

## **Making Reparations Work in Congo**

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ICC supports inclusive approach to reparations, but how wide can its reach be?

A landmark decision by the International Criminal Court, ICC, will see damages paid to the victims of convicted Congolese warlord Thomas Lubanga Dyilo. Given the complexity of deciding who is eligible, judges have given considerable latitude to the body responsible to define how the reparations programme should work.

The August 7 ruling followed on from the conviction of Lubanga in March 2012 for conscripting, enlisting and using child soldiers under the age of 15 to participate in hostilities in the east of the Democratic Republic of Congo. He was sentenced in July. (See **Congolese Warlord Gets 14 Years for Using Child Soldiers.**)

As this was the ICC's first conviction, it is also the first time the court is exercising its powers to order payment of reparations to people who suffered as a result of criminal actions.

A special body called the Trust Fund for Victims, TFV, works alongside the court in order to implement any reparations programme that is put in place.

Individuals convicted by the ICC can be required to contribute to reparations if they have sufficient funds, but during sentencing in July, judges found that Lubanga was not in a position to do so.

In their August decision, judges set out general principles on how the process should be implemented, but left it up to the TFV to carry out an assessment of the harm suffered in eastern DRC and to decide what form reparations should take.

On October 3, Lubanga's lawyers launched an appeal against his conviction and sentence. They also plan to contest some of the points in the reparations judgement.

### **DEFINING THE SCOPE OF REPARATIONS**

The TFV will not launch a reparations programme until all appeal processes have been completed, but it is already considering how it should proceed.

Issues around the scope and purpose of reparations – who can claim them, and whether payments should go mainly to individuals or to communities – have vexed experts on international justice.

According to the ICC's founding treaty, the Rome Statute, only those victims who suffered from the crimes of which Lubanga was convicted will be eligible for compensation. In the strictest interpretation, this would be only those child soldiers who were forcibly conscripted into his Union of Congolese Patriots and used as combatants during fighting in 2002-2003.

However, judges have decided that the process should encompass "direct and indirect victims", a category that includes "family members of direct victims, along with individuals who intervened to help the victims or to prevent the commission of these crimes".

Earlier this year, IWPR interviewed some who argued that such a broad-based, even-handed approach would be much more effective in healing the scars left by conflict and extensive human rights abuses (See **Lubanga Verdict Prompts Debate on Reparations.**)

Phil Clark, a lecturer in comparative and international politics at the University of London's School of Oriental and African Studies, SOAS, says the TFV will have to play "a very careful diplomatic game" to make sure that reparations do not become divisive by appearing to benefit one set of victims over another. He believes the lack of money available for reparations is likely to be a limiting factor, and will mean that not all victims can be reached by the TFV's programmes.

### **ENGAGING DRC GOVERNMENT**

Some observers argue that the Congolese government has a role to play in making sure the TFV's reparations programme runs smoothly.

Although it is unclear to what extent the authorities can and should assist in the process, given that Lubanga was a rebel fighter, ICC judges stress the importance for the TFV to establish "close cooperation" with the national government. De Baan confirms that the TFV will be engaging with the government in a

bid to persuade it of the value of a reparations programme.

“Cooperation by the DRC government should be extremely important, for instance in terms of access to information and to ensure that the implementation of reparations awards will take place under the best possible safety conditions,” he said.

For the moment, the political leadership in Kinshasa appears reluctant to move on the issue, arguing that it cannot undertake obligations stemming from the crimes of one convicted individual.

“The most important contribution from the DRC is to have arrested Lubanga and sent him to the ICC,” said government spokesman Lambert Mendé. “Now, if reparations are indispensable, I think it is for the person who is guilty of the crimes to take responsibility... Our ministry of humanitarian affairs has always been there for all the victims, [but] Lubanga was at war against the republic; he was not employed by the DRC. I don't see why we should be concerned with reparations.”

De Baan would not be drawn on whether he would expect Kinshasa to contribute financially to a process for which judges have said “there are very limited financial resources available”.

Ruben Carranza, director of the reparative justice programme at the International Centre for Transitional Justice, ICTJ, points out that the government could contribute in ways that do not involve payouts.

“The government could cooperate in order to preserve the records and names of victims, including those that have been identified but are not part of the Lubanga case,” Carranza said. “They could also turn sites where violations took place into memorials, in order to acknowledge the suffering of victims.”

