences of the crimes, and to redress victims. In this context, reparations should exclude the punitive element. ... In the context of criminal justice, the purpose of reparations by the offender is ‘to remove the burden which the crime has unfairly placed upon the victim.’ The objective of reparation is not to make the criminal to ‘pay back’ for his wrongdoing, but to restore the victim to his baseline positions.

The section on reparations is included in Part 6 of the Rome Statute, entitled ‘The Trial’, and not in Part 7 ‘Penalties’. Reparations are also not mentioned in article 77, which lists the applicable penalties. This indicates that the drafters of the Rome Statute did not intend reparations to have a punitive character, but rather to repair the harm suffered by the victims.²

This is in line with domestic justice where a civil action launched by a victim is meant to

¹ Stanislas Kabalira, pp. 90-91.

² In reality, the exclusion of the exemplary element from an award for reparations under the Article 75 was deliberate. Article 73(2) of the 1998 Statute of the ICC stated that ‘[An award by way of compensation may comprise: (i) an exemplary element; (ii) a compensatory element; (iii) both]’. Such a provision was eventually excluded from the ICC Statute; this reinforces the argument that reparations under the ICC Statute should not comprise the exemplary element (*ibid*, p. 91).

repair the situation and put the victim back where he would have been, had he/she not become a victim of a crime.³ This is also the traditional position under international law on compensation.⁴

Yet, the effect of it on the person convicted is highly punitive, particularly because the amounts are significant in light of the high number of victims in cases before the ICC. In line with the jurisprudence, any reparations ordered must be proportionate to the harm caused as well as the level of responsibility of the convicted person, and his participation in the commission of the crimes for which he was found guilty, taking into account the specific circumstances of the case.⁵ However, due to the limited capacity of the Court, very few out of many persons responsible for the crimes committed, are brought before the Court. Many, including those who superior in the overall hierarchy and carried greater responsibility for the crimes,⁶ will never be brought to justice. The risk therefore is that those few are held disproportionately accountable for the crimes merely on the basis that not more persons were brought before the Court; and that insufficient regard is given to the role of others in the crimes.⁷

In addition, the fact of indigence has been completely ignored. A convicted person who has been declared indigent by the Registrar will unlikely be able to pay any significant amount of the allocated reparations award in the near future. In light of that reality, the already high amount a person convicted of atrocity crimes is ordered to pay, is disproportionate to his means and accordingly highly punitive. It is to be noted that domestic criminal justice systems do not impose compensation orders where there is no reasonable prospect of it being met, and where it may even encourage future criminality to do so.⁸

The ICC Victim Trust Fund advances the share of an indigent convicted person. Yet, a very heavy financial burden, which he can never meet, is hanging over his head. If ever the

³ C. Howard, *Compensation in French Criminal Procedure*, TOC, Vol 21, Issue 4, July 1958, p. 388.

⁴ Barker, J., 2010. The different forms of reparation: compensation. In: J. Crawford A. Pellet and S. Olleson, eds., 2010. *The Law of International Responsibility*. Oxford (US): Oxford University Press, p. 605, 91.

⁵ *Lubanga* Judgement, para. 118.

⁶ See, *for instance*, ICC-01/04-01/07-3266-Conf-Corr2 Second Corrigendum to the Defence Closing Brief, 23 April 2012, paras 654-662, 697-699.

⁷ Observations de la Défense du 14 mai 2015, ICC-01/04-01/07-3549, para. 69.

⁸ For example, the UK law relating to compensation, restitution and reparation – see PCC (sentencing) Act 2000 sections 130-132 – need for an appropriate amount having regard to means. See Archbold, *Pleading and Practice* 2015 pp 5-691 onwards.

convicted person will rebuild his life and earn a living, he would at least in theory be liable to pay back (part of) the amount advanced by the Victim Trust Fund ('VTF'). The result is that there is no finality of the case, which is unfair on the convicted person.⁹ It also means that defence counsel has a responsibility to ensure that the reparations for which the convicted person rather than the VTF is held liable are accurate and proportionate to the harm suffered; and allocated only to genuine victims of the crimes he has been convicted of. The result of this so far is that the reparation proceedings have taken many years to reach a conclusion. These proceedings have accordingly become very costly, heavily burdening the Court's budget. The lengthy reparations proceedings also infringe upon the right of the convicted person to a fair trial without undue delay, a right which has been considered in the context of victim participation.¹⁰

The expeditiousness of the proceedings is equally important to the victims, who have to wait for an excessive period of time for any compensation. If the VTF would take the full burden of compensating the victims, the role of defence counsel in reparations proceedings would be reduced to a very minimal role, if any at all. The proceedings would accordingly be less time-consuming, less expensive and more in line with reality (given the unlikelihood that the person convicted would ever be able to pay any significant part of the reparations).

