

**Twelfth session**

The Hague, 20-28 November 2013

Report of the Court on the criteria for the determination of disposable means relating to reparations**I. Introduction**

1. In 2012, in its resolution ICC-ASP/11/Res.7 on victims and reparations, the Assembly of States Parties (“Assembly”) “[r]ecall[ed] that the declaration of indigence of the accused for the purpose of legal aid bears no relevance to the ability of the convicted person to provide reparations,¹ which is a matter for judicial decision in each particular case, and further request[ed] the Court to review this matter and to report to the Assembly at its twelfth session”.²

2. This topic has subsequently been discussed in The Hague Working Group of the Bureau of the Assembly during the facilitation on reparations, victims and affected communities and the Trust Fund including intermediaries, chaired by Ambassadors Mohamed Karim Ben Becher (Tunisia) and Eduardo Pizarro Leongómez (Colombia). As part of the facilitation, the Court made a presentation in the Hague Working Group on the matter and submitted an Informal Court Paper on the Criteria for the Determination of Indigence relating to Reparations.³

3. The Court submits this report to the Assembly to elucidate the legal issues regarding the determination of disposable means of a convict for the purposes of reparations.⁴

4. Although the Rome Statute foresees the provision of legal assistance without payment by a person who does not have sufficient means⁵, it is important to note that “indigence” as such is not mentioned in the Rome Statute, nor as part of the criteria for the payment of reparations under article 75 of the Rome Statute. While criteria have been established by the Registry for determining whether a suspect, accused or a victim is eligible for legal aid pursuant to rules 21 and 90 of the Rules of Procedure and Evidence (“Rules”)⁶, there are no criteria to establish the convict’s disposable means from the point of view of reparations. The only case as yet before the Court dealing with the determination of disposable means in the context of reparations is the *Lubanga* case, in which the Chamber noted that Mr. Lubanga had “been declared indigent” during first instance proceedings and further found that “no assets or property have been identified that can be used for the purposes of reparations”.⁷

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Tenth session, New York, 12-21 December 2011* (ICC-ASP/10/20), vol. I, part III, ICC-ASP/10/Res.3, para.3.

² *Official Records ... Eleventh session ... 2012* (ICC-ASP/11/20), vol. I, part III, ICC-ASP/11/Res.7, para. 12.

³ The paper is dated 15 May 2013 and was subsequently disseminated amongst members of The Hague Working Group.

⁴ It is considered that the use of the term “indigence” may be misleading in the context of reparations as the term is strictly connected with the determination of entitlement to funds for legal representation during judicial proceedings provided for by the Court in its legal aid scheme pursuant to article 67(1)(d) of the Rome Statute.

⁵ See articles 55(2)(c) and 67(1) of the Rome Statute.

⁶ Articles 55(2)(c) and 67(1) set out the legal basis in the Rome Statute for the provision of legal aid to those who do not have sufficient means to pay. See also regulations 83 – 85 of the Regulations of the Court.

⁷ Trial Chamber I, *Decision establishing the principles and procedures to be applied to reparations*, ICC-01/04-01/06 2904, 7 August 2012, para. 269.

II. Determination of indigence for the purpose of legal aid

5. The Court's publicly funded legal aid system covers the costs of legal representation of indigent persons – those who lack sufficient means, in part or in whole, to assume such costs – and ensures that indigent beneficiaries receive resources to cover all the costs reasonably necessary for an effective and efficient legal representation as stipulated in regulation 83 of the Regulations of the Court (“Regulations”) and as determined by the Registrar.

6. To be eligible for legal aid, the applicant must be found by the Registrar to be (fully or partially) indigent pursuant to his or her declaration of assets and further investigations by the Court into his or her assets, if necessary. The Registry has established parameters that classify at what point an applicant can be considered “indigent” as well as the relevant principles that apply. The principles reinforce the idea that the system should be based on objective criteria, should allow the applicants to meet their obligations to dependants and should be flexible and simple.⁸ The criteria are based on an assessment of the cost of the proceedings during the different stages and the monthly disposable means of the applicant. These criteria have been reviewed on several occasions by the Court, the Committee on Budget and Finance and the States Parties.⁹

7. To determine an applicant's indigence for legal aid, the Registry calculates their monthly disposable means (“MDM”) in accordance with regulation 84 of the Regulations. To calculate the MDM, the applicant's residence, furnishings and up to two motor vehicles are excluded, except for luxury items of extraordinary value. All other assets, including additional real estate, stocks, bonds, or bank accounts as well as assets transferred to another person for the purpose of concealment, will be included among the applicant's disposable means.¹⁰ The MDM is calculated by subtracting the applicant's obligations from his/her assets. Where the MDM is higher than the monthly cost of legal representation for the most onerous phase of proceedings (i.e. trial), the applicant will be deemed not indigent. Where the MDM is less than or equal to zero, indigence will be recognised.¹¹ Partial indigence is also recognised where the MDM partially covers the cost of representation and the Court contributes the difference.

8. On the basis of this information, the Registrar makes an assessment on the application for legal aid and issues a decision as to the person's indigence. Decisions on the scope of legal aid (i.e. the extent of resources) are appealable before the relevant Chamber, which is the ultimate arbiter of the scope of legal aid assessed by the Registry.¹² Further, the Registrar's decision on payment of legal assistance to an applicant is subject to review by the Presidency pursuant to regulation 85(3) of the Regulations.

