

ICC and Civil Reparations

Many thanks to Assistant Professor Nicolás Zambrana (University of Navarra, Spain), author of this comment on the ICC decisions against Lubanga.

First Decision on Civil Reparations by the International Criminal Court

Last 14 of March, the International Criminal Court (ICC) issued its first judicial decision ever, declaring Thomas Lubanga guilty of the crime of conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities in the Democratic Republic of Congo. The following 10 of July, another decision, sentencing Lubanga to 14 years in prison, was issued by the same tribunal. Finally, last 7 of August a decision on reparations for the victims has been issued by the ICC. The first thing to be observed is that there does not seem to be a declaration by the tribunal concerning the **civil liability** of Lubanga in any of the three decisions, even if art 75 of the Rome Statute foresees that the ICC may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Furthermore, Lubanga is believed by the court to have no known assets, so no monetary fines have been imposed and no monetary reparations will be exacted from him, although the tribunal foresees that he should provide an apology to the victims as part of the reparations. If the person condemned by the ICC has assets with which to satisfy the fines imposed or the amounts of the reparations decided by the court, the Rome Statute foresees, in article 109.1, that **State Parties** (i.e. parties to the Rome Statute) **shall give effect to those fines or forfeitures** ordered by the Court without prejudice to the rights of *bona fide* third parties, and in accordance with the procedure of their national law. This article can be complemented by article 93 of the Statute, which declares the obligation by countries to abide by orders of the ICC requesting seizures of property under the law of the country. This procedure seems, at least as regards its goals, rather similar to a common **exequatur system of recognition and enforcement of foreign judgements**, only this time there is no foreign country where the judicial decision originates but an international tribunal. Nevertheless, it could be anticipated that, as it happens with the **enforcement of decisions issued by human rights courts** such as the European Court of Human Rights, even if the international obligation to abide by the decision of the international tribunal is clear, nothing is foreseen in case

the enforcing State delays or altogether refuses to comply with the decision. This may be easily done since the compliance with the ICC's decision on fines and seizures of property of the person condemned has to be carried out in accordance with the law of the country and few countries may have already adapted their legislation on enforcement of foreign judgments to the Rome Statute. It is also peculiar that, even if the person condemned has no assets with which to satisfy his or her civil liability, the Rome Statute foresees (art. 75.2) that the reparations can still be made "through" a **Trust Fund** funded by the States. This Trust Fund operates in such a way that the ICC only needs to find somebody guilty of one of the crimes established by its Statute in order to set in motion an elaborated machinery that will try to repair all kind of damages, individual or communitarian, physical or psychological, caused by the crimes (art. 97 of the Rules of Procedure and Evidence of the ICC). However, the most interesting part of the 7 August decision is the set of principles elaborated by the ICC in order to "calculate", design and distribute the reparations. It is worth noting that these principles are only valid for the Lubanga case, as the Rome Statute foresees that in every case the ICC will establish the principles needed to establish the reparations. Even if this almost one hundred pages decision sets out those principles, **it does not quantify the reparations** or even determine their exact nature, leaving that for the Trust Fund, which will have great discretion for this task, being only monitored by a Chamber of the ICC. One interesting feature of these principles is that they do not limit the reparations to victims present at the trial but to any person, community or entity that is found to have suffered from the crimes adjudicated. Therefore, the principles choose to make the victims a "class", as in the **US class action system**. Another interesting feature is that the ICC Lubanga principles state that victims may obtain reparations also under other mechanisms, according to national or international law. Another one of the principles will sound familiar to civil and common lawyers because it says that Restitution should, as far as possible, restore the victim to his or her circumstances before the crime was committed. This is certainly a landmark decision because it opens the way to non punitive redress for the victims of egregious international crimes.