

**Twelfth session**

The Hague, 20-28 November 2013

**Report of the Court on principles relating to
victims' reparations****I. Introduction**

1. The Court submits this report on principles relating to victims' reparations to the Assembly of States Parties ("Assembly") at its twelfth session, pursuant to the resolution on victims and reparations of 21 November 2012.¹ Under the resolution, the Assembly recalled "the need for the Court to ensure that coherent principles relating to reparations continue to be established in accordance with article 75, paragraph 1, of the Rome Statute and further request[ed] the Court to report back to the Assembly at its twelfth session".²

2. Article 75(1) of the Rome Statute stipulates that:

[t]he Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.³

II. Background

3. In 2011, during the facilitation of its Cluster III ("Increasing the Efficiency of the Criminal Process"; focal point: Mr. Yoshiki Ogawa (Japan)), the Assembly of States Parties' Study Group on Governance ("Study Group")⁴ discussed the issue of victims' reparations as one of its two sub-items.⁵ As part of detailed and comprehensive discussions between States Parties and the Court in the Study Group, the Presidency explained that the issue of development of principles relating to reparations prior to any reparations proceedings before Chambers had been discussed by the plenary of Judges on two occasions in 2006 and 2008.⁶ The Presidency noted that, as a result of those discussions, it was left to the competent Chambers to establish principles relating to reparations within the context of specific cases, where the question would

¹ Resolution ICC-ASP/11/Res.7 on victims and reparations, ICC-ASP/11/20, 21 November 2012.

² *Id.*, para. 7.

³ Rome Statute, article 75(1).

⁴ The Study Group was established via resolution of the Assembly of States Parties on 10 December 2010 "to conduct a structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court while fully preserving its judicial independence [...]"; and "to facilitate the dialogue referred to in paragraph 1 with a view to identifying issues where further action is required, in consultation with the Court, and formulating recommendations to the Assembly through the Bureau". Resolution ICC-ASP/9/Res.2 on Establishment of a Study Group on Governance, 10 December 2010, paras. 1-2.

⁵ Report of the Bureau on the Study Group on Governance, ICC-ASP/10/30, 22 November 2011, para. 23.

⁶ *Id.*, para. 27.

naturally arise subsequent to a conviction of an accused by the Court.⁷ The Presidency also issued an informal information note on article 75(1) of the Rome Statute to the Study Group to clarify its oral explanations during this facilitation of Cluster III.⁸

4. Following discussions on this topic in the Study Group, the Bureau of the Assembly issued its Report of the Bureau on the Study Group on Governance on 22 November 2011 and noted, in relevant part:

“From the outset of the discussion, the Study Group expressed concern that the legal framework and principles for reparations (article 75, paragraph 1, of the Rome Statute) were missing while the potential reparations phase was approaching. Initial discussions focused on the composition of the judiciary in reparations proceedings, as well as the timing and modalities of the establishment of the principles. The Presidency explained orally that it was currently anticipated that the three trial judges in each case would continue to hear reparations and that the judges had decided in plenary that principles would be developed through the jurisprudence of the Court and finally unified by the Appeals Chamber. [...] [I]n relation to reparations principles, some States Parties remained concerned about the lack of the principles and requested that a dialogue with the Court should be continued with a view to clarifying the legal framework and principles before a specific reparations order would be made. States Parties also noted that in establishing any principles on reparations, the Court will also take into account any relevant jurisprudence of its Chambers that may be available by the eleventh session of the Assembly of States Parties.”⁹

5. Importantly, the Report acknowledged that an enhanced dialogue between Judges of the Court and States Parties with regard to principles relating to reparations was difficult “as it would be highly problematic for judges in a non-judicial context to express their views before they would decide on reparations in a judicial context.”¹⁰ On the other hand, the Court expressed its readiness to continue the dialogue with States Parties.¹¹

6. Subsequently, at its tenth session, the Assembly requested the Court via its resolution on reparations of 20 December 2011, “to ensure that Court-wide coherent principles relating to reparations shall be established in accordance with article 75, paragraph 1, based on which the Court may issue individual orders for reparations [...]”.¹²

