Dottorato di ricerca in Ordine internazionale e diritti umani, Sapienza, Università di Roma - Intercenter, Università di Messina

Ordine internazionale e diritti umani

International Legal Order and Human Rights
Ordenamiento Jurídico Internacional y Derechos Humanos
Ordre juridique international et Droits de l'Homme

2. THE TRIAL CHAMBER VI REPARATIONS ORDER IN THE CASE *PROSECUTOR V. BOSCO NTAGANDA*

1. Introduction

On 8 March 2021, Trial Chamber VI (TC) of the International Criminal Court (the Court or ICC) issued the Reparations Order (the Order) for the Case of "*the Prosecutor v. Bosco Ntaganda*", thus beginning the long and complex process of reparations for the victims of the war crimes (WC) and crimes against humanity (CaH) committed by Mr Ntaganda in Ituri, Democratic Republic of Congo (DRC). This is the fourth reparation order issued by the Court, and the first addressing Sexual and Gender-Based Violence (SGBV).
This analysis provides an outlook of the *Ntaganda* case, followed by a summary of the main parts of the Order, for the purpose of addressing a couple of its most interesting aspects, such as its timing, the notorious influence of other fields of international law, the subject of SGBV, and the delicate issue of expectations v. reality when it comes to ICC reparations.

a. The Facts and Historical Context of the Case

With regard to the historical and cultural background of the decision, it should be immediately noted that the case was part of a group of cases that the ICC Office of the Prosecutor (OTP) investigated in the context of the situation in the DRC, namely *Lubanga*, *Katanga*, *Ngudjolo Chui*, and *Ntaganda*. The crimes in these cases were committed in the context of at least one non-international armed conflict between the *Union des Patriotes Congolais* (UPC) with its military wing, the *Forces Patriotiques pour la Libération du Congo* (FPLC), and the Ugandan armed forces, as well as between the UPC/FPLC and opposing organised armed groups, in the Ituri district of the DRC, from on or about 6 August 2002 to on or about 31 December 2003.
Thomas Lubanga was the President of the UPC/FPLC whereas Bosco Ntaganda the Deputy Chief of Staff and Commander of Operations of the FPLC. According to the OTP, the UPC/FPLC conducted a widespread and systematic attack against the civilian population between August 2002 and May 2003. These crimes were committed pursuant to a common plan to drive out all the Lendu from the localities targeted during the course of the UPC/FPLC military campaign against the *Rassemblement congolais pour la democratie-Kisangani/Mouvement de libération* (RCD-K/ML), and to prevent them from returning to the assaulted localities.

b. Procedural History of the Case

The Pre-Trial Chamber I issued an arrest warrant for Mr Ntaganda on 22 August 2006. He voluntarily surrendered to the ICC on 22 March 2013, marking the Court's first voluntary surrender. His trial stage started in September 2015, and on 8 July 2019 the Trial Chamber VI (TC) issued its Judgment, convicting Mr Ntaganda of five counts of crimes against humanity and thirteen counts of war crimes, namely: murder and attempted murder, rape, sexual slavery, persecution, forcible transfer of population, intentionally directing attacks against civilians, pillage, ordering the displacement of the civilian population, conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities, intentionally directing attacks against protected objects, and destroying the adversary's property.

On 7 November 2019, the TC issued the Sentencing Judgment, imposing on Mr Ntaganda a joint sentence of thirty years of imprisonment. These decisions were followed by the currently analysed TC Reparations Order of 8 March 2021, and the Appeals Chamber (AC) confirmation of both the Judgment and the Sentencing on 30 March 2021.

2. The Ntaganda Reparations Order

a. The Principles

The TC started by recognizing that reparations fulfil two main purposes: oblige those responsible for serious crimes to repair the harm they have caused and enable the Court to ensure that offenders account for their acts. They also aim, to the extent *possible* and *achievable*, to relieve the suffering caused by serious crimes, afford justice to the victims by addressing the consequences of the wrongful acts committed by the convicted person, deter future violations, and enable the victims to recover their dignity (paras. 2-3).

