

STRIKING A BALANCE BETWEEN RESTORATIVE AND RETRIBUTIVE JUSTICE: A NEW CHALLENGE FOR INTERNATIONAL PROSECUTORS

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Diligite iustitiam qui iudicatis terram

(Believe in justice, you who judge the Earth)

Dante Alighieri, *The Divine Comedy*, Paradiso, Canto XVIII

The International Criminal Court's first trial concluded in August 2011. The judgment, against Thomas Lubanga Dyilo, was rendered on March 14, 2012, while the Katanga/ Ngudjolo case has entered its final stages following closing statements that took place from 15 to 23 May 2012. With the Court moving into the sentencing and reparations stages, and its second decision drawing closer, the moment is approaching when all the expectations envisaged in the Rome Statute regarding victims' rights may finally materialise.

The concept of war reparations is not new. As early as the mid third century BC, Carthage was condemned by Rome to pay reparations after the first and second Punic wars. Notwithstanding the array of historical precedent, war crimes and mass atrocity reparations have always been addressed after prosecutorial duties, placing the restorative component of international criminal justice behind the interests of retribution. In 1998 the International Criminal Court ("the ICC") was established with a mandate that expressly included victim participation. This momentous achievement recognised victims' rights and the importance of reparations far beyond what other international courts had previously implemented.

Reviewing contemporary approaches to victim's reparations at international criminal courts and tribunals illuminates its peripheral role. Neither Nuremberg nor Tokyo, and more recently, not even the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), or the Special Court for Sierra Leone (SCSL), could be compared to what the ICC has endorsed. The Statute of the ICTY – the first *ad hoc* tribunal created after Nuremberg and Tokyo - contains only a small provision in Article 24(3) for the restitution of "property and proceeds acquired by criminal conduct."² To date, there is only one comparable experiment to the ICC with regard to the rights and the role of victims in international criminal trials: the Extraordinary Chambers in the Courts of Cambodia (hereinafter, ECCC or The Khmer Rouge Tribunal). Both the ICC and the ECCC have adopted features of a civil law system, but the latter, as a hybrid-lab-Court, has gone one step further by granting victims full rights to participate in the process as Civil

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² Article 24(3) of the Statute of the International Tribunal for the Former Yugoslavia states that, "In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners."

Parties.³ The development of the cases pending in both courts and the recent judgments rendered are now shaping the idea of reparations and victim's participation.

The ICC and the ECCC offer a perfect example of two different approaches to war crimes, genocide and mass atrocities accountability. The first significant decision on victim's rights by the ICC was on 17 January 2006 with the decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 ('The Decision of 17 January 2006').⁴ With this decision, which dealt primarily with the prosecution's reticence to grant broad procedural rights to victims, the Pre-Trial Chamber I opened the door to a roller coaster of decisions regarding victims' participation.⁵ Furthermore, the Office of the Prosecutor (OTP) expressed concern about possible negative consequences for the defendant's right to a fair and expeditious trial that victim participation at the investigatory stage could entail.⁶ In the framework of the Rome Statute, thousands of victims are expected to want to participate in the proceedings. When considered within the complex matrix of international criminal cases, the sheer volume of victims may compromise their ability to be effectively heard and their right to participate may be impaired. This may also have a consequential effect on defendant's rights, particularly concerning the inevitable lengthening and additional complexity of trials and the attendant costs.

This difficulty seems to be being acknowledged by the ICC's prosecutor when building a case before the Court. The restrictive scope adopted by the OTP limits the number of potential claimants. For instance, in *Lubanga*, his indictment was limited to the recruitment and deployment of child soldiers under Articles 8(2)(e)(vii) and 25(3)a of the Rome Statute. The indictment clearly ignores the crimes of killing, rape or pillage. Even though this fact implies further consequences regarding victims' rights; the first and most clear effect is that ignoring the aforementioned crimes, limits from the beginning the number of potential victims' applications, "crippling"

³ Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, see Rule 23 onwards.

⁴ 'The Decision of 17 January 2006' granted to the victims a general right of access to the Court, even during investigations, under the conditions of Article 68(3) of the Statute. See, International Criminal Court, Pre Trial Chamber I, Situation on the Democratic Republic of the Congo, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101, (January 17, 2006).

