

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06

Date: 18 April 2012

TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

**Public
With 2 public annexes**

Registrar's observations on reparations issues

Source: Registry

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mrs Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Paul Kabongo Tshibangu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

Mr Pieter de Baan, Executive Director,
Trust Fund for Victims

The Registrar of the International Criminal Court (the “Court”);

NOTING the Scheduling Order (the “Order”) issued by Trial Chamber I (the “Chamber”) on 14 March 2012, ordering the Registry to transmit to the Chamber by 16.00 on 18 April 2012, any observations on issues set out in paragraph 8 of the Order;¹

NOTING the Second Report of the Registry on Reparations of 1 September 2011 (“Second report on reparations”);²

NOTING the Registrar’s First report to the Trial Chamber on applications for reparations (the “First report on applications”);³

NOTING articles 21 and 75 of the Rome Statute, rules 97 and 98 of the Rules of Procedure and Evidence (the “Rules”) and regulation 110(2) of the Regulations of the Registry;

CONSIDERING that the Registrar has previously submitted to the Chamber her recommendations as regards the procedural steps to be followed⁴ and on the principles to be applied⁵ in reparations proceedings;

CONSIDERING that in its First report on applications the Registrar indicated that she will address substantive issues regarding the principles that may be applied by the Chamber with regard to reparations in a further report to be filed by 18 April 2012;⁶

RESPECTFULLY SUBMITS to the Chamber the following observations:

1. The Registrar notes that in its Second report on reparations, it has already made extensive observations in relation to each of the five specific issues listed

¹ ICC-01/04-01/06-2844, para. 9.

² ICC-01/04-01/06-2806.

³ ICC-01/04-01/06-2847.

⁴ See ICC-01/04-01/06-2847, paras. 21-37.

⁵ See ICC-01/04-01/06-2806.

⁶ ICC-01/04-01/06-2847, para. 21.

in paragraph 8 of the Order. At the request of the Chamber, the Registrar nevertheless makes some further observations on these issues and refers the Chamber to the relevant sections of its Second report on reparations.

(i) Whether reparations should be awarded on a collective or an individual basis

2. This issue is already covered at paragraphs 60-73 of the Second report on reparations.
3. The Registrar is grateful to the Chamber for allowing her this opportunity to make observations on the “principles relating to reparations to, or in respect of, victims” before the Chamber issues the first decision on this issue in the history of international criminal justice. In that perspective, the Registrar is of the view that the issue of whether reparations should be individual or collective may depend, at least to some extent, on the existence of an individual or collective right of victims to reparations before the Court. The Registrar will focus the present observations on this very aspect.
4. At first glance, one could interpret, the Rome Statute as not creating a positive right of victims to reparations before the Court, be it individual or collective. The wording of Article 75(2) seems to condition reparations on (i) a finding of guilt (“against a convicted person”) and (ii) the discretion of the Chamber (“may”). The Registrar already submitted that other interpretations are also conceivable.⁷
5. The Registrar submits that the first sentence of Article 75(2) cannot be read in isolation from other relevant provisions of the Rome Statute. The Registrar has already addressed the difference between the first and second sentences of Article 75(2) and the different ways in which these two sentences may be articulated.⁸

⁷ ICC-01/04-01/06-2806, paras. 162-165.

⁸ *Ibid.*

6. The Registrar further observes that Article 75(1) of the Rome Statute gives the Court a broad discretion to establish “principles related to reparations to, or in respect of, victims”, “determin[ing] the scope and extent of any damage, loss and injury to, or in respect of, victims” and “stat[ing] the principles on which it is acting”. The French version of Article 75(2) further broadens the scope of the principles governing reparations to benefit “victimes ou [...] leurs ayants droit”, namely their respective families and successors.⁹ Article 75(1) by itself does not establish a positive right of victims to reparations, but it is the Registrar’s respectful submission that one may argue that it empowers the Court to establish such a principle.
7. The next question then becomes whether the Court can establish “principles related to reparations” *ex nihilo* or whether it should rely on pre-existing principles. In the latter case, the source of the pre-existing principles should be specified. Although this issue falls entirely under the discretion of the Chamber and its interpretation of Article 75(1), the Registrar observes that, under Article 21(1) of the Rome Statute, the applicable law of the Court includes:

“(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 laws and standards.” (emphasis added)

⁹ Donat-Cattin (D.), “Article 75” in Triffterer (O.), *Commentary on the Rome Statute*, 2nd ed., Beck/Hart/Nomos, München, 2008, pp. 1402-1403; Schabas W.A., *The International Criminal Court – A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, pp. 881-882.

