Early submissions about how Ntaganda reparations hearings should proceed

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By: James Hendry

The second Lubanga Appeals Chamber decision on reparations (Lubanga II) was released shortly after the conviction of one of his confederates, Bosco Ntaganda, of five crimes against humanity and 13 counts of war crimes, including one arising from the use of child soldiers all in the Ituri province of the Congo. He was one of Lubanga's commanders. Ntaganda has appealed his conviction. The sentencing hearing is scheduled for November 7, 2019 (here). The Appeals Chamber decision has been the subject of descriptive commentary (here).

Order for submissions

In the meantime, one of the judges of the convicting Trial Chamber issued an Order for preliminary information on reparations in Ntaganda's case. The judge noted that there were 2129 victims who had been authorized to participate in the proceedings under article 68(3). The judge ordered the Registry to submit information on three questions: information on, and a methodology for identifying victims (not yet participating) in the proceedings, observations on whether experts should be appointed to assist the Chamber and an update on security in the Congo (para. 4). The judge allowed the Legal Representatives of Victims (LRV), the Defence, the Office of the Prosecutor (OTP), the Registry and the Trust Fund for Victims (TFV) to file responses to the Registry's submission. He also announced his intention to order these parties to submit further observations on reparations six weeks after the Court's sentence is pronounced on Ntaganda.

The preliminary submissions show that the bodies that were called on for preliminary submissions have differing visions of how reparations should be carried out in Ntaganda's case. However, the detail of the submissions demonstrates the sophistication of these participants in the process, learned from rulings by the Appeals Chamber and their own experience in the bureaucracy and in the field.

The Registry's response

The Registry's observations with Annex submitted by its Victims Participation and Reparations Section (VPRS) proposed a 'streamlined' system to identify potential beneficiaries of reparations before the Trial Chamber makes a reparations order. The VPRS explained that it had reviewed the files of the victims already participating in the proceedings, finding 283 former child soldiers and 1849 victims of the attacks. They had been allowed (paras. 41-51) to participate in 2015 as victims on prima facie proof of direct or indirect harm from the crimes. The VPRS expected that the number of potential beneficiaries for reparations for the attacks drawn from these files to be reduced because the Trial Chamber had excluded some villages and crimes from Ntaganda's conviction (para. 6, fn.7). The VPRS noted that it was proceeding on the basis that the second judgment of the Appeals Chamber in Lubanga II required applying the same criteria for reparations to be set by the Trial Chamber to already participating victims and potential new beneficiaries (para. 6). It noted that only 38 of the participating victims had submitted a form that met the Rule 94 requirement for requesting reparations (para. 7). The VPRS then said that it had already conducted field work to identify victims, consulting with community leaders and had gathered information at each village completing forms that could support new beneficiaries' claims and to estimate the numbers of potential unidentified beneficiaries (para. 8). Noting the overlap with the Lubanga case involving child soldiers (and the differences in temporal scope and the gender-based violence in the present case), they proposed to streamline the process for the two cases by keeping the lists of child soldiers separate for confidentiality and legal representation reasons, while drawing on the Lubanga list to notify Ntaganda victims of their right to file a separate reparations request (para. 9). The VRPS proposed using the same system for identifying new beneficiaries as current participants allowing the collection of information on an individualized basis without affecting the Chamber's decision whether to award individual or collective reparations (para. 10). It submitted that the victim identification process should be completed before

the Chamber made its reparations order (with some room for identifying victims in the implementation phase) (para. 11, fn. 19).

The VRPS proposed to assess all victims according to the Chamber's criteria, consulting with the TRV and Legal Representatives of Victims (LRVs) for greater efficiency (para. 11). The VPRS would see to the collection of information about victims in the field and the resulting forms would be sent to the LRVs for representation (para. 12). The VPRS then proposed to process the forms according to the Chamber's criteria in three groups: those clearly identified as beneficiaries, a group clearly not, and a group where the claim was unclear whose applications would be transmitted to the Chamber where the participants would be heard on the claim.

The purpose of this proposal was to increase efficiency, manage victim expectations and identify the most pressing victim needs (paras. 13-5). The VRPS then proposed that the Chamber would be able to make an order setting out the criteria to be applied and to ratify the "clear" applications, ratify or amend the "clearly-not" applications allowing the LRVs to challenge the VRPS's view, and decide the "unclear" applications which would be the focus of LRV and Defence submissions, all prior to the release of the appeal decision (paras. 16-19). The VRPS argued an individualized form-based process was necessary for reliability purposes (paras. 21-3). It submitted that it would assess all potential beneficiaries subject to the Chamber's approval especially for questionable cases (paras. 24-5). Ntaganda's fair trial rights would be protected by allowing him to review the screening process, the implementation plan and by involving him in the questionable applications (para. 26). The Registry sought to organize the information already in hand about the victims in this case to assist the Chamber early on in the proceedings in setting a standard of proof and documentary expectations for potential victims to facilitate uniform assessment of victims (para. 28). The VPRS would send newly identified victim's forms to a LRV (para. 29).