7. Discussions in the Court on the issue of principles regarding victims’ reparations continued in 2012 within The Hague Working Group on Victims and Affected Communities and Trust Fund for Victims and Reparations, co-facilitated by Ambassador Karim Ben Becher (Tunisia) and Ambassador Eduardo Pizarro Leongómez (Colombia).¹³

8. Simultaneously, on 7 August 2012, Trial Chamber I issued its landmark “Decision Establishing the Principles and Procedures to be Applied to Reparations” in the *Lubanga* case (“*Lubanga* decision on Reparations”).¹⁴ The decision comprehensively defined, for the first time, a number of principles regarding reparations¹⁵ as well as relevant substantive and procedural issues.¹⁶

⁷ *Ibid.*

⁸ Report of the Bureau on the Study Group on Governance, ICC-ASP/10/30, 22 November 2011, para. 28.

⁹ *Id.*, para. 26.

¹⁰ *Id.*, para. 27.

¹¹ *Ibid.*

¹² Resolution ICC-ASP/10/Res.3 on reparations, ICC-ASP/10/20, 20 December 2011, para. 1.

¹³ Report of the Bureau on victims and affected communities and the Trust Fund for Victims and reparations, ICC-ASP/11/32, 23 October 2012, paras. 11-13.

¹⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, “Decision Establishing the Principles and Procedures to be Applied to Reparations”, 7 August 2012 (“*Lubanga* decision on Reparations”).

¹⁵ *Id.*, paras. 182-259. The Chamber underlined that the principles are “limited to the circumstances of the present case”, *Lubanga* decision on reparations, para. 181.

¹⁶ *Id.*, paras. 260-288.

III. Principles established in the *Lubanga* decision on reparations

9. In the *Lubanga* decision on reparations, Trial Chamber I established principles relating to reparations for victims in the *Lubanga* proceedings¹⁷ and determined the approach to be taken for their implementation.

10. When establishing the principles, the Chamber first noted the applicable law for doing so, as outlined under article 21 of the Rome Statute.¹⁸ Not only did the Chamber apply the Statute, Rules and Regulations of the Court,¹⁹ but it also recalled universal and regional human rights treaties,²⁰ which enshrine “the right to reparations [as] a well-established and basic human right”.²¹ In addition, the Chamber sought guidance from other international instruments²² tailored to the question of victims’ reparations including:

- (a) The UN Basic Principles;²³
- (b) The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;²⁴
- (c) The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime;²⁵
- (d) The Nairobi Declaration;²⁶
- (e) The Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa;²⁷ and
- (f) The Paris Principles.²⁸

¹⁷ See footnote 15.

¹⁸ *Id.*, para. 182. Article 21 of the Rome Statute provides that:

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

¹⁹ *Lubanga* decision on reparations, para. 182.

²⁰ *Id.*, para. 185, citing to: Article 8 of the Universal Declaration of Human Rights which contains provisions relating to the right of every individual to an “effective remedy” for acts violating fundamental rights; Article 9(5) of the International Covenant on Civil and Political Rights which refers to an “enforceable right to compensation”; Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination which provides for a right to “seek [. . .] just and adequate reparations or satisfaction for any damages suffered[. . .]”; Article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which provides for “an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible”; Article 21(2) of the African Charter on Human and Peoples’ Rights which refers to a right to recovery of property and adequate compensation, and Article 63(1) of the American Convention on Human Rights which calls for the situation giving rise to the breach of a right or freedom “be remedied” and that “fair compensation be paid to the injured party.

²¹ *Lubanga* decision on reparations, para. 185.

²² *Ibid.*

²³ United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, United Nations General Assembly, resolution A/RES/60/147, 21 March 2006.

²⁴ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations General Assembly, resolution A/RES/40/34, 29 November 1985.

²⁵ Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, United Nations Economic and Social Council, resolution 2005/20, 22 July 2005.

²⁶ Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation, adopted at the International Meeting on Women’s and Girls’ Right to a Remedy and Reparation, held in Nairobi from 19 to 21 March 2007.

²⁷ Cape Town Principles and Best Practices, Adopted at the Symposium on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa, Cape Town, UNICEF, 27-30 April 1997.

²⁸ Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, UNICEF, February 2007.