Guidelines agreed by the United Nations in 2005 stress that all victims of human rights abuses must be able to access some form of reparations. Carranza argues that this places an obligation to act on the DRC government.

“The universal right to reparations is based on victimisation, and not individual criminal responsibility,” he said. “This is why it's important to go beyond the Rome Statute [ICC's founding treaty] and look at what role other actors, including the state, can play in recognising the harm that victims have suffered.”

Experts on post-conflict justice say that if the government shows itself unwilling to get behind the TFV's work, it could undermine the key purpose of reparations – to provide recognition of the harm that victims have suffered. The experience of similar programmes elsewhere may serve as a warning.

A reparations programme was launched in Sierra Leone in 2009 to help victims recover from a decade of bloody civil war. The conflict officially ended in 2002, leaving thousands dead and countless others maimed, often with limbs deliberately amputated.

At present, most of the money for reparations is channelled through the United Nations' peacekeeping mission in Sierra Leone. But Ibrahim Tommy, executive director of the Centre for Accountability and Rule of Law, points out that this might not last forever.

“There is a clear lack of willingness on the part of the political leadership to roll out an effective, meaningful and sustainable reparations programme,” he said. “If you're going to rely on the UN and other international bodies, then at some point, the focus will change and move to other countries. The government must be made to start taking responsibility and honour its obligation to provide reparations for those victims most affected by the war.”

John Caulker, the head of Fambul Tok, a peacebuilding initiative in Sierra Leone, thinks a large part of the problem is a lack of understanding within government about the purpose of reparations.

“The government doesn't see the need for reparations, given that there is an ongoing programme of development in the country,” he said. “We have had to argue quite insistently that reparations are trying to do something different. Reparations aren't just about monetary compensation – they are about the restoration of victims' dignity and the acknowledgment that they were wronged.”

In Cambodia, victims have struggled to get reparations from the tribunal set up to try Khmer Rouge leaders for the mass atrocities of the 1970s. Like the Sierra Leone court, this tribunal is a joint venture between the UN and the national government.

The Cambodian court has received more than 4,000 applications for compensation from victims, of which just over half have been declared admissible.

According to lawyer Kim Suon Hong, one of the reasons why the Cambodian government is reluctant to take part is its belief that convicted individuals rather than the state should pay. Yet many of those convicted or on trial do not have sufficient assets to pay reparations.

“The way that human rights work is that when someone loses everything or has no way to support their

life, the government must be responsible for their wellbeing. This is exactly the same as if it had been the government that directly caused the problems for the victims,” Hong said. “But the government doesn’t see things like this. The government always says it is the responsibility of the accused. But if the accused has no money, what can they do?”

The ICC is the first international court to adopt a reparations policy applicable to every individual it convicts. But as it seeks to deliver reparations in its case, observers fear difficulties similar to those seen elsewhere.

“The Rome Statute enables the TFV to address some of the needs of [Lubanga’s] victims, but we need to look at how we go beyond that,” Carranza said. “It’s the state that should have the primary responsibility to recognise the victims of violations committed by state agents or violations committed by non-state actors that the state could have prevented.”

## **BEYOND REPARATIONS**

There is an important distinction to be made between judicial reparations and development aid. Reparations are intended to provide recognition for the harm that victims have suffered, whilst development aid is a continuous process to help communities climb out of poverty.

Clark from SOAS cautions that the distinction between reparations and development aid must be made very clear, so that compensation for victims is not seen as a substitute for aid.

“Victims need compensation for the crimes that they have suffered, but they also need development aid by virtue of being citizens of the Congo,” he said. “There is a danger that reparations, funded by the international community, might become a substitute for the development that people would ordinarily expect anyway.”

Whilst the reparations process is necessarily limited, TFV director De Baan hopes that the reparations process will encourage broader efforts by others, with a longer-term impact.

“The TFV will not be operating in the region permanently, and so it is very important that the reparation measures put in place continue to benefit victims and affected communities even when the TFV is no longer there,” he told IWPR. “These measures should function as an incubator, inspiring initiatives by other donors and the [DRC] government to eventually use the approach and methods in a way that is not constrained by the legal boundaries of the ICC’s judicial reparations.”

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