The VPRS noted special merit in retaining experts on the scope of victimization and long-term consequences on communities (para. 33).

An issue posed by the Registry's proposed individualized forms-based approach

The individualized form-centered approach proposed by the Registry had been considered in Lubanga II where the Trial Chamber made a collective order. There, the Appeals Chamber dealt with Lubanga's argument that reparations should be limited to those who officially claimed them under the rules (para. 69). The Appeals Chamber noted that article 75(1) requires the court to establish principles for reparations for the victims and that the trigger for the court's reparation jurisdiction in article 75(2) is the receipt of requests for reparations or exceptional circumstances allowing it to act on its own motion. The Appeals Chamber noted that this 'trigger' is not a limitation (para. 77). It reasoned that article 75(2) provides that the Court may make a reparation order directly or through the TFV based on what it determines from all the relevant information before it to deal with the types of harms in issue. Rule 98(2) specifically contemplates that the TFV will verify that individuals come within the beneficiary group where the Trial Chamber cannot identify each victim at the time of the order and had

not made a formal claim (para. 80). Also, collective awards under Rule 98(3) do not mandate the identification of victims (para. 82).

Further, and perhaps most relevant to the Registry's proposal here, the Appeal Chamber noted that requiring the reparations order only be based on requests received would reduce the efficiency of the reparations process because large groups of victims would require a great deal of time to fill out requests, which would have to be built into the order. The implementation process would not start until the order was made, delaying reparations for the already identified victims (para. 80). Finally, the Appeals Chamber said that reparations for only those who claimed them or in exceptional circumstances could undermine the whole idea underlying repairing the harms of criminal acts (paras. 79, 83). This was because some cases involving smaller numbers of victims might be dealt with based on individual requests for reparations, while cases with larger number of victims might be dealt with on a collective basis and not individual assessment. In the latter case, a principle that formal individual requests in article 94 is the trigger for reparations could prevent full reparation in the circumstances where expert reports and other relevant information might reveal more victims (paras. 87-9).

The Trust Fund for Victims (TFV) response

The TFV's response to the Registry's Preliminary Observations submitted that the VRPS' proposal that the Chamber approve an individual applications-based screening process conducted solely by the VPRS before it made its reparations order would be premature and potentially contrary to the best interests of potential beneficiaries (para. 5). The TFV separated the issue set by the Chamber into the issue of the identification process for non-participating victims as distinct from any potential eligibility screening process, focusing on the identification process because the screening process might not be needed for already-identified victims (para. 6). The TFV said that it would respond to the information that the VPRS had gathered information on potential victims in the field and its underlying methodology when it was given to the Chamber (para. 8). The TFV submitted that the methodology and experience developed in the Lubanga case would be useful for the Chamber. There, the TFV led the identification process in the implementation phase (fn. 9) collaboratively leading to contacts with potential new victims very successfully and especially relevant here because of the overlap between the Lubanga and Ntaganda cases (para. 10). It recommended the appointment of experts who would assist in the implementation phase, if any were appointed at all: the TFV noted the parties to the case and are the best source of necessary information (paras. 12-3, fn. 17).

In response to the Registry's submissions on the process to be followed, the TRV identified three reparation processes approved by the Appeals Chamber and open to the Chamber, all of which depend on the circumstances of the case. In Katanga, the Chamber used a 'pre-reparations order model', in Al Mahdi, a 'post-reparations order model' and in Lubanga II, a judicial procedure led by the Chambers making a decision based on a 'sample' of victim applications and an administrative procedure implemented by the TRV on other applications made after the reparations order (para. 20). The processes in Katanga were commented on in this Journal here and those in Al Mahdi here.

The Katanga pre-reparations order was based on individual applications under Rule 94 filed by victims of a one-day attack enabling the Defence to challenge each application in the process. But the Trial Chambers noted that such an approach would not be as appropriate where there were a large number of potential victims and the attacks occurred over a long period of time and area (para. 20). The TRV noted with the Al Mahdi 'post-reparations order model' the TFV screened individual cases where the Chamber did not identify beneficiaries subject to judicial review. The Defence and LRVs were engaged in the screening process. Eligibility for collective awards was determined by the TRV with no role for Defence or LRV (para. 22). The TRV noted that in Lubanga's case, the Chamber reviewed a sample of dossiers to set the amount of the award and to devise a method of screening victims for the TRV to implement subject to the Chamber's overview, with the Defence able to make submissions on the screening process, challenge the samples used to set the award, but not challenge applications submitted to the TFV (para. 23).

