

Thomas Lubanga Dyilo Case: The 'Left-Out' Victims for Reparation in International Criminal Law

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Abstract: This study examined the decision of the International Criminal Court (ICC) in the case of The Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06) (hereinafter referred as Lubanga case) which had introduced a new principle in the international criminal law on the issue of reparation for the victims. However, in this case, no discussion was made on the rights of the victims in which the crime which had been committed against them was not charged upon the offender. This paper will highlight the issue by using traditional legal method which is mainly based on the library search. The data will be gathered from the legal documents such as international conventions, statutes, reported cases, legal journals, articles and relevant text books. By examining the relevant laws and provisions, this paper will discuss the right of the victims of an international crime to reparation and the liability of the proprietor to repay them. It will also analyse the rights of the disremembered victims to the reparation eventhough the proprietor does not been charge for the crimes which had been commit against them.

Key words: Victims Trust Fund • Harms • Deprivation • International Law

INTRODUCTION

The International Criminal Court (hereinafter referred as ICC) has a broad mandate in protecting the victims where they can participate in the trial either as a victims or witness, be inform of the decision which effecting them, ask for the legal aids to support their presentation before the ICC and also as for the reparations from the ICC against the perpetrator, where ICC lays down the rights of the victims to claim reparation for the harm suffered.

The reparation has a specific legal meaning which encompasses both the obligation of the proprietor to provide reparation and the right of the victims to claim for it [1]. This concept should be distinguished from the concept of remedies where it is defined as means by which a right is enforced or the means by which the violation of a right is prevented or redressed [2]. So the concept of reparation falls under the spectrum of remedies as remedies includes not only the mechanisms set up to provide redress, but also enforced the rights and prevent further violations.

With regard to the right of reparation, the Rome Statute of the International Criminal Court (hereinafter referred as Rome Statute) had, under Article 75, established the right to reparations to victims of 'the crimes'. The crime here means any act which is considered as crime under the Rome Statute. This Article provides that ICC shall establish principles relating to reparations to, or in respect of, victims of the crimes that ICC deals with in accordance with its jurisdiction and it also further provides that reparation may include restitution, compensation and rehabilitation.

Eventhought, the principle of reparation is, actually, applied to the relations between states, but it can also operate as reference to the application of reparation in ICC, as some of the principle of reparation does not only apply to the breach of international obligations owed by a state but also apply for the breach by individual.

The Concept of Reparation under International Law: According to Victim Support, as stated by Moffet, a victim of a crime, generally, have emotional, informational and practical supports and the bigger the scale and

gravity of the crime committed, the bigger these support is needed [3]. The needs for the support may changes over the time and may overlap each other as the impact of the violations affect individual and group differently, because of diverse social and cultural background and also personal characteristics [4].

The emotional needs of victims may require medical rehabilitation, public acknowledgement of their suffering and supportive treatment and protection measures in judicial proceeding, to ensure they are not re-victimised during the trial. With regards to the victims' informational needs, it may include the information on why they were targeted, who is the responsible person in each case, the wider context of violations and how they can access redress. And lastly, for the practical needs, the victims, to some extents, want to see those who are responsible for their loss and suffering be identified, prosecuted and punished [5].

Historically, according to Cohen [6], the Nuremberg and Tokyo trials did not provide for a possibility of victims reparation and as a consequence, the victims obtained reparation through lump-sum agreement and on the basis of State responsibility [7]. During this time and after the World War II, the civil redress in relation to breach of international obligation was mainly based on the law of state responsibility.

The United Nations Basic Principles and Guidelines (thereinafter referred as UNBPG) had included the victim's right to: equal and effective access to justice, adequate, effective and prompt reparation and access to relevant information concerning violations and reparation mechanisms as the remedies for violations of international law. Principle 23 of UNBPG also includes the guarantees of non-repetition as a method of prevention of violations of international law.

Reparation in Lubanga's Case: Steward stated that even the Lubanga judgment was widely celebrated but the question still remains as to how ICC would approach the post-judgment phase of reparations. In Lubanga case, the interests of victims formed an integral part and this was evident from the participation of 129 victims in this case [8].

