

**Thirteenth session**

New York, 8-17 December 2014

**Report of the Court and the Trust Fund for Victims on the rules to be observed for the payment of reparations\****Executive summary*

This report addresses the Committee's requests on the rules to be observed for the payment of reparations.

Request (ICC-ASP/12/15, para. 138); content:

- (a) The Court provides information on the rules to be observed with regard to the payment of reparations.
- (b) In its reparations decision of 2012 in the *Lubanga case*,<sup>1</sup> Trial Chamber I defined a number of principles regarding reparations applicable in that case, also clarifying a number of substantive and procedural issues, and determined the basic approach to be taken for their implementation. However, appeals proceedings in this case are still on-going and no final conclusions can be drawn.
- (c) In general, the payment of reparations, in particular if and when carried out through the Trust Fund for Victims, will be governed by the Court's Financial Regulations and Rules as well as relevant legal provisions relating to the immunities and privileges of the Court.
- (d) Regarding the determination of disposable means relating to reparations, the Court's legal framework does not provide authoritative guidance. The Court is therefore considering this matter in anticipation of future cases with a view to establishing general guidelines.
- (e) As regards asset recovery, there are a number of key challenges which have to be met regarding the Court's internal proceedings but also the cooperation of States Parties, which plays a crucial role.
- (f) In line with Rule 98.3 of the Rules of Procedure and Evidence and Regulation 42 of the Regulations of the Trust Fund for Victims, regarding the administrative costs of the implementation of a reparation order, the capacity and resources of the Trust Fund's Secretariat should be responsive to any such decision; costs should not be covered through donations or resources collected from fines or forfeitures.

\* Previously issued as CBF/22/7.

<sup>1</sup> *The Prosecutor v. Thomas Lubanga Dyilo, Decision Establishing the Principles and Procedures to be Applied to Reparations*, ICC-01/04-01/06-2904, 7 August 2012.

## I. Introduction

1. In September 2013, the Committee on Budget and Finance (“the Committee”) called on the International Criminal Court (“the Court”) to initiate joint reflection on the relevant rules to establish a preliminary financial approach for the payment of reparations and to report to it at its twenty-second session, stating that

“[...] cases currently at the appeals stage should soon draw to a close and the Court might then be required to consider the payment of reparations, if and where applicable. This innovative procedure had no equivalent in this field and therefore a preliminary financial approach was impossible.”<sup>2</sup>

2. At the request of the Committee, the Court, in association with the Trust Fund for Victims (“the Trust Fund” or “TFV”), submits this report to the Committee on the rules to be observed for the payment of reparations.

## II. Background

### A. The *Lubanga* decision on reparations

3. On 7 August 2012, Trial Chamber I (the “Chamber”) issued its first *Decision establishing the principles and procedures to be applied to reparations* in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“*Lubanga* decision on reparations”) This landmark decision defined a number of principles regarding reparations applicable in the *Lubanga* case, also clarifying a number of substantive and procedural issues, and determined the basic approach to be taken for their implementation. However, a number of aspects of the *Lubanga* decision on reparations have been appealed by victims participating in the proceedings and by Mr Lubanga, and a number of relevant arrangements are pending a possible discussion and guidance by the Appeals Chamber.<sup>3</sup> The principles applicable in the *Lubanga* decision on reparations as well as the main issues currently under appeal are summarised in the annex to this report.<sup>3</sup>

### B. Principle, provisions and procedures guiding the Trust Fund

4. In general, the payment of reparations will be governed by the Court’s Financial Regulations and Rules (“FRR”) as well as by relevant legal provisions relating to the immunities and privileges of the Court. The FRR regulations on voluntary contributions, in particular, are of relevance for the TFV.<sup>4</sup>

5. The Court and the TFV are migrating to International Public Sector Accounting Standards (IPSAS) which set new and unified accounting standards.

6. For managing grants and payments to implementing partner organizations under the TFV’s assistance mandate,<sup>5</sup> the TFV uses the SAP grant management system (SAP GM). This system allows the TFV to deal with earmarked or non-earmarked voluntary contributions by States Parties or any other private donation and to handle payments to implementing partner organizations.

7. The TFV will use the same SAP GM system for the implementation of a reparations order and will benefit from the previous positive experience under the assistance mandate.

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<sup>2</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Twelfth session, The Hague, 20-28 November 2013* (ICC-ASP/12/20), vol. II, Part B, (initially filed as ICC-ASP/12/15), para.138.

<sup>3</sup> The Appeals Chamber will only need to decide as to the reparations appeals if Mr Lubanga’s conviction is upheld on appeal.

<sup>4</sup> See also Report of the Court on principles relating to victims’ reparations, ICC-ASP/12/39, 8 October 2013.

<sup>5</sup> Regulation 6, 6.5; rule 106.1; regulation 7, rule 107.2, 7.2 - 7.4 of the Financial Regulations and Rules.