It proceeded to address the Principles on Reparations – namely: (1) victims; (2) harm; (3) types and modalities of reparations; (4) liability; (5) defence rights; and (6) other principles. On (1) victims, the TC determined, among other things: that beneficiaries encompass victims that fulfil the "nexus" requirement (meaning there must be a causal nexus between the crime and the harm suffered); that natural persons can be direct victims (whose harm is the result of the commission of the crime) or indirect victims (those who suffer as a result of the harm caused to direct victims), while legal persons must have sustained direct harm; and that a person may qualify simultaneously as both direct and indirect victim for different crimes, and thus seek reparations for the different harms (paras. 31-40).

On (2) harm, the TC explained that it denotes hurt, injury and damage either material, physical and/or psychological (para. 68). This may be manifested through a combination thereof, which denotes damage to the life plan of the victim, transgenerational harm, or harm suffered by persons as members of a family or community (para. 71); especially because inherent features of the crimes under the Court's jurisdiction result in mass victimization (para. 74). As to causation, there must be a direct link between the crime and the harm (para. 76). The TC also clarified that what the 'appropriate' standard of proof is and what is 'sufficient' for the purposes of a victim meeting the burden of proof, will depend upon the specific circumstances of the case, including any difficulties the victims may face in obtaining evidence (para. 77).

On (3) Types and Modalities of Reparation, the TC recalled that pursuant to Rule 97 of the Rules of Procedure and Evidence, the types of reparations can be individual or collective, and that such types of reparations are not mutually exclusive and can be awarded concurrently. According to Article 75 of the Rome Statute, reparations modalities include restitution, compensation and rehabilitation. Reparations must be proportional, prompt, and adequate; follow prioritisation criteria, and may even take transformative purposes (paras. 78-95).
On Liability, the TC highlighted that the convicted person's liability for reparations must be proportionate to the harm caused, in the specific circumstances of the case. On the other hand, the judges identified factors which are irrelevant for the determination of the liability of the convicted person, including the responsibility of other persons and organizations, the convicted person's financial situation, and the potential resources available to the TFV. Additionally, according to the principle of no over-compensation, the goal of reparations is not to punish the convicted person but to repair the harm caused (paras. 96-100).
As to the Rights of the Defence, the TC only recalled that the principles on reparations shall not prejudice or be inconsistent with the rights of the convicted person to fair and impartial reparation proceedings (para. 101).
Finally, the TC set out two additional principles. First, it noted that States Parties have the obligation to cooperate fully and are enjoined not to prevent the enforcement of reparation orders or the implementation of awards. In fact, reparations awarded pursuant to a reparations order must not interfere with the *primary responsibility of States* to address the harms suffered and award reparations to victims pursuant to their obligations under other treaties or national law (para. 102). Second, the TC underlined the importance of the publicity of reparation proceedings (para. 103).

b. *The Reparations*
The TC determined collective reparations against Mr Ntaganda to be made through the TFV (para. 104). Instead of identifying particular victims, it decided to establish their eligibility criteria (paras 105-107). It considered as direct victims: (i) the victims of the attacks, including murder and attempted murder as a CaH and a WC, victims of the crime of directing attacks against the civilian population as a WC, rape and sexual slavery as CaH and WC, persecution as CaH, pillage as WC, forcible transfer and deportation as CaH and displacement of the civilian population as WC, intentionally directing attacks against protected objects and destroying the adversary's property as WC; (ii) child soldiers as victims of the WC of conscripting and enlisting children under the age of fifteen years into an armed groups and using them to participate actively in hostilities, rape and sexual slavery; and, (iii) children born out of rape and sexual slavery (paras. 108-123).
Regarding the latter, the TC specified that children born out of rape and sexual slavery may qualify as *direct* victims since the harm they suffered is the result of the commission of said crimes. On the other hand, children not born out of rape or sexual slavery, but whose mothers were victims of such crimes within the context of the crimes committed by Mr Ntaganda, may be considered as *indirect* victims after the harm they might have suffered as a consequence of the direct victims' own suffering. Remarkably, the TC considered that such recognition is an acknowledgment of the particular harm suffered and may constitute a measure of satisfaction (paras. 122-123).
As for indirect victims, the TC followed its jurisprudence and retook many concepts of the *Lubanga* and *Katanga* cases. For instance, the requirement of the existence of a harm, rather

than closeness of the family member to the direct victim. It also applied the principle of non-discrimination in the context of birth and marital rights, in order to include unmarried partners and children born out of wedlock. Finally, it recalled that those who witness the commission of the crime may be irreversibly impacted and fall within this category (paras. 124-128).