⁵ After several decisions related to 'The Decision of 17 January 2006', the Appeals Chamber eventually overturned the general participation rights entailed to the victims by the Pre-Trial Chamber and determined that the Pre-Trial Chamber cannot grant a general right in the investigation phase. See International Criminal Court, Situation on the Democratic Republic of the Congo, Appeals Chamber, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-556, (December 19, 2008). Vid. Infra 6.

⁶ The Prosecution applied for a leave to appeal the Decision of the Pre-Trial Chamber - an application which was rejected. A further application for an extraordinary review of the decision was dismissed by the Appeals Chamber. See International Criminal Court, Situation on the Democratic Republic of the Congo, Prosecution application for leave to appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-103, (January 23, 2006). See also, International Criminal Court, Situation on the Democratic Republic of the Congo, Pre-Trial Chamber I, Decision on the Prosecution application for leave to appeal the Chamber's Decision of 17 January 2006 on the applications for participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-135, (March 31, 2006). See also, International Criminal Court, Situation on the Democratic Republic of the Congo, Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, (July 13, 2006).

therefore, the restorative aspect of justice - given that for example, raped women never had the opportunity of being considered victims of such crime in Lubanga's case. Although the victims' history with the ECCC has not followed a smooth path either, quite a different approach has been followed at the ECCC's prosecution in regard to war crimes and crimes against humanity accountability.

One of the most controversial decisions at the ECCC was the severance order pursuant to Internal Rule 89⁷ issued on 22 September by the Trial Chamber. This decision separated the "proceedings into a number of discrete cases" and effectively limited the broad scope the prosecution had adopted since the inception of the ECCC, and, therefore, limits the actual participation of the victims as civil parties. The analysis of the challenge the co-prosecutors are facing with such a significant decision falls outside the purpose of this article. So too is the study of the difficult situation the civil parties are contending with in terms of internal organisation and reparations. However, notwithstanding criticisms by victims' groups claiming mistreatment by ECCC judges, the ECCC prosecutors have been more inclined than the ICC to address justice from a restorative point of view.

This broader approach to what the scope of a war crimes or crimes against humanity case should be, has arguably contributed to the international recognition and support of the ECCC prosecution. Criticism of the ICC and the Lubanga case has often addressed the restrictive scope chosen by the prosecution, whereas the ECCC in case number 002 tried to prosecute accused persons for as many crimes as possible and it was only after the decision of the judges that the scope of the trial was constrained.

During 2011, the ICC received more than ten thousand victim applications for participation and/or reparations. The ECCC has its own fight on victims' participation. As another example of how contentious this issue is, on June 2011, the Pre-Trial Chamber of the ECCC overturned a co-investigating judges' decision, thereby accepting the initially rejected 1,728 Civil Party applications.⁸ In its first case, the ECCC only accepted ninety-four civil parties. This is an insignificant number in comparison to the nearly four thousand applicants of its second case, and compared to what the ICC will have to face in the following years.

A logical consequence of granting participation rights to victims is the eventual awarding of reparations. Precisely, reparations, in regards to victims' rights, tend to be another point of divergence between the ICC and the ECCC. Monetary compensation is explicitly excluded by the ECCC,⁹ whereas the ICC has a victims'

⁷ Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case 002, Severance order pursuant to internal rule 89ter, E124, (September 22, 2011).

⁸ By the decision of the Pre-Trial Chamber - Judge Catherine Marchi-Uhel dissenting in part, - accepting the 1,728 applications initially rejected by the Co-Investigating Judges, the Pre-Trial Chamber granted the status of Civil Parties to 98% of the applicants. Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber, Case 002, Decision on appeals against orders of the co-investigating judges on the admissibility of civil party applications, D411/ 3/ 6, (June 24, 2011).

⁹ Rule 23 (quinqüies) (1) of the Internal Rules of the ECCC (Revision 8) stipulates that "If an Accused is convicted, the Chambers may award only collective and moral reparations to Civil Parties. Collective and moral reparations for the purpose of these Rules are measures that: a) acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted and b) provide benefits to the Civil Parties which address this harm. These benefits shall not take the form of monetary payments to Civil Parties. "

trust fund and may grant individual reparations.¹⁰ The ECCC, in contrast, is only entitled to award collective reparations.