11. Finally, the Chamber took into account the jurisprudence of regional human rights courts, national and international mechanisms and practices, and significant human rights reports²⁹ specifically addressing the issue.³⁰

12. On the basis of the foregoing, the Chamber outlined the following principles:

(a) *Dignity, non-discrimination and non-stigmatisation*: all victims are to be treated fairly and equally irrespective of whether they participated in the trial proceedings; particular attention and priority must be paid to the needs of victims in a particularly vulnerable situation such as children or victims of sexual or gender-based violence; victims shall be treated with respect for dignity and human rights, including rights to safety and privacy; reparations should be granted avoiding further stigmatisation of the victims and discrimination by their families and communities; and reparations will not be affected by awards or benefits received by victims from other bodies although they will be considered so that reparations are not applied unfairly or in a discriminatory manner.³¹

(b) *Beneficiaries of reparations*: reparations may be granted to direct and indirect victims, including the family members of direct victims; anyone who attempted to prevent the commission of one or more of the crimes under consideration; those who suffered personal harm as a result of offences, regardless of whether they participated in the trial proceedings; and legal entities.³²

(c) *Accessibility and consultation with victims*: reparations principles and procedures should have a gender-inclusive approach; victims of crimes, together with families and communities should be able to participate throughout the reparations process with adequate support; recipients of reparations shall provide informed consent prior to any participation in reparations proceedings or award of reparations; outreach activities to affected individuals and their communities are an essential feature to render reparations significant; and the Court should consult with victims on reparations issues such as the identity of beneficiaries, priorities and obstacles to securing reparations.³³

(d) *Victims of sexual violence*: appropriate reparations awards should be provided to victims of sexual and gender-based violence; gender-sensitive measures shall be implemented to ensure that women and girls are enabled to participate in a significant and equal way in the design and implementation of reparations orders.³⁴

(e) *Child victims*: the age-related harm of victims as well as any differential impact of crimes on boys and girls shall be taken into account; all reparations decisions concerning children should be guided by the Convention on the Rights of the Child³⁵ and should reflect a gender-inclusive perspective; special measures should be taken for the development, rehabilitation and reintegration of child soldiers in reparations proceedings; comprehensible information about reparations proceedings shall be provided to child victims and those acting on their behalf; and child victims shall be consulted regarding reparations decisions.³⁶

(f) *Scope of reparations*: reparations may be awarded to individuals or groups; a collective approach should be utilized to ensure that reparations reach unidentified victims; individual and collective reparations may be awarded concurrently; individual reparations should avoid creating tensions within communities; collective reparations should address harm suffered by victims on an individual and collective basis; and the Court should

²⁹ *Lubanga* decision on reparations, para. 185, citing: Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr. Theo van Boven, Special Rapporteur to United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1993/8, 22 July 1993; The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report of the Special Rapporteur Mr. M. Cherif Bassiouni to the Commission on Human Rights, E/CN.4/2000/62, 18 January 2000; The rule of law and transitional justice in conflict and post-conflict societies, Report of the United Nations Secretary-General S/2004/616, 23 August 2004; The rule of law and transitional justice in conflict and post-conflict societies, Report of the UN Secretary General, S/2011/634, 12 October 2011.

³⁰ *Lubanga* decision on reparations, paras. 185-186.

³¹ *Id.*, paras. 187-193, 200-201.

³² *Id.*, paras. 194-199.

³³ *Id.*, paras. 202-206. It bears noting that this section is in part under appeal.

³⁴ *Id.*, paras. 207-209.

³⁵ UN General Assembly resolution 44/25 of 20 November 1989, entry into force on 2 September 1990.

