Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-01/06**
Date: **18 April 2012**

TRIAL CHAMBER I

Before: **Judge Adrian Fulford, Presiding Judge**
Judge Elizabeth Odio Benito
Judge René Blattmann

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Document

Observations on the sentence and reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 , a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09 and a/1622/10

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. INTRODUCTION

1. In its 14 March 2012 order,[1] the Chamber invited the legal representatives to file submissions on the procedure to be followed for determining the sentence and the principles to be applied with regard to reparations, as well as the procedure to be followed in this regard.

2. Following that order, the legal representatives also received the hitherto *ex parte* reports filed by the Registry[2] and the Trust Fund for Victims,[3] in addition to other reports filed by the Registry on 28[4] and 29 March 2012.[5] These reports are a seminal contribution to the discussion on reparations. The very short time between their disclosure and the time limit for filing submissions prevent the legal representatives from analysing them exhaustively and in depth and certainly from addressing all the issues raised therein.

3. Accordingly, the legal representatives have given priority to the consultation of their clients on the issues raised by the Chamber.

II. DETERMINING THE SENTENCE

4. Pursuant to rule 145(1)(c), in determining the sentence the Chamber gives consideration, *inter alia*, to the extent of the damage caused to the victims and their families. Rule 145(2)(a)(ii) provides that the convicted person's efforts to compensate the victims may constitute mitigating circumstances which the Court may take into account.

5. It is therefore indispensable for the legal representatives of the victims to make submissions both on the harm caused to thousands of children deprived of their liberty, family life, education, schooling and prospects, their physical and/or mental integrity, or even their lives, and on Mr Lubanga's efforts or absence thereof to compensate these victims.

6. "Efforts to compensate the victims" may also be taken to include the convicted person's attitude to his past behaviour, in this case the recruitment of children under the age of 15 years into the UPC, but also in relation to the pressure that third parties might bring to bear on victims who cooperated with the Court and/or participated in the proceedings.

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[1] ICC-01/04-01/06-2844.
[2] ICC-01/04-01/06-2806.
[3] ICC-01/04-01/06-2803-Red (hereinafter "Registry report").
[4] ICC-01/04-01/06-2847.
[5] ICC-01/04-01/06-2855.

7. It is self-evident that if the convicted person were to apologise to the victims, this might also constitute a circumstance that the Chamber could take into account in determining the sentence.

8. The legal representatives therefore request to be afforded the opportunity to make oral and written submissions in the event of a sentencing hearing.

9. Moreover, they take the view that it is in the interests of justice to hold such a hearing.

III. PRINCIPLES TO BE APPLIED IN DETERMINING REPARATIONS

10. The legal representatives were able to meet with twelve of their clients who had been associated with the UPC-FPLC and two whose children were enlisted into this militia, and requested them to respond to a questionnaire based on the 14 March order.

11. The legal representatives will attempt to set out herein the views and concerns of these victims as conveyed through the answers received.

12. On some points, these views and concerns are widely divergent. This may be partly because these victims do not form a group and are acting individually. On other points, however, their views and concerns clearly converge.

13. The legal representatives are aware that the positions taken may be influenced by the composition of the group answering the questions (for example, several boys – who form the majority of the group – consider that the girls have already received assistance through various programmes, whereas the girls tend to highlight that they not only suffered more than the boys, but even today still suffer more acutely from the effects of their time in the militia).

14. In any event, the responses of these participating victims to the questions asked and the proposals advanced by the Registry and the Trust Fund for Victims are clearly material to the issue of reparations in that they were expressed by victims who have been following the proceedings closely for several years and have had time to consider the issues.

i) Should reparations be individual or collective?

15. Unsurprisingly, twelve of the fourteen interviewees consider that individual financial compensation, even though limited, would be useful to them or even necessary. Nonetheless, two former child soldiers stated clearly that this form of reparation would be useless to them.

16. At first glance, it is difficult to award collective reparations to child soldiers because they do not form a collective. Those child soldiers participating in the current proceedings are often in conflict with their own communities (the Hema ethnic group in Ituri). Whilst from an objective standpoint, this community did suffer from the enlistment of its youth in the militia and the use of its children in hostilities, it also accepted this behaviour for the most part and supported the leaders who engaged in it. Many even collaborated. An award for reparations to the Hema community as a whole would therefore not be reasonable and might be perceived as unjust by other communities.

17. Conversely, some initiatives which may be considered collective are likely to benefit the social group of former child soldiers as a whole without being perceived as unjust or encouraging the enlistment of children in future conflicts, in particular initiatives that could encourage the reintegration of former child soldiers into society.

18. The majority of former child soldiers in group V01 (9 of 12) thus support the idea of an outreach campaign in the community to combat the unsavoury reputation of former child soldiers (bad, violent or delinquent boys, "sullied" girls) and to encourage respect for and solidarity with these victims. This view is shared by the two parents who were consulted.

19. The creation of a memorial to the children who died in combat and to denounce the horror of recruitment of children was also well received by the victims (10 of 14).