3. Pressure to convict

The acquittal of Bemba has left thousands of victims disappointed because they would accordingly not benefit from reparations. This was one of the reasons that the pressure on the judges to confirm the conviction against Bemba was high. Three out of five judges resisted this pressure and did what they deemed right: they acquitted him, notwithstanding the disastrous consequences for the many victims. Another bench may not have resisted the pressure. The angry reactions to the Bemba acquittal speak voluminous. Acquittals are not welcome. Yet, the guilt or innocence of a person accused should only depend on the strength and sufficiency of the evidence, not on emotions, or a presumption of guilt. In the Court, victims play a dominant role, their interests are considered in all decisions and one third of

⁹ See, for instance, Observations de la Défense du 14 mai 2015, ICC-01/04-01/07-3549, paras. 72-73.

¹⁰ ICC-01/04-01/06-1556-Corr, (*Lubanga*) Decision on the applications by victims to participate in the proceedings, 15 December 2008, para. 121; ICC-01/09-01/11-460, (*Ruto & Sang*) Decision on victims' representation and participation, 3 October 2012, para. 13; see also para. 36; ICC-01/09-02/11-498, (*Kenyatta & Muthaura*) Decision on victims' representation and participation, 3 October 2012, para. 14.

the budget is allocated to victims. In such an atmosphere, the determination of guilt or innocence can easily be influenced (consciously or unconsciously) be influenced by the desired outcome for the victims, thereby greatly jeopardizing the presumption of innocence and the impartiality of the judges.

4. Costly and time-consuming

Given the number of victims concerned by the widely spread mass atrocity crimes, which are being dealt with by the ICC, too much time and money is required to assess the legitimacy of their claims during a criminal trial. This is extensively illustrated by judge Van der Wyngaert in her article ‘Victims Before International Criminal Courts, Some Views and Concerns of an ICC Trial Judge’¹¹, where she refers to the Katanga case in which she was a judge. She points out that, before the start of the hearings on the merits in the Katanga case, easily more than one third of the Chamber's support staff was working on victims' applications for several months. The cost and time required by the ICC reparation proceedings is, in our view, disproportionate in light of their outcome - too much time spent leads to unreasonable delays both for the accused and the victims (see above); and too much money is spent to the proceedings rather than the actual victims, especially by comparison with the final awards granted to them.

5. Lack of clarity and consistency

The Reparations scheme is deeply flawed, beginning with the facts that very few defendants have had any property available to use for Reparations, and that Reparations themselves are ill-defined in the Statute and other documents. What are the damages subject to reparations, and what resources of convicted persons should be subject to seizure for reparations, if they have any at all? This has been the cause of a major problem of uncertainty of the ICC practice regarding reparations proceedings, the approach adopted being very different in the Lubanga, the Katanga and the Bemba cases for instance. Judges ought to use their authority to state Principles of Reparations as an independent document, as they are authorized to do. Most judges preferred to state these principles through caselaw instead, which has led to the current problems and uncertainty in dealing with reparations. The adoption of some

¹¹ Christine Van den Wyngaert, Judge at the ICC, Case Western Reserve University – 21 November 2011, Case Western Reserve University Journal of International Law 2012.

guidelines by the judges in their Chambers practice manual does not put an end to this uncertainty since it does not bind the judges. This uncertainty is necessarily prejudicial to both the accused and the victims who do not know what to expect at the start of the trial.

The uncertainty of the ICC reparation proceedings causes prejudice to the accused and victims, given the absence of clear rules governing such proceedings. This is also a cause of delay; there are always extensive arguments regarding the scope of victims participation and reparation. The victims representatives, not knowing in advance which criteria will be used to assess the victims' claims, often do not collect immediately all the relevant information and wait for the last years of the trial - ie after the conviction - to lead investigations to demonstrate the harm of their clients - at least this is what happened in the Katanga case. Katanga was brought to the ICC in 2007, convicted and sentenced in 2014, and the reparation proceedings are still ongoing!