When analysing the harm, the TC specified that the causal link between the crime and the personal harm for the purposes of reparations is to be determined in light of the specific circumstances of a case (para. 131) and it is up to the applicant to provide sufficient proof of such link (para. 135). Yet, since reparations proceedings require a less exacting standard of proof than trial proceedings, the TC endorsed the "balance of probabilities" test as the appropriate standard of proof (para.136). Thus, victims eligible for reparations must provide sufficient proof of identity, of the harm suffered, and of the causal link between the crime and the harm (para. 137). When applying this test to sexual crimes there must be a gender inclusive and sensitive approach; accordingly, the victims' coherent and credible account shall be accepted as sufficient evidence to establish their eligibility as victims (para. 139).

Moreover, in the particular circumstances where applicants lack direct proof, factual presumptions shall be relied upon in order to consider certain fact to be established to the requisite standard of proof (para. 143). Most importantly, certain harms may be *presumed* once a victim has proved, on a balance of probabilities standard, to be a victim of the crimes for which Mr Ntaganda was convicted. Accordingly, the TC presumed material, physical, and psychological harm for (i) former child soldiers; (ii) direct victims of rape and sexual slavery; and (iii) indirect victims who are close family members of direct victims of the crimes against child soldiers, rape, and sexual slavery (paras. 144-145).

Likewise, it is not necessary to scrutinise the specific physical and psychological harm alleged by each potential eligible direct victim of the attacks once their eligibility has been established on a balance of probabilities. Hence, the TC presumed physical and psychological harm for (i) direct victims of attempted murder; and (ii) direct victims of the crimes committed during the attacks, who personally experienced the attacks (para. 146).

Lastly, it is not necessary to scrutinise the specific psychological harm alleged by those victims once their eligibility has been established on a balance of probabilities. Thus, the TC also presumed psychological harm for (i) victims who lost their home or material assets with a significant effect on their daily life; and (ii) indirect victims who are close family members of direct victims of murder (para. 147).

When determining the type of harm suffered by the victims, the TC began by noting that they suffered *multidimensional* harm due to the nature of the crimes, which entailed *mass victimisation* (para. 149). The TC once again differentiated between direct victims of the attacks, crimes against child soldiers and rape and sexual violence as well as indirect victims. It proposed a break-down of the harms suffered by each type of victim. Direct victims may suffer, among others: material harm, physical injury and trauma, psychological trauma and the development of psychological disorders, loss of productivity capacity, reduced standard of living and socio-economic opportunities, loss of life plan, loss of adequate healthcare, and peculiar harms related to specific categories such as former child soldiers, direct victims of rape and sexual slavery, and children born out of rape and sexual slavery. On the other hand, indirect victims may suffer, among others: material deprivation and/or psychological harm that accompanies the loss of the family member, psychological harm and trauma as a result of what they witnessed during or after the attacks, harm resulting from aggressive behaviour by former child soldiers, and transgenerational harm of children of direct victims (para. 183).

Regarding the type of reparations, the TC opted for *collective* reparations with *individualized* components since they may provide a more *holistic* approach to the *multi-faceted* harm suffered by the victims. This *"ensures a more efficient, prompt, and practical approach, as the potential large number of victims would make an individual assessment of their harm for the purposes of granting individual reparations, resource-intensive, time consuming, and, in the end, disproportionate to what could be achieved."* Additionally, this sort of reparations aims to provide victims with sustainable and long-term livelihood means rather than simply addressing their daily needs on a short-term basis. This approach addresses the concerns that victims should receive equal reparations to avoid awards being a source of jealousy, animosity, or stigmatisation among the affected communities and between interethnic groups, especially given the unstable security situation on the ground (para. 194). These reparations also appear to be appropriate for both victims of rape and sexual violence as well as former child soldiers, who might be reluctant to come forward if they were singled out due to fear of rejection and stigmatization (para. 195).

The TC proposed a combination of the different modalities of reparations: restitution, compensation, rehabilitations (such as medical services, assistance, psychosocial services, trauma based counselling), satisfaction (through campaigns, certificates, outreach programmes to inform of the outcome of the trial, educational campaigns), and symbolic reparations. It notes that Mr Ntaganda may contribute by way of a voluntary apology. Lastly, the TC considered that the conviction, sentencing and reparations order consists in a measure of satisfaction (paras. 197-211).