III. Determination of the convict's ability to provide reparations

9. Article 75(2) of the Rome Statute stipulates that “[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.” Further, rule 98(1) of the Rules stipulates that “[i]ndividual awards for reparations shall be made directly against a convicted person.”¹³ The above provisions illustrate the importance of determining whether and to what extent a convicted person is able to render reparations to victims.

⁸ Report on the operation of the Court's legal aid system and proposals for its amendments”, (ICC-ASP/6/4), 31 May 2007.

⁹ See for example Interim report of the Court on legal aid: Alternative models for assessment of indigence, (ICC-ASP/8/4), 6 May 2009; the Report on the principles and criteria for the determination of indigence for the purposes of legal aid, (ICC-ASP/6/INF.1), 31 May 2007; and the Registry's Single Policy Document on the Court's Legal Aid System, CBF/20/5/Rev.1, 11 March 2013.

¹⁰ See regulation 84(2) of the Regulations.

¹¹ Report on the principles and criteria for the determination of indigence for the purposes of legal aid, (ICC-ASP/6/INF.1), 31 May 2007, page 5.

¹² See Regulation 83(4) of the Regulations.

¹³ Also paragraphs (2) and (3) of rule 98 of the Rules make it explicit that “the award for reparations is directed against a convicted person”.

10. The assessment of a convicted person's ability to provide or to contribute to Court-ordered reparations, as well as the standards that apply have not been subject to a formal regulatory process to date. In the *Lubanga* case, the Trial Chamber carried out its assessment in a two-tiered approach: first, it considered that Mr Lubanga had been declared indigent for the purpose of legal aid during the judicial proceedings against him; and second, it noted that "no assets or property have been identified that can be used for the purposes of reparations".¹⁴ It concluded that Mr Lubanga's ability to provide reparations was limited to non-monetary reparations.¹⁵

11. There are noteworthy distinctions between a determination of disposable means for the purpose of a reparations order and that of indigence for receipt of legal aid. Importantly, suspects or accused who receive legal aid up until a judgment pursuant to article 74 of the Rome Statute is rendered do so with the presumption of innocence. In contrast, reparations can only be ordered following a conviction (pursuant to article 75 of the Statute). The finding of guilt is therefore an important element by which the determination of disposable means may be distinguished. Furthermore, the Registry's calculation when establishing whether a legal aid claimant is indigent is based on, *inter alia*, the actual cost of legal representation in proceedings - a component which is wholly absent when determining the convict's (lack of) means for the exclusive purposes of reparations.

12. While the contexts are different between determining indigence for the purposes of legal aid and the determination of disposable means for a reparations order, some of the same principles may be relevant, such as the factors being considered when assessing the living expenses/needs of those dependent on the convicted person.¹⁶

13. With regard to the *Lubanga* case, it bears noting that the legal representatives of Victim Group V01 have submitted on appeal that Trial Chamber I committed an error of law in exempting Mr Lubanga from any material obligation regarding reparations, and basing this finding on the previous determination of his indigence for the purpose of judicial proceedings before the Court.¹⁷ The matter is, therefore, from a certain angle *sub iudice*.¹⁸

14. Future Trial Chambers will have to assess the specific facts of the case concerned when deciding which standards to apply for the determination of assets of a convicted person for the purpose of reparations as well as whether and how to issue reparation orders if indigence is at issue. The eventual judgment of the Appeals Chamber, if any,¹⁹ on the matter under consideration in the *Lubanga* proceedings is likely to provide some general guidance.

15. Further, once a full judicial cycle has been finalised, including the conclusion of the currently pending appeals proceedings, the Court anticipates taking stock of this and other procedural issues. In particular, it may consider the matter of establishing general criteria for the determination of disposable means for reparations orders, as well as other matters relevant to indigence.²⁰ This could assist future Trial Chambers in making their relevant findings.

¹⁴ Trial Chamber I, *Decision establishing the principles and procedures to be applied to reparations*, ICC-01/04-01/06 2904, 7 August 2012, para. 269.

¹⁵ *Ibid.*

¹⁶ See annex I ICC-ASP/6/4, page 13.

¹⁷ *Document à l'appui de l'appel contre la "Decision establishing the principles and procedures to be applied to reparations" du 7 août 2012*, ICC-01/04-01/06, 5 February 2013, paras. 27 f., and paras. 33, 35 in particular.

¹⁸ The appeal appears not to aim at the *criteria* used by Trial Chamber I in determining Mr Lubanga's lack of means for the purpose of affording reparations to victims of crimes subject to his conviction, *ibid.*

¹⁹ As the *Lubanga* case is still under appeal on the merits it cannot be anticipated whether or not the Appeals Chamber confirms Mr Lubanga's conviction; however, only in case Mr Lubanga's conviction is confirmed will there be a need for the Appeals Chamber to rule on the appeals submissions regarding the Trial Chamber's *Decision establishing the principles and procedures to be applied to reparations* of 7 August 2012 (ICC-01/04-01/06 2904).

²⁰ Such criteria could be issued in a form similar to the criteria for the determination of indigence for the purposes of legal aid, see *supra* footnotes 7 and 9.