In assisting the Court in formulating the principle of reparation, the ICC asked the interested parties to make submissions on whether they would prefer individual or collective reparations [9]. Based on the advise of the non-governmental organisations, the Trial Chamber stated that to address the inequalities between the victims, the affirmative measure will be made as the Chamber recognize

that there is no one-size-fits-all approach to reparations, but the Chamber considered the circumstances of each individual [10].

The Trial Chamber 1 had set out five purposes of reparations when they make an order for the reparations on 7 August 2012, first, to give relieves for the victims which was suffered by Lubanga's crimes; second, to afford justice to the victims by minimising the consequences of crimes; third, as a deterrence from future violations; fourth, as an effective restoration of child soldiers; and lastly to promote reconciliation between the convicted person, the victims of the crimes and communities.

The Trial Chamber emphasised that the reparations should be of a collective nature, by addressing suffered by the victims on an individual and collective basis [11], taking priority to the needs of vulnerable victims such as women and children and recognise the need for child and gender-sensitive measure to accords equal justice to all victims. The Chamber also said that the victims, their families and communities should play their role in the reparations process as it aimed to promote reconciliation as far as possible. The court also recognised the rights of both direct and indirect victims who should benefit from the reparations, which includes the family of direct victims and those who were intervene to try to help the victims [12].

Based on the Chamber's decision in Lubanga's case, a procedure of a community based and participative approach in assessing the harm suffered by the victims and for identifying appropriate reparations was recommended and this procedure was to be carried out in the affected localities in Ituri under the guidance of the Trust Fund for Victims (thereinafter referred as TFV). The outcome of this consultancy proses will be presented to a newly constituted Trial Chamber for its approval and the resources is from the Trust Fund [13].

Accordingly, the implementation of the order for reparation by the Chamber in Lubanga's case based on the TFV and all states are required to cooperate to give effect to the reparations awards. The Chamber also left TFV with a great responsibility as it does not specify the amount to be paid to the victims [14].

In this case, the Trial Chamber did not order Lubanga himself to pay for the reparations since he has been found to be penniless. But, Elizabeth Rehn, Chair of the TFV Board of Directors, has emphasized on the importance of the 'perpetrator pays' principle and ICC should increase the efforts to identify and freeze all the assets of the persons accused before it [15].

Determination of the ‘Victims’: Rule 85 of Rules of Procedure and Evidence (RPE) of ICC has defined ‘victims’ as “any natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”. But to be classified as a victim, their interest and justice as provided by Articles 53(1)(c) and (2)(c) Rome Statute shall be taken into account. The selection then will be narrowed down by the selection of perpetrators and crimes by the Prosecutor to be tried before the ICC. Thus, eventhough Rule 85 provides extensive definition of victims, but it was being confined by the limited cases which have been brought before ICC.

The classification of the beneficiaries of the reparations, actually, reflects the earlier jurisprudence of the court in respect of victim participation [16]. Despite some obiter dicta that suggested the definition of victim may be expanded to the reparations stage, the court had merely reflected its prior jurisprudence on the matter [17].

The definition of victims also has been limited by Swart, where Mackenzie wrote that, according to Swart, the adopted definition of harm by the ICC could be considered as too broad and unmanageable and she also rejected the contention of the Office of Public Counsel for Victims that psychological harm should fall within the definition of harm as it will creates practical issues later on. The court may also face the difficulty in determining the type of injuries which may be amounted to psychological harm [18].

Swart also referred to the contention of Massada, where Principal Counsel of the OPCV in the Lubanga’s case decided that the indirect harm suffered by the parents due to the moral and psychological suffering they experienced by the abduction and enlistment of their children, which lead to the concept of indirect victims.

Swart suggested that the ‘indirect victims’ may weaken effectiveness of reparations and the Court should then focus on the direct victims only. She also submitted that it is beyond the limit of remit allowed for the court to include victims of sexual offence to the class of beneficiaries and it should only dealt, for the reparations proceedings, with those who has suffered by the actions for which the proprietor was charged [19].