When determining Mr Ntaganda scope of liability, the TC found him *"liable to repair the full extent of the harm caused to the direct and indirect victims of all crimes for which he was convicted, regardless of the different modes of liability relied on in the conviction and regardless of whether others may have also contributed to the harm"* (para 218). Notably, Mr Ntaganda and his co-perpetrators, including Mr Lubanga are jointly liable *in solidum* to repair the complete extent of the harm caused to the victims. This responsibility *in solidum* implies the right for any of the co-perpetrators who may have repaired, in full or in part, the harms caused to the victims, to seek to recover from the co-perpetrators their proportionate share (para. 219).

Considering the rapport of the present case with the *Lubanga* one, the TC decided to adopt the reparation programmes ordered by Trial Chamber II in the latter in relation to overlapping victims and harms of both cases (para. 220). The additional harm suffered by the victims of rape and sexual slavery and victims of recruitment beyond the temporal scope of the Lubanga case, for which Mr Ntaganda bears sole liability, require additional reparation measures (para. 222).

The TC recalled the irrelevance of indigency and existent funds for reparations determination in addition to States Parties obligation to cooperate fully in the implementation of the present Order. Likewise, it noted that the present Order is without prejudice to the primary responsibility of relevant States, *particularly* the DRC, to address the harms suffered and award reparations to victims in accordance to international obligations and domestic law (paras. 223-225).

Notably, the number of possible beneficiaries remains unknown, with estimations between 1,100 and 100,000 new victims, on top of the 2,121 victims that participated in the proceedings. Only regarding child soldiers, the Registry's assessment is that the 284 participating victims in the *Ntaganda* case have not been impacted by the scope of the conviction, and that all victims recognised to date as potential beneficiaries in the *Lubanga* case are also potentially eligible for reparations under this order (paras. 232-235). The TFV provided an estimated cost to repair the harm caused to the victims (para. 236) and the TC

proceeded to set the total reparations awards at USD 30,000,000 (thirty million dollars) (para. 247).

c. *Implementation*
The TC ordered the TFV to prepare a draft implementation plan (para. 249). Considering Mr Ntaganda indigency, the TC requested the Presidency and the Registry to continue exploring whether he possesses any undiscovered assets and encouraged the TFV to complement the reparation awards to the extent possible and engage in additional *fundraising* efforts to the extent necessary to complement the totality of the award. Most importantly, the TC acknowledged that in order to fully complement the award, substantial fundraising will need to take place and that, depending on the information to be provided by the TFV in its draft implementation plans, it may need to allow for phased and flexible approaches to implementation, including by allowing additional prioritisation and adjustments according to the availability of funds (paras. 254-257).

3. Remarks on the Reparations Order

a. The Timing
The TC decided to issue the Order prior to the issuance of the AC judgment on conviction and sentence due to the upcoming end of mandate of two of the three Chamber judges. In addition, having recalled the victims' right to prompt reparations, the fact that Mr Ntaganda's crimes took place almost two decades ago and most victims have received little to no assistance so far, and the particular vulnerability of some victims who may require urgent assistance, the Chamber argued that such decision would contribute to more expeditious reparations proceedings (para. 5). However, given that the appeal judgment was rendered only 23 days after the Reparations Order, I find this argument unconvincing. It would have been perhaps more appropriate to argue the opposite: that because the appeal judgment was expected shortly after, any potential reversal of some or all of the charges would not have impacted victims because the implementation work was unlikely to have started.
The ICC practice seems to be ambivalent in this regard. In the *Katanga* and *Al Mahdi* cases it issued the reparations order once the conviction had become final, whereas in *Lubanga* the reparations order was issued before the AC judgement (para. 5, footnote 10).
Some scholars have questioned the logic applied by TC, as perhaps just waiting the 23 days that it took the AC to issue its judgments would have been more in accordance to the interest of the victims (*see* M. LOSTAL, "*The Ntaganda Reparations Order: a marked step towards a victim-centred reparations legal framework at the ICC*", in *EJIL: Talk!*, 24 May 2021, available here).
In any given case, the decision of issuing the Order before the AC decisions had no major implications, as the AC confirmed both judgments. Yet, the fact that the TC felt comfortable enough to issue a reparations order before the judgment was final may also raise questions of impartiality, an undesirable scenario also in light of the stigma or general bias on the presumption of innocence surrounding those accused for atrocity crimes.