20. The twelve former child soldiers (now aged between 18 and 23 years) who were interviewed generally consider their career prospects to be jeopardised and many would be happy to benefit from measures enabling them to undertake an income-generating activity.

21. Nine of them thus stated that the possibility of microcredit would be of (great) use to them (for example to purchase a motorcycle taxi or farmland). Eight would be happy to learn a trade if they could receive vocational training or a scholarship. The possibility of being recruited by a business established to

provide employment for former child soldiers is also considered (very) useful by eight people.

22. A significant number (7 of 12) of these young people consider that the after-effects of the trauma they suffered during the war makes it useful or even necessary for them to receive medical and/or psychological care organised by the Court or the Trust Fund for Victims.

23. It is worth noting that some of the victims said that the "status" of a victim of war (evidenced by a card or attestation), to which certain benefits would be attached (such as access to free or subsidised medical care, or indeed greater ease in negotiating police roadblocks) would be of use to them. Nonetheless, others find that on the contrary, it would be a very bad idea which would further stigmatise them and even arouse hostility.

ii) Who should receive reparations? How should the damage be calculated? What criteria should be used to award reparations?

Beneficiaries

24. Some participating victims consider that those who took the risk to participate in the proceedings should in some manner take precedence, but all of them consider it normal that other young people who were enlisted as child soldiers should still be able to apply for reparations for a period to be determined by the Court.

25. In general (13 of 14), they however consider that an application must be submitted and general information on this option, provided by radio, for example, should be sufficient and the Court need not take other initiatives to search actively for potential beneficiaries, for example in cooperation with bodies which organised demobilisation.

26. A significant minority (4 of 14) see no difficulty with other victims of the UPC (especially those who were attacked by child soldiers) also receiving reparations. Nonetheless, the overriding fear is that the means available would be spread too thinly.

Damages

27. The victims are aware that comprehensive reparation for the harm they suffered is not possible. They acknowledge that the harm should be determined efficiently, be tailored to the number of victims and proportionate to the available funds. None of the victims requested that the harm suffered by each individual be determined on the basis of a precise assessment as is the norm in civil cases (with medical experts determining, as required, the exact degree of inability to work, disability or aesthetic harm, calculation of the financial impact of the loss of one year of schooling, loss of career prospects, etc.) A relatively significant number of victims (4 of 14) do not even see any impediment to each victim being treated in the same way, either with regard to a lump-sum financial compensation or other forms of reparation.

Criteria to be used

28. Only a few victims suggested that the sums earmarked for reparations should simply be shared amongst the victims who have submitted applications for reparations. A majority of the victims however consider that the Chamber might determine categories of victims to take precedence or receive more reparations than others. Four of the interviewees spontaneously stated that reparations should be awarded primarily to individuals who have not yet received assistance from public programmes or NGOs active in this area and six interviewees suggested categories listed by order of importance.

29. The following criteria were considered to be most relevant (diminishing order of importance):
    - Girls infected with HIV or who had a child as a result of rape
    - Victims who are currently living in highly precarious circumstance or are highly vulnerable
    - Girls who were victims of sexual abuse or slavery
    - Victims with physical or psychological trauma
    - Forcibly enlisted children
    - Parents of deceased children

ii) Is it possible or proper to make an order for reparations against the convicted person?

30. The second Registry report notes that Mr Thomas Lubanga appears currently to be insolvent and any reparations must be awarded through the Trust Fund for Victims. The Registry therefore proposes that the Chamber distinguish between the "portion of reparations supported by the convicted person" and the "complement" to be borne by the Trust Fund for Victims.[6]

31. The convicted person should only be ordered to make non financially-significant reparations (?) or reparations limited to the available assets.[7] The convicted person would not be concerned by the "complement" to be provided by the Trust Fund for Victims absent a recovery mechanism.[8]

32. The Registry goes as far as to suggest that a fresh discussion on the "portion […] to be supported by the convicted person" could take place at a later date if his financial circumstances were to improve. The legal representatives do not share this interpretation of the legal instruments.

33. The obligation to remedy the harm caused by a crime is primarily incumbent upon the person found guilty.

34. That person's insolvency does not invalidate this principle, nor does the *de facto* provision of reparations by a third party (a trust fund or insurance), at least initially. For the victims, making an award for reparations against the guilty party could be psychologically important and would itself constitute recognition of the harm caused.

35. Even in prison, a convicted person may generate income (prison work, rental income, royalties) of which at least part should be given over to reparations. After serving his or her sentence, the perpetrator of the crimes must remain bound to devote (at least part of) his or her income and/or assets to reparations for victims, either directly or indirectly, by repaying (the part of) the reparations advanced by the Trust Fund for Victims or by any other body.

36. It would be unrealistic and antithetical to the principle of legal certainty to predicate the future intervention of the convicted person on his future solvency and a fresh procedure to be initiated by the Trust Fund for Victims.

[6] Registry report, ICC-01/04-01/06-2806, p. 92, para. 201(viii).
[7] Registry report, *ibidem*.
[8] Registry report, p. 75, para. 157. *Ibidem*.