Reparation for the ‘Left-out’ Victims: The appeal decision of the Thomas Lubanga Dyilo’s case has signified that eventhough the proprietor is a penniless person, but he still can be held liable for reparation and in this case Mr Dyilo was ordered to pay for reparation to the child soldiers that he used in a fight at northeast of

Democratic Republic of Congo. But, when it came to reparations for gender-based violence, the appeal Chamber decided that sexual and gender and gender-based violence cannot be defined as a harm resulting from the crimes for which Mr. Lubanga was convicted.

The International Federation for Human Rights representative at ICC, Carrie Comer, said that the Chamber had underpinned the direct and indirect victims of the crimes that are eligible for reparations, but has excluded victims of sexual and gender-based crimes [20].

Article 54(1)(b) of the Rome Statute provides that the Prosecutor shall take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court and in doing so, respect the interests and personal circumstances of victims and witnesses, including age and gender and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.

The purpose of the inclusion of the word gender is to ensure that victims have equal representation and access to justice [21]. It means that the treatment of women within armed conflicts should be equal with men, in contrast to the previous experience of women in armed conflict [22]. Charlesworth and Chinkin wrote that the suffering of the women and men who has become the victims of sexual and gender-based violence should be recognized by the Court under the Rome Statute so that they will not feel like they were left behind [23].

According to Ligue pour la solidarité Congolaise (LSC), the lack of charges for sexual and gender-based crimes “is a minimisation by the Prosecutor and the ICC of the crimes committed against women and neglects the suffering of thousands of victims of armed conflicts and of victims of gender-based violence”; and they further added that “medical and psychological examinations are not sufficient to define all damages suffered by the victims... where many women and girls raped by found to be HIV-positive and have suffered from multiple internal and external injuries; some of the young women had unwanted pregnancies and some have been rejected by their family or their community upon their return” [24]. They also suggested that the social and economic aspects of the attacks suffered also need to be taken into account when considering the reparation for the victims [25].

This problem arise may be because of the democratic nature of international law, since it does not been termed as democratic [26]. Eventhough ICC which

was established by state consensus in an international forum, however it does not represent the views of all people [27] and the use of the Court by all states, either member and non-member, as a political bargaining tool had led to the lack of enforcement mechanisms and the vogue power of prosecutorial discretion have limited democracy of the ICC, thus limited the achievement of international justice [28].

Recommendation: As suggested by Swart [29], ICC should give more concrete definition and content to the term ‘harm’ as its definition is overly inclusive and broad. It is important because the Rome Statute, Rule 85(a), defines ‘victim’ as to relate with to the concept of harm, thus without a clear definition of ‘harm’ it is also not possible to define the term ‘victim’. An analytical framework should also be introduced by the ICC and the framework should have autonomous power [30].

The encouragement of national consultations with victims and affected groups is a critical element of a human rights-based approach to transitional justice and it is the key for ensuring victims’ participation. Besides, it also serves as a tool of empowerment, recognition and redress.

Adequate reparation for victims of sexual and gender-based which combine individual, collective, material and symbolic benefits can maximize the possibilities of redress for large number of victims [31]. The criteria and procedures for accessing reparations must be gender-sensitive and it should adopt adequate procedural and evidentiary rules for sexual violence. By taking into account the gender-specific nature of the harm suffered by victims, ICC should strive to be transformative and assistance in overcoming structures of inequality and discrimination.

CONCLUSION

All in all, in Lubanga’s Reparation case, frustrations linger around the forgotten victims as their interest was not been considered. If the office of the prosecution decided to take into consideration their case then it’s would certainly have been heard. However, since the Prosecution did not bring any charges for these crimes, majority of the Trial Chamber held that neither allegations of sexual violence; nor sexual violence can be taken into account to be considered as an aggravating factor in Lubanga’s sentencing.

Makaya said that in a few years’ time, some victims will certainly complain about the inadequacy of the benefits to which they are entitled since one or several aspects related to their rights had not been individually taken into account [32].

And the most crucial thing is the exclusion of the gender and gender-based violence from the definition of ‘harm’ in REP of Rome Statute has greatly contributes to denial of the rights of gender-based violence especially in the cases involving young girls and women.

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