³⁶ *Lubanga* decision on reparations, paras. 210-216.

consider providing medical services, general rehabilitation, housing, education and training.³⁷

(g) *Modalities of reparations*: the forms of reparations outlined in article 75 of the Statute, namely restitution, compensation, rehabilitation, do not represent an exclusive list. Other types of reparations may be appropriate, including those with symbolic, preventative or transformative value; restitution should, as far as possible, restore victims to their circumstances before the crimes were committed; compensation should be considered where economic harm is sufficiently quantifiable, it is appropriate and proportionate, and there are available funds; compensation shall be applied broadly to all types of harm such as physical, moral and non-material damage; rehabilitation shall include *inter alia* provision of medical services, psychological and social assistance, or appropriate reintegration measures for victims of child recruitment; other forms of reparation may include wide publication and outreach with respect to the Court's convictions and sentences, educational campaigns, or voluntary apologies by convicted persons to victims.³⁸

(h) *Proportional and adequate reparations*: victims should receive adequate, appropriate and prompt reparations; reparations awards should be proportionate to the harm, injury, loss and damage established by the Court in light of the particular context of a case and circumstances of the victims; reparations should aim at reconciling victims with their families and communities at large; reparations should reflect local cultural and customary practices without being discriminatory or unequal; and reparations should support programmes that are self-sustaining over an extended period of time.³⁹

(i) *Causation*: the causal link between the crime and relevant harm which forms the basis of a reparations claim shall not be limited to "direct" harm or "immediate effects"; rather, there should be a "but/for" relationship and the crime must be the "proximate cause" of the harm for which reparations are sought.⁴⁰

(j) *Standard and burden of proof*: the Trial Chamber determined that a standard of "a balance of probabilities" is sufficient and proportionate to establish the facts relevant for a reparations order.⁴¹ Further, in light of the difficulty victims may face in obtaining evidence to support their claims, the extensive and systematic nature of the crimes and numbers of victims involved, a wholly flexible approach to determining factual matters for reparations was considered appropriate.⁴²

(k) *Rights of the defence*: nothing in the above-listed principles will prejudice or be inconsistent with the rights of a convicted person to a fair and impartial trial.⁴³

(l) *States and other Stakeholders*: States Parties are obliged to cooperate fully and not prevent the enforcement or implementation of reparations orders and awards; and reparations under the Rome Statute do not interfere with States' responsibilities to award reparations to victims under other treaties or national law.⁴⁴

(m) *Publicity of the Principles*: the Registrar of the Court is responsible for taking all necessary measures to publicise reparations principles and proceedings; reparations proceedings shall be transparent; and measures should be adopted to ensure that all victims have detailed and timely notice of reparations proceedings and access to any awards.⁴⁵

³⁷ Id., paras. 217-221.

³⁸ Id., paras. 222-241.

³⁹ Id., paras. 242-246.

⁴⁰ Id., paras. 247-250. It bears noting that the Trial Chamber's finding in this respect is currently under appeal.

⁴¹ Id., para. 253; see also footnote 439.

⁴² In particular when reparations are awarded from the resources of the Trust Fund for Victims or from any source other than the convict's. Id., paras. 251-254. It bears noting that the Trial Chamber's findings in this respect are currently under appeal.

⁴³ *Lubanga* decision on reparations, para. 255.

⁴⁴ Id., paras. 256-257.

⁴⁵ Id., paras. 258-259.

IV. Developments subsequent to the *Lubanga* Decision on reparations

13. Following the *Lubanga* decision on reparations, victims participating in the proceedings, as well as Mr Lubanga, appealed the decision and filed their respective documents in support of the appeals in early 2013 following the Appeals Chamber's decision on the admissibility of the appeals, which was rendered in December 2012. Specific issues under appeal relating both to the principles as well as certain substantive and procedural issues established in the *Lubanga* decision on Reparations include *inter alia*:

- (a) The participation at the reparations stage of potential groups of victims not already authorised to participate at trial;
- (b) The dismissal of individual applications for reparations without examination of the merits;
- (c) The referral of reparations proceedings to a new trial chamber;
- (d) The delegation of powers to the Trust Fund for Victims;
- (e) The standard of proof to be applied, including the necessary link between the crimes subject to conviction and the victims' harm suffered;⁴⁶
- (f) The issue of collective reparations for harm suffered by the community;
- (g) The alleged lack of limitation of reparations to localities referred to in the trial judgment; and
- (h) The decision not to order Mr Lubanga to pay reparations.⁴⁷