The final submission of the TRV was about lessons learned about screening models considering the interest of victims and modalities of repair (para. 25). First, TRV identified the need for identifying the harms subject to reparation to enable filling out viable applications (para. 26). The TRV noted that if the Chamber awards collective reparations, there may be no need for individual applications that would risk re-traumatizing victims, generating their expectations of generous reparations and use too many administrative resources (para. 27). The TFV noted that the Ntaganda case most resembled the Lubanga case (para. 24).

The Legal Representatives of Victims (LRV) response

The LRV response submitted that the Chamber should not attempt to fully repair the harms at issue by making an order based on a pre-established list of beneficiaries, but suggested it set out eligibility criteria, based on a sample of potentially eligible victims and the work already done on the scope of their victimization (which should be continued), as well as a standard of proof, principles, types and modalities of reparations. They proposed the TRV screen victims according to the Chamber's criteria during the implementation phase with the help of the Registry and LRVs (paras. 2,3). The LRVs joined the TFV in their view that the Chamber had asked about identifying victims (para. 10). The LRV submitted that the VRPS proposed an 'applications-based approach' like the one adopted in Katanga's case (para. 12). They noted that the Appeals Chamber observed in Katanga's case that the individual reparations approach was most appropriate where there were a small number of potential beneficiaries, a view repeated by the Appeals Chamber in Lubanga and that a Trial Chamber should not make individual assessments where there are many victims (paras. 13-4) and quoted the clear support for this position in the drafting history of the Rome Statute's provisions on reparations (para. 15). The LRV observed that Ntaganda's and Lubanga's victims far exceeded the number of victims of Katanga and that it was safe to assume that only a fraction of potential victims had been so far been identified given the geographical scope of the crimes. Thus, an individual reparations order would be contrary to the rulings of the Appeals Chamber, impractical and would fall short of repairing all harms suffered by victims (para. 16).

The LRV drew attention to the Registry's suggestion that the processing of beneficiaries' claims in three groups was based on its proposal to apply the same standard for participating at trial and for reparations. But these were clearly different standards (para. 17).

The LRV were in favour of ensuring the TFV presided over the screening process as suggested by the Court's 'legal framework and jurisprudence' relying on the expertise of the TFV (para. 19). The LRV noted that this case was unprecedented and the largest case dealt with the Court, with a high number of victims involved, the wide geographical scope, the current volatile situation in the area, the Ebola outbreak, the displacement of many victims and the time elapsed since the conflict, during which most victims live in a situation of humanitarian crisis, transgenerational harms, loss of opportunities and life plans, death, PTSD, psychological damage from gender violence and complaints that victims have not received any reparations (paras. 21-2). The LRV submitted that the process for reparations must also consider the emotional circumstances of the victims, who were waiting on the outcome of Ntaganda's appeal, to avoid their disappointment, the possible re-traumatization that would result from a complex administrative process prior to the finalization of his conviction and the need to avoid duplication of screening child-soldier victims with those in Lubanga's case (para. 25).

All this led the LRV to suggest that the reparations process proceed during the appeal phase during which the Chamber could develop eligibility criteria, a standard of proof, establish principles, types and modalities of reparations (para. 26).

The LRV suggested that the Chambers might consider a bifurcated reparations procedure prior to the decision on appeal, ordering measures that can be implemented without identifying individual beneficiaries such as community-based collective measures (para. 29). If the conviction is overturned, then such community-based measures might be considered awarded under the assistance mandate of the TFV (para. 30).

The LRV also submitted that the many victim participants in the proceedings should be presumed to have requested them (para. 32). The LRV also invited the Chamber to abandon current jurisprudence requiring the victim's consent for release of their personal information to the TFV for the purpose of participating in collective projects and simply presume consent and take it to be confirmed when the victims participate (para. 33).

The LRV submitted that the identification of new beneficiaries should be carried out in the implementation phase (para. 34). The LRV added that identifying victims prior to the issuance of a reparations order was difficult until they knew the content of the TFV projects, so attempting to identify and screen them beforehand will not take into account this reality, especially after suffering the trauma of rape and sexual slavery (para. 36).

The LRV noted that outreach to affected communities was a first step, acknowledging the extent of victimization and types of harm, and that potential beneficiaries had to understand the purpose and nature of reparations before they will come forward, requiring coordination of messaging of the various

bodies involved in the reparations process (para. 38). The LRV was concerned about the cost of retaining experts that would reduce money for reparations but noted that expert opinion on the long-term effect of the crimes on communities would be useful (para. 40).