b. The Notorious Influence of other International Law Fields
Considering that reparation is a new topic for the ICC, it is just logical that it reaches out to other fields of law with extensive practice on the matter. The Court constantly engages in transjudicial dialogue with the Regional Human Rights Courts. This is especially evident in

the present Order, as it includes extensive human rights references, mostly from the Inter-American Court of Human Rights (IACtHR).

The Order references iconic cases of the IACtHR and draws on two extremely important concepts coined by the Inter-American system: life plan and intersectionality (para. 60). The concept of damage to "life plan" or "project of life" had already been endorsed by the ICC in the *Lubanga* Case. In terms of the ICC, it refers to the *"lack of self-realisation of a person who, in light of their vocations, aptitudes, circumstances, potential, and aspirations, may have reasonably expected to achieve certain things in their life"*. This is expressed in the expectations of personal, professional, and familial development that are possible under normal circumstances. Accordingly, the damage implies loss or severe diminution of prospects for personal development in a manner that is irreparable or reparable only with great difficulty, but nonetheless can be addressed through particular modalities of reparations (para. 72). This is an excellent input for cases involving child soldiers, whose project of life is severely damaged.

On the other hand, the notion of intersectionality is normally employed in cases that involve a specific form of discrimination that resulted from the intersection of several factors. In Judge Ferrer Mac-Gregor's words: *"intersectional discrimination refers to multiple reasons or factors that interact to create a unique and distinct burden or risk of discrimination. (…) This approach is important because it underscores the particularities of the discrimination suffered by groups that, historically, have been discriminated against for more than one of the prohibited reasons established in various human rights treaties."* (*Gonzales Lluy et al. v. Ecuador*, Concurring Opinion, para. 11). This logic intends to go beyond the mere addition of discriminative elements (gender, age, socioeconomical status, race, etc.) but to a new and aggravated discriminatory condition.

Nonetheless, even if this approach can be extremely useful when addressing victims and their harm, taking it to its last consequences may not be suited for the ICC. It's reasonable to bind the commission of discriminatory crimes to structural biases, hence the perpetrator takes advantage of this state of affairs to commit the crimes. When going down this path, some may suggest the Court to ensure that reparations properly address any underlying and overlapping *systems of power*, oppression and injustices (*see* G. MAUČEC, *On Implementation of Intersectionality in Prosecuting and Adjudicating Mass Atrocities by the International Criminal Court*, in *International Criminal Law Review*, 2021, pp. 1-34, available here).

However, this may be another farfetched proposal, as structural discrimination can be better addressed from an IHRL perspective that involves the active participation of a massive structure such as the State, considering that *structural* bias require *structural* reforms. Once again, the ICC acts within the limits of individual criminal responsibility and is ill-suited for generating a massive internal change within social, governmental and even cultural circles. This proposal is without prejudice to the benefits of applying an intersectional perspective to the victims of certain cases, which is a great input for the Court's jurisprudence, inasmuch as it is applied according to its legal framework and actual capacities.

The TC appears to be aware of this risk, as it considered that transformative reparations aim at producing restorative and corrective effects in addition to promoting structural changes, dismantling discriminations, stereotypes, and practices that may have contributed to creating the conditions for the crime to happen (paras. 94 and 209). In this regard, the judges acknowledged "*the challenges involved in addressing ambitious transformative programmes to tackle conditions of structural injustice, especially in the absence of State and civil society action, and the nature of reparations in the Court's context*" (para. 94, footnote 254). Thus, the TC highlighted the inherent shortcomings of the Court's mandate when it comes to tackling situations of generalized and structural violence via reparations.