<sup>6</sup> See Regulations of the Trust Fund for Victims (RTFV).

### III. Developments regarding the determination of disposable means relating to reparations

8. In December 2012, in its resolution ICC-ASP/11/Res.7 on victims and reparations, the Assembly of States Parties (“the 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, 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”.<sup>6</sup> Subsequently, the Court submitted its “Report of the Court on the criteria for the determination of disposable means relating to reparations”<sup>7</sup> to elucidate the legal issues regarding the determination of disposable means of a convicted person for the purposes of reparations.<sup>8</sup> In particular, this report examined the issues related to the assessment of the convicted person’s ability to provide reparations.

9. The Court noted that the term “indigence” as such is not mentioned in the Rome Statute (“the Statute”), nor as part of the criteria for the payment of reparations under article 75 of the Statute. The assessment of a convicted person’s disposable means is relevant in the enforcement phase of a reparation order issued against a convicted person.

10. While criteria have been established by the Registry for determining whether a suspect, an accused person or a victim is eligible for legal aid pursuant to rules 21 and 90 of the Rules of Procedure and Evidence (“RPE”),<sup>9</sup> there are no criteria to establish a convicted person’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.”<sup>10</sup>

11. The Court is actively considering this matter in anticipation of future cases where the assessment of a convict’s disposable means for the purpose of the enforcement of a reparation order has to be made.

### IV. Asset recovery

12. With regard to identifying and freezing assets, the Court mostly relies on the assistance and cooperation of States Parties and non-States Parties, as it has limited means to identify any monetary assets or property itself. Worldwide investigations aimed at identifying, tracing, and ultimately, freezing or seizing assets are impossible without the comprehensive, effective and unambiguous cooperation of States Parties and non-States Parties.

13. Article 93 of the Statute imposes obligations on States Parties regarding, *inter alia*, assistance in “[t]he execution of searches and seizures” and “[t]he identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties”. With respect to reparations awards, article 75(5) of the Statute indicates that the obligations of States Parties are the same as those set out in article 109, relating to the enforcement of fines and forfeiture measures.

14. States shall take all necessary steps to enforce these orders. Nonetheless, assets subject to provisional seizure orders will only be transferred to fulfill final reparations orders if a much higher burden of proof is met. Not only must it be conclusively shown that the assets are owned and controlled by the convicted person, but also that proceeds,

<sup>6</sup> *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.

<sup>7</sup> Report of the Court on the criteria for the determination of disposable means relating to reparations, ICC-ASP/12/40, 8 October 2013.

<sup>8</sup> 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 Statute.

<sup>9</sup> 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.

<sup>10</sup> *Lubanga* decision on reparations, para. 269.

property or assets derived directly or indirectly from crimes committed by the convicted person in the particular case.<sup>11</sup>

15. The key cooperation challenges to ensure reparations to victims include:
- (a) The ability to efficiently carry out and enforce orders for “protective” or preliminary measures to safeguard assets;
  - (b) Enforcing final awards of reparations including monetary and non-monetary awards under article 109 of the Statute; and
  - (c) Institutional responsibility within the Court for monitoring the enforcement of reparations orders.
16. The Statute allows a Pre-Trial or Trial Chamber to order “protective measures” upon the issuance of an arrest warrant or summons, or once a person is convicted, but also for the purpose of forfeiture.<sup>12</sup> Assuming that States are willing to cooperate, appropriate domestic legislation and procedural mechanisms to foster cooperation need to be put in place.
17. This includes but is not limited to (a) naming the bodies responsible for receiving and implementing cooperation requests (b) ensuring that such bodies are well apprised of their responsibilities in advance of any actual request, (c) clarifying the internal procedures for formally recognizing and fulfilling the requests, including the role of local bodies, and (d) specifying how such requests are prioritized against local or third-country requests.

## V. Reimbursement by an accused person of awards paid by the Trust Fund

18. The Court notes that under article 75(2) of the Statute, a Chamber may “order that the award for reparations is made through the Trust Fund”. This order can complement an order to pay reparations made against a convicted person who does not possess the necessary means to pay the award at the time of the final judgment. In this case the Chamber may order that the Trust Fund step in to use its “other resources” pursuant to regulation 56 of the Regulations of the Trust Fund for Victims (RTFV). The Trust Fund notes that this payment can be viewed as an advance payment, in the event that the convicted person is deemed to be indigent; this advance payment could be reimbursable to the Trust Fund by the convicted person.

19. The Presidency, supported by the Registrar, monitors the financial situation of the sentenced person on an ongoing basis in order to enforce, *inter alia*, reparation orders.<sup>13</sup>

## VI. Use of TFV resources to complement reparations orders

20. Regulation 56 of the RTFV stipulates that the Board of Directors of the Trust Fund “[s]hall determine whether to complement the resources collected through awards for reparations with ‘other resources of the Trust Fund’ and shall advise the Court accordingly”; and
- “[w]ithout prejudice to [its assistance mandate] the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under rule 98, sub-rules 3 and 4 of the Rules and Procedures and Evidence [...]”<sup>14</sup>
21. Rule 98(3) of the RPE gives the Chamber the discretion
- “[t]o order that an award [...] against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations make a collective award more appropriate.”