37. The principle that reparations are to be borne by the guilty party is also endorsed by article 75 of the Statute. If applicable, these reparations shall be paid *through* the Trust Fund for Victims. The term "through" is not insignificant. Whilst the Statute does not expressly provide for "recovery action" by the Trust Fund against the convicted person, rule 147 does not preclude the Chamber from ordering the forfeiture of assets which are as yet unseized or unidentified at the time of judgment, or even the future income of the guilty party.

38. The Chamber may therefore order Mr Lubanga's assets and income to be given over to reparation for the crimes of which he has been found guilty in an amount it will determine, independently of the actual availability of such assets and income. The States Parties will be bound to implement such order in accordance with article 109 and rule 217. Regulation 31 of the Regulations of the Trust Fund for Victims in fact provides that "[t]he Trust Fund shall take receipt of all money and other property collected through fines or forfeiture that is transferred, by order of the Court, to the Trust Fund". Under such an order, all funds belonging to the convicted person which are made available to the Court may therefore be transferred to the Trust Fund.

39. The possibility of the Trust Fund for Victims acting against the guilty person necessarily derives from the payment of reparations "*through*" the Trust Fund. Rule 98(3) in fact expressly sets out the concept of "an award for reparations against a convicted person […] made through the Trust Fund". If the debt of the guilty person is paid through the Trust Fund, this implies that the Trust Fund is acting for this person as the person's intermediary. It follows that the Trust Fund may act against the debtor to recover any advances disbursed. This is in fact the difference between reparations ordered by the Court and other assistance that the Trust Fund for Victims may provide to the victims.

iv) Would it be appropriate for the compensation paid as reparation to be paid through the Trust Fund for Victims?

40. Contrary to the position taken in the first report of the Trust Fund for Victims,[9] the application of article 75(2) is not restricted to situations where the convicted person's assets are forfeited or immediately available. If the drafters of the Statute had wished to place such a restriction, they would have made this clear.

41. Similarly, no provision in the Rules of Procedure and Evidence supports such an interpretation. On the contrary, rule 98(5), which deals with awards for

[9]ICC-01/04-01/06-2803-Red, 23 March 2012, p. 54, para. 145.

reparations made against the convicted person through the Trust Fund for Victims, expressly states: "[o]ther resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79". The Trust Fund for Victims may therefore advance the reparations ordered by the Court, also using resources other than sums generated by fines and forfeitures.

42. Article 75 does not state that in the event of reparations through the Trust Fund for Victims, the Trust Fund must necessarily pay the full amount of the reparation. Accordingly, nothing prevents the Chamber from awarding a lump sum for the harm against the guilty party whilst also determining the amount of this sum to be advanced by the Trust Fund for Victims.

43. The legal representatives respectfully suggest that the Chamber order the Trust Fund for Victims to advance (in part) the reparations awarded against the guilty party and thus pay the reparations through the Trust Fund.

44. In the event that the Trust Fund intervenes, it would be logical for all the reparations to be processed through it, especially as all the beneficiaries and the exact harm suffered by each victim are not yet known. The Trust Fund will therefore receive the assets and/or income of the guilty party as the States Parties provide them to the Court.

45. Moreover, the report states that the Trust Fund for Victims had in September 2011 received at least €1 000 000 in donations expressly intended for reparations awarded in the two cases then pending in the situation in the Democratic Republic of the Congo.[10] These funds (which may have since increased) can therefore be used for reparations through the Trust Fund according to the donors' wishes.

IV THE PROCEDURE

46. It certainly appears necessary to hold a hearing specifically on reparations in the instant case to allow the Court to rule for the first time on the principles governing reparations.

47. The legal representatives take the view that the assessment of the harm suffered by the victims may rely on a report by the Registry, prepared if appropriate with the assistance of one or more experts appointed by the Chamber. Oversight may de delegated to one of the judges of the Chamber.

[10]ICC-01/04-01/06-2803-Red, 23 March 2012, p. 49, para. 129.

48. In any event, the views of the legal representatives will have to be sought in all future discussions on reparations, and especially on any reports to be filed by the Registry, the Trust Fund for Victims or experts.

49. The Defence and the Office of the Prosecutor should also be allowed to present their views, both on the scope of the harm caused by the recruitment of child soldiers by the UPC and the most appropriate means of making reparation for this harm. The Trust Fund for Victims and the Registry, for their part, should be allowed to make submissions on the estimated cost of such reparation and on the portion which may be advanced by the Trust Fund for Victims.

50. Once the Chamber has determined the extent of the harm, the resources to allocate to reparations and the estimated cost of this operation, neither the Defence nor the Prosecutor will be further concerned by the implementation of the reparations programme. However, the legal representatives of the victims could still usefully assist or represent their clients during reparation operations organised by the Trust Fund for Victims.

FOR THESE REASONS

MAY IT PLEASE THE CHAMBER

To note these submissions.

For Victims a/0001/06, a/0003/06, a/0007/06 a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, and a/1622/10.

The legal representatives of the V01 group of victims,

[signed]
Luc Walleyn

[signed]
Franck Mulenda

Brussels and Kinshasa, 18 April 2012.