The Rome Statute was deliberately vague in defining reparations, providing interpretive discretion to the bench. Restitution, compensation and rehabilitation were the three kinds of reparations generally accepted in international law and therefore incorporated into the Rome Statute under Article 75(1)¹¹. Although this apparent ambiguity has been criticized, if properly addressed by the chambers it presents a good opportunity to make further steps in integrating restorative justice within the retributive framework of traditional international criminal law. In the case of the ECCC, both the sentence and the sentence on appeal of ECCC Case 001 were perceived as a disappointment due to the gap between the reparations sought by victims and that awarded by the Trial Chamber.¹² Notwithstanding the above criticism, the ECCC is the only current international criminal court with experience granting reparations to the victims.

Ubi jus, ibi remedium - where there is a right, there must be a remedy. The question is, consequently, what an international court of justice should understand by “remedy.” In some Ugandan languages, for instance, there is not a word for “crime” or “punishment” but rather “wrong” and “righting a wrong.” Given the diverse backgrounds of the countries and circumstances where the ICC has engaged¹³, the flexibility under the Rome Statute to provide different kinds of reparations may support the Court’s ability to effectively operate in culturally diverse jurisdictions.

On the other hand, the present flexibility endangers the equal treatment of the victims. For example, if individual compensations are granted, a substantial portion of the trust funds may be distributed following the first two decisions of the Court – namely the Lubanga and the Katanga/ Ngudjolo cases. The judges have requested submissions from the prosecution, defense, and victims in regard with how consideration of potential reparations ought to be conducted¹⁴. This will be the first time the issue of reparations is addressed at the ICC. In this sense, the ECCC’s approach with victims could be a durable solution for future efforts, especially when

¹⁰ Rule 97(1) of the ICC Rules of Procedure and Evidence considers individual reparations “Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both” and Article 79 of the Rome Statute establishes a trust fund for the victims. See Chapter 4, Section III, Subsection 4 (Rules 94–99) of the ICC Rules of Procedure and Evidence for provisions in relation with victim’s reparations.

¹¹ Article 75(1) of the Rome Statute provides that “The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.”

¹² For the judgment on reparations against KAING Guek Eav (‘Duch’) see, Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Case 001, Judgment, E188, (July 26, 2010). See especially paras. 652-9 for Civil Party’s claims, paras. 667-675 for an analysis of the reparations requested and paras. 682 and 683 for the sentencing concerning reparations. The Co-Lawyers for the group 2 of the Civil Parties requested to overturn the Judgment on Civil Party claims and to grant all reparations in full. See, Extraordinary Chambers in the Courts of Cambodia, Case 001, Appeal Against Judgment on Reparations by Co-Lawyers for Civil Parties – group 2, F13, (November 2, 2010). For the appeal judgment on reparations see, Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case 001, Appeal Judgment, F28, (February 3, 2012), Section VII.

¹³ For an in-depth description of the situation and cases currently before the ICC see, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/>

¹⁴ <http://www.icc-cpi.int/iccdocs/doc/doc1379842.pdf>

the ICC has no jurisdiction over States and the enforcement of the decision on reparations relies on national jurisdictions.

Psychological, moral and, in general, collective reparations seem to be a more feasible, long lasting and fair answer, as well as a more effective method for reconciliation purposes. For instance, regarding the restrictive scope adopted by the ICC prosecution in *Lubanga*, the fact that Lubanga was only charged and convicted for child soldiering adds an ethnic consideration¹⁵ to reparations proceedings. In this regard, the implementation of more community-oriented programs would be a better use of the trust fund, and would likely also be more responsive to culturally particular notions of justice.

There is no possible way to “repair” mass atrocities. There is no possible way of making whole again a sector of the population that has been eradicated. Instead, the focus should be on achieving a balance between restorative and retributive justice. This must be done whilst bearing in mind the rights of both victims and defendants, given that the ultimate purpose of the ICC should be to contribute to long lasting peace. Balancing both aspects of justice is a matter of judicial engineering where the prosecution is exposed to one of its greatest challenges in contemporary international criminal law. By approaching its traditional retributive role from the relatively new restorative perspective of justice, the ICC seems to be trying to advance this purpose.

¹⁵ Child soldiers are mostly from the Hema ethnic group. However, Hema forces committed crimes against humanity against the Lendu and other ethnic groups.