<sup>11</sup> Rule 147 RPE.

<sup>12</sup> Articles 57(3)e, 75(4) of the Rome Statute; rule 99 RPE.

<sup>13</sup> Regulation 111 of the Regulations of the Registry and regulations 113, 116, 117 of the Regulations of the Court.

<sup>14</sup> See under: [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-ASP4-Res-03-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP4-Res-03-ENG.pdf) (emphasis added).

22. The governing rules and regulations have to be applied in a manner putting the power of a Chamber to order that reparations be provided through the Trust Fund in relation with the responsibility of the Trust Fund's Board of Directors to assess whether and how to complement a reparations order. In doing so, the Board will undertake "reasonable endeavours to manage the fund taking into consideration the need to provide adequate resources"<sup>15</sup> to complement a reparations order.<sup>16</sup>

## VII. Administrative costs of reparations

23. In line with regulation 42 of the RTFV which states that "[t]he resources of the Trust Fund shall be for the benefit of victims of crimes within the jurisdiction of the Court [...]", the Trust Fund notes that any administrative costs related to the implementation of a reparations order are to be borne by the Trust Fund Secretariat's budget and not through donations or resources collected from fines or forfeitures. Accordingly, the capacity and resources of the Trust Fund's Secretariat should be responsive to any decision to implement Court-ordered reparations awards.

## VIII. Conclusion

24. As outlined in this report, the *Lubanga* decision on reparations has created a legal precedent which represents the necessary first step towards a comprehensive set of principles on reparations which also provide guidance on how to approach reparations from a financial standpoint.

25. Whilst awaiting the outcome of the appeals in this case, the Court and the TFV will take any steps necessary to establish a framework to implement any reparations awards, whether in this case or others.

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<sup>15</sup> Regulation 56 of the RTFV.

<sup>16</sup> See Trial Chamber I's discussion and findings on the matter in the *Lubanga* decision on reparations, paras. 270-273.

## Annex

### Principles established in the *Lubanga* decision on reparations

As noted by Trial Chamber I in the *Lubanga* decision on reparations, article 75 of the Rome Statute (“the Statute”) is a key provision in the legal framework regarding reparations. Article 75(1) of the Statute clearly 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.”

In addition, rules 97 and 98 of Rules of the Procedure and Evidence (“the RPE”) are integral to the legal framework regarding reparations. Rule 97 deals with the assessment of reparations, stating that by examining the scope and extent of any damage, loss or injury “the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.” For this purpose, the Court may appoint experts to assist it “in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations.” Moreover, under rule 98(3) of the Rules and relevant to the *Lubanga* proceedings, “[t]he Court may order that an award for reparations against a convicted person be made through the Trust Fund [for Victims (“the TFV”)] where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.”

The Chamber identified the applicable law pursuant to article 21 of the Statute (outlined *supra*). It comprehensively considered an extensive range of international instruments tailored to the question of victims’ reparations. The Chamber also took into account the jurisprudence of regional human rights courts, national and international mechanisms and practices, and significant human rights reports specifically addressing the issue. On this basis, 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.
- (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.
- (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.
- (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.

- (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 Child 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.
- (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 consider providing medical services, general rehabilitation, housing, education and training.
- (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.
- (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.
- (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.
- (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. 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.
- (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.
- (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.
- (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.

In its decision, Trial Chamber I endorsed a five-step implementation plan for reparations, which the TFV had submitted at the Chamber's request:

- (a) First, the TFV, the Registry, the Office of Public Counsel for Victims (OPCV) and a multidisciplinary team of experts should establish which localities ought to be involved in the reparations process in the present case (focusing particularly on the places referred to in the Judgment and especially where the crimes were committed);
- (b) Second, there should be a process of consultation in the localities that are identified;
- (c) Third, an assessment of harm should be carried out during this consultation phase by the team of experts;
- (d) Fourth, public debates should be held in each locality in order to explain the reparations principles and procedures, and to address the victims' expectations.
- (e) The final step is the collection of proposals for collective reparations that are to be developed in each locality, which are then to be presented to the Chamber for its approval. These proposals would indicate what type of reparation is desired by victims in this case; the type of measures required to implement the desired reparations; an estimation of the costs and available resources; best practice and technical standards to be applied; the links to the case and reasons why the proposed measures would be meaningful to victims and address the harm suffered.

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 appeal following the Appeals Chamber's December 2012 decision on the admissibility of the appeals. Specific issues under appeal relating both to the principles and to 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 TFV;
- (e) The standard of proof to be applied, including the necessary link between the crimes subject to conviction and the victims' harm suffered;
- (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.

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