Ntaganda's response

Ntaganda's response was first to agree to a swift resolution of reparations while observing his rights. He wanted to ensure that the starting point was the victims who participated in the hearing, reduced by the number of victims resulting from the removal of crimes and villages from his conviction. He noted that only 38 of the 2132 participating victims had submitted a request for reparations meaning that the VPRS would have to meet the remaining victims to determine if they seek reparations, as well as new potential victims, appearing to agree with the VRPS on a form-based approach for assessing reparations (paras. 17-8, 38).

He also noted that there had to be a determination about how to divide liability for reparations relating to child soldiers between himself and Lubanga, to avoid child soldier beneficiaries from receiving double reparations for the same harms (para. 20).

He also proposed recommendations to identify new potential beneficiaries prior to the reparations order, presumably in support of this proposal of the VPRS (para. 21). He submitted that participating victims and potential victims should be assessed according to the same criteria for reparations, but not the prima facie basis for participation at trial, but at the higher standard of a balance of probabilities for being a beneficiary (paras. 22-4).

He also proposed that he should be involved in assessing all beneficiaries, contrary to the Registry proposal for the assessment of three groups, a process he argued had not been approved by the Appeals Chamber (paras. 25-6, 31). He submitted that without such participation, his rights would not be respected (para. 30). He argued that he should be able to offer submissions on the criteria for all beneficiaries (para. 38). While the VPRS recommended that all newly pre-identified applicants be represented by the relevant LRV, Ntaganda felt that they should only be represented once their beneficiary status was confirmed (para. 40).

Must reparations be prorated among perpetrators?

Ntaganda raised an issue that Lubanga also argued before the Appeals Chamber in Lubanga II: that the Trial Chamber had erred by finding him fully liable for the harms regardless of other co-perpetrators and the degree of his participation in the crimes. He had also argued the Trial Chamber should have considered his efforts to demobilize children, his concern for their fate, the responsibility of national and international authorities which should have protected the civilian population, and his efforts to promote peace (paras. 288-9).

The Appeals Chamber replied under the sub-heading ‘How to apportion liability’ (para. 301). It recalled the first appeal decision (Lubanga I, at para. 118) observing that the scope of a convict’s liability may

differ depending on such things as the mode of individual criminal responsibility and its specific elements and that it had been guided by the principle, not previously articulated, that a perpetrator's liability for reparations must be proportionate to the harm caused and their participation in the commission of the crimes in the circumstances of the case. However, the Appeals Chamber noted that in the Katanga appeal on reparations at para. 175, it had said that this did not mean that a convicted person's liability must reflect their relative responsibility for the harm vis-a-vis the others who may have contributed which was irrelevant and that it was not inappropriate to hold the person liable for the full amount, though is some cases the Trial Chamber might consider the role of the person vis-à-vis the others involved, for example where two or more are convicted for crimes causing the harm. Overall, the main concern for the Appeals Chamber in Lubanga II was the extent of the harm and the cost to repair rather than the role of the convicted person (paras. 302-4). The Appeal Chamber held that the Trial Chamber in Lubanga properly took into account his responsibility considering that he was President of his Party, Commander in Chief of its militia, that his contributions were essential to a common plan that resulted in the conscription and enlistment of children for hostilities and the gravity of his crimes committed on a large scale and in a widespread manner (para. 309). The Appeal Chamber held that Lubanga's evidence about his efforts to demobilize children would only be relevant at the reparation stage if he had been able to prove he reduced the harm suffered by many victims by helping to demobilize them (para. 311). His evidence of good behaviour that he had to act to protect civilians because the government and international community did not was irrelevant at this stage of proceedings because it was an attempt to justify the common plan for which he was convicted (para. 315).

Conclusion

The early submissions on the issue of reparations in the Ntaganda case provide an interesting and detailed look at the various visions of the participants about the way the process should unfold. The Registry appears to want to keep a tight hold on the process. The TFV and LRV both appear to recognize the enormity of the task and the multitude of issues that would arise in dealing with reparations in such a stream-lined administrative manner. The TFV noted that Ntaganda's case was more similar to the Lubanga case than the form-based Katanga reparations process due to the greater number of victims and harms suffered, geographic scope and the dispersal of victims over the decade-plus period between the crimes and the order. The Appeals Chamber jurisprudence appears to support this approach and points toward a collective award of reparations. However, the appeal of Ntaganda's conviction is still pending and a reparations order lies some time in the future. In the meantime, the submissions of the participants provide a fascinating insight into the structure of the reparations process.

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Image: Bosco Ntaganda during the delivering of the judgment of ICC Trial Chamber VI at the seat of the Court in The Hague (The Netherlands) on 8 July 2019 ©ICC-CPI.