Possible Solutions

The solution of these concerns is to separate the victim reparations from the determination of guilt or innocence of the accused. In doing so, the concerns raised above are no longer relevant. The proceedings can be faster and cheaper without (significant) involvement of the defence. Reparation schemes could benefit all victims in a particular neighborhood, not only those who were victimized by the convicted person. The money saved by separating victim reparations from the determination of the guilt or innocence of the accused could be used for victim reparations. An added benefit is that reparation funds can be distributed in more equal fashion between different ethnic communities, rather than mainly to those communities who were directly victimized by a convicted individual. In this regard, the Registry correctly pointed out (in respect of the Katanga case) that “the impact of any measure of reparation on intra- and intercommunity relations, and the wider conflict, must be carefully assessed, and steps taken to avoid, or at least to mitigate, potentially harmful effects”¹² given that “there is a risk that the provision of reparation to victims of the present case could exacerbate, rather than alleviate, tensions between ethnic groups in the area. The attack on Bogoro of 24th February 2003 took place in the context of wider hostilities in which other communities, including some in the immediate vicinity of Bogoro, also suffered harm. Indeed, the Ngiti

¹² Registry Report, para. 82.

community has suffered substantially more than other communities, including the Hema. Awards of reparations, if not carefully managed, could fuel rivalries between communities and go against attempts at reconciliation.”¹³

If proceedings are separate, the TFV could better ensure that the suffering caused by the war to all communities, being affected by the conflict, be adequately addressed. Separation of procedures will therefore benefit both the victims, whose fate does not depend on a finding of guilt, and persons accused. Both would benefit from not having to wait for years to see the end of the case. The Court will also benefit because the process would be less costly and lengthy.

As Judge Van der Wyngaert pointed out:

"It may be too much to expect from the ICC to be a retributive (fighting impunity) and a restorative mechanism at the same time. It may be worth considering separating the two, and to leave the restorative functions to the Trust Fund."

In line with this, it is suggested that the reparation process be fully in the hands of the TFV, and clear regulations should be adopted, by the TFV or the Assembly of States parties, to define the general criteria to be recognised as victims and the methods to evaluate their harm. There should be some requirement of proof of victims' damages - but this may not go beyond sworn statements of victims, as there is a great deal of damage for which no paper documentation exists. Unfortunately, the TFV has not been an effective body thus far, taking a very long time to draft and implement reparation plans. The TFV should accordingly be drastically reformed.

Judge Van der Wyngaert proposes that the TFV be transformed in a Reparations Commission which would be competent to assess the claims of victims concerned by the situations investigated by the ICC, an idea endorsed by the ICCBA:

"A possible alternative could be to transform the Trust Fund for Victims into a Reparations Commission, which would directly deal with victims' reparations claims. In this proposal, the victims would be detached from the criminal proceedings and be allowed to bring their claims before a Trust Fund for Victims Reparations Commission. Reparation claims before such a commission would not need to be restricted to convictions but could be open to potentially all the victims of the situations investigated by the ICC. The number of potential beneficiaries of this

¹³ Registry Report, para. 78.

mechanism would be significantly higher than the victims of cases that result in convictions. In fact the Trust Fund for Victims mandate already fulfills this function. It has indeed already compensated victims on a parallel track, unattached to cases that are tried before the Court, as the example of Northern Uganda illustrates."

Not everyone agrees. One point of view is that the procedure as is recognized in the Rome Statute is to found reparations on a finding of guilt. If that function is to be removed, then why have a reparations scheme in the Rome Statute at all. In line with the point of view, it would not be for the ICCBA to propose such a structural change to the system because it would be too disconnected from the Rome Statute. Changing the system may also not alleviate the 'pressure to convict' concern because that pressure may stem from a more general duty towards victims, irrespective of reparations.

An alternative suggestion is therefore for the Judges or the ASP to create a Principles of Reparations document, which is applied consistently in all cases, with input from all organs and other branches of the Court, from Counsel, including the ICCBA, from States Parties, from experts, and from civil society generally, including both NGOs and interested persons.