14. Contemporaneously, discussions on the issue of principles regarding victims' reparations continued in the Court in 2013 within the Hague Working Group on Victims and Affected Communities and Trust Fund for Victims and Reparations, co-facilitated, as in 2012, by Ambassadors Ben Becher and Pizarro Leongómez. As a result, the Court provided its "Informal Court Paper on the Question of Principles Relating to Reparations" to The Hague Working Group.⁴⁸

V. Conclusion

15. The *Lubanga* decision on reparations was an important step towards the establishment by the Court of a comprehensive framework for principles relating to victims' reparations in accordance with article 75, paragraph 1, of the Rome Statute. As outlined in this report, the Chamber distilled a broad set of general principles on reparations from the most relevant authoritative international and regional instruments that can serve as a source of law for the findings of the Court.⁴⁹

16. Any such principles, regardless of how they are established, have to be subject to judicial revision and need to be measured against the rights of all parties to the proceedings. As outlined in this report, a number of predominantly procedural but also material issues are currently subject to appeal in the *Lubanga* case before the Court's Appeals Chamber. However, any Appeals Chamber determination on these appeals is likely to be contingent upon the outcome of Mr Lubanga's final appeal against the conviction decision. If the

⁴⁶ See already footnote 42.

⁴⁷ See *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, "Document déposé à l'appui de l'appel à l'encontre de la « Decision establishing the principles and procedures to be applied to reparations » délivrée par la Chambre de première instance I le 7 août 2012 », 5 February 2013, paras. 22-65 ; *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, "Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la « Decision establishing the principles and procedures to be applied to reparations », rendue par la Chambre de première instance le 7 août 2012," 5 February 2013, paras. 5-188; *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, Document à l'appui de l'appel contre la « Decision establishing the principles and procedures to be applied to reparations » du 7 août 2012, 5 February 2013, paras. 10-59.

⁴⁸ Dated 15 May 2013. The report was presented orally to The Hague Working Group on 28 May 2013 by a representative of the Presidency and was followed by a question-and-answer session.

⁴⁹ See article 21 of the Statute.

conviction decision is overturned, the reparation appeals may be considered moot, given that “an order for reparations depends upon there having been a conviction”.⁵⁰ If these matters are ultimately addressed, some of the principles subject to the current appeals can be expected to be clarified further as a result of the Appeals Chamber’s consideration and findings.

17. In conclusion, it can be noted that in establishing a comprehensive set of general principles applicable in the *Lubanga* proceedings,⁵¹ the *Lubanga* decision on Reparations has created a legal precedent which represents the necessary first step towards a comprehensive set of principles on reparations validated as necessary by the Appeals Chamber in order to create appropriate legal certainty for those most affected – victims of the crimes under the Statute.

18. In addition, as the Court noted in its “First Report to the Assembly of States Parties” of 23 October 2012 on the item of lessons learned (“*Lessons Learned* Report”), at the conclusion of other cases currently pending, the matter may⁵² be elucidated even further.⁵³ The Court intends, at that point, to take stock, in coordination with the Assembly through its Hague Working Group as appropriate, of diverse matters that have arisen in the case law for purposes of continuously codifying a coherent system of victims’ reparations in accordance with article 75 of the Rome Statute.⁵⁴

⁵⁰ See *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06 (A A2 A3 OA21), “Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings”, 14 December 2012, para. 86.

⁵¹ See *Lubanga* decision on reparations, para. 181.

⁵² This is necessarily contingent upon whether convictions are reached.

⁵³ Study Group on Governance: Lessons Learnt: First Report of the Court to the Assembly of States Parties, ICC-ASP/11/31/Add.1, 23 October 2012 (“*Lessons Learned* Report”), Annex, para. D. 3 (“Principles and assessment of reparations”). This report was originally submitted to the Assembly in August 2012 as a result of the Study Group’s facilitation on “Expediting the Criminal Process”.

⁵⁴ *Lessons Learned* Report, annex, para. D. 3 (“Principles and assessment of reparations”), as noted in the Report of the Bureau on victims and affected communities and the Trust Fund for Victims and reparations, ICC-ASP/11/32, 23 October 2012, para. 35. These may include: individual and collective reparations; whether principles on reparations could be addressed in a court-wide document or need to be further developed on a case-by-case basis; and whether reparations to victims might be dealt with by a single judge.