Another field implicitly influencing the Order is Transitional Justice (TJ), as the TC constantly takes into account the situation on the ground and the pacification processes. For the TC, reparations *"may also have a symbolic, preventative, or transformative value, and may assist in promoting reconciliation between the victims of the crime, the affected communities, and the convicted person*" (para. 82, also para. 90). Which comes as no surprise as TJ has always been a relevant component of the Court's discourse over the years, for instance through the application the "interest of justice" clause. (see D. ĐUKIC, *Transitional justice and the International Criminal Court – in "the interests of justice"?*, in *Int. Rev. Red Cr.*, 2007, pp. 691-718, available here).
Finally, despite its reluctancy, the Court appears to be dangerously approaching the domains of humanitarian assistance. Namely, the Order addresses the principle of "do no harm" (para. 50), not to mention the ICC's broader picture, where the TFV carries out activities way beyond reparation of harm caused by the commission of international crimes.

c. SGBV
The topic of SGBV was central to the *Ntaganda* case as a whole and this echoed in the Order, as the TC explicitly addressed this thematic in the *Victims* sections of the Principles on Reparation. Notably, it endorsed a gender-inclusive and sensitive approach to reparations which integrates intersectionality as a core component and takes into account the existence of previous gender and power imbalances, as well as the differentiated impact of harm depending on the victim's sex or gender identity (paras. 60-61).
Regarding SGBV, the TC noted that *"(g)ender-based crimes are those committed against persons because of their sex and or gender expression or identity*" and that they are "*not always manifested as a form of sexual violence"*. Additionally, it clarified that it does not follow the assumption that SGBV victims are unable or unwilling to come forward and recognised the especially grave nature and consequences of this crimes, in particular against children (paras. 63-66). These inputs are especially relevant for the cases of rape and sexual slavery, although it would be interesting to see the Court apply intersectionality and a gender approach to other crimes and their victims.

d. Expectations v. Reality
This case is very interesting as it is framed within the Court's activity in relation to the situation in DRC. In fact, the TC constantly notes that some individuals may qualify as victims both of the *Lubanga* and *Ntaganda* cases (i.e., paras. 13, 30, 219-221). In order to prevent overlapping, the TC decided to consider that the reparation programmes implemented in the *Lubanga* case should be understood to repair the victims' harm on behalf of both Mr Lubanga and Mr Ntaganda (para. 220). Hence it is worth looking at where the Lubanga reparation process stands, in order to foresee how the Ntaganda process may unfold.
The *Lubanga* reparations stage started in 2012; yet, given all the procedure requirements, the TFV was only able to announce details concerning the collective service-based reparations in March 2021. Trial Chamber II set the amount of liability of Mr Lubanga at USD 10 million, however since he is considered indigent, the TFV has complemented the payment of this award with the amount of EUR 3.85 million and continues to strive to make more funds available through voluntary contributions by States and private actors (*see* TFV Lubanga File).
Can victims expect anything better for the *Ntaganda* process? At least this will not be the Court's first reparations rodeo.

4. Conclusions

The analysed Reparations Order is a remarkable legal document within the ICC case law, as it develops its practice regarding reparations principles and addresses SGBV for the first time. The subjects of child soldiers and victims of rape and sexual violence are at the core of the Order, setting a reference worldwide for addressing the harm caused by these crimes and their eventual reparation. Notably, it fulfils all the elements of a reparations order (*see* para. 23): (i) it's directed against Mr Ntaganda, (ii) informs him of his liability alone and in relation to its co-perpetrators, (iii) provides for collective reparations with individualized components, (iv) identifies the harm caused depending on the type of victims and proposes restitution, compensation, rehabilitations, satisfaction and symbolic reparations, and (v) sets the criteria for victims identification.
Nonetheless, the Order calls for the recurrent discussion of Individual (ICL) v. State responsibility (IHRL). It shows the shortcomings of the former emulating the latter, as the implementation of reparations may be one of the Court's weakest points, especially when it comes to funding and structural reform (which cannot be expected to be fulfilled by the ICC alone or even primarily). Accordingly, the Court could put more emphasis on State's primary obligations when it comes to victims, as well as its complementary role in impunity fighting as a first approach to expectation management.
In any given case, considering the Court's close rapport with the DRC situation, this is a golden opportunity for the ICC to prove that its elaborated reparations mechanism consisting on collaboration between the convicted person, the TFV, and State Cooperation actually works. Now that the order was issued, it's up to the AC to determine the ultimate reparations measures, as the defence already filed a notice of appeal, and up to us to keep a close eye on the reparation process to come.

FERNANDA GARCIA