8. The Registrar therefore respectfully submits that her understanding of these provisions is that the “principles related to reparations” should result, at least to a certain extent, from the principles referred to under Article 21(1)(b) and (c). Accordingly, should “principles and rules of international law, including the established principles of the international law of armed conflict” and/or “general principles derived by the Court from national laws of legal systems of the world” provide a positive right of victims to reparations, the Court could as a result establish this principle as a “principle related to reparations” under the Rome Statute.
9. The Registrar also observes that Article 75(6) explicitly provides that “[n]othing in this article” – not even the apparently narrowed scope of the first sentence of Article 75(2) – “shall be interpreted as prejudicing the rights of victims under national or international law.”
10. Under the first prong of Article 75(6), the rights of victims under national law – for instance whether DRC law provides a right for victims to reparations – cannot be prejudiced under Article 75. This provision seems to imply that whatever reparations a victim may receive, or not, from the Court, should not impact any reparations to which he or she may be entitled under domestic law. It does not state that domestic reparation orders should bear no impact on the Chamber’s determination of reparations before the Court.
11. The second (international) prong of Article 75(6)’s operates the same way, but with slightly different results. A first – immediate – interpretation of this sentence leads to the conclusion that, as for reparations under domestic law, whatever reparations a victim may receive, or not, from the Court, these should not impact on reparations he or she may be entitled to receive under any other international mechanism. The Registrar is not able to identify such an international mechanism. Another interpretation, which complements the

first, is that, should international law provide a right to reparations for victims, this right should not be prejudiced by the application of Article 75.

12. This second interpretation is actually a necessary consequence of Article 21(1)(b), since, should “applicable treaties and the principles and rules on international law, including the established principles of the international law of armed conflict” provide a positive right of victims to reparations, then this right would form part of the applicable law before the Court. Article 21(3) confirms this assessment, providing that “[t]he application and interpretation of law pursuant to [article 21] must be consistent with internationally recognized human rights [...]”. The Registrar therefore concludes that, should such a right exist in international law, the Court not only could, as explained above, but should establish the right of victims to reparations as a principle relating to reparations before the Court under Article 75(1) of the Rome Statute.
13. The Registrar first observes the absence of a general convention providing a right of victims to reparations in international law. In spite of this lacuna, the Registrar has identified numerous instruments that provide for a right of victims to receive reparations or, at least, an obligation to repair falling on the person – natural person, legal person or State – responsible for the damage. For the sake of clarity, the Registrar provides in annex to the present observations an overview of relevant provisions from a non-exhaustive list of selected sources.¹⁰
14. Should the Chamber wish to consider whether “general principles derived by the Court from national laws of legal systems of the world” also contribute to establishing a positive right of victims to reparations, the Registrar further draws the attention of the Chamber to the non-exhaustive list of relevant

¹⁰ Annex 1.

domestic sources the Registry was able to identify.¹¹ The Registrar stresses that the Registry lacks specific expertise in comparative criminal law on this issue and that the information in the annex are only provided as an indication of possible relevant references for the Chamber's consideration.

15. In the preparation of the present filing, the Registrar lacked sufficient time to transmit all the references of the documents listed in the two annexes, and keeps them available to the Chamber, should it so request.

16. The Registrar provides the two lists in annex in order to assist the Chamber in its determination on whether "applicable treaties and the principles and rules on international law, including the established principles of the international law of armed conflict" and or "general principles derived by the Court from national laws of legal systems of the world" provide a sufficient basis for establishing, as a principle relating to reparations under Article 75(1), a positive right of victims to reparations. The Registrar observes that the Registry was not able to identify a single domestic source denying the right to reparations to victims of criminal offences, whereas domestic sources from the various legal systems of the world consistently provide the right of victims to reparations. A significant number of countries¹² also create special trust funds for the payment of compensation to victims, which is, in some case, independent from a judgment of guilt against the alleged offender.¹³ An equivalent solution is contemplated in the Registrar's Second Report on Reparations.¹⁴

17. The forms of reparations may vary depending on the legal system. For example, the system in the United States seems to be more restitution-oriented, even though Federal law establishes a victims' compensation fund.

¹¹ Annex 2.

¹² Annex 2: Belgium, Bolivia, Canada (Québec), Czech Republic, Finland, France, Mexico, Netherlands, United Kingdom, United States.

¹³ Annex 2: Belgium, Canada (Québec), Czech Republic, Finland, France, Netherlands, United Kingdom.

¹⁴ ICC-01/04-01/06-2806, paras. 164-165.

On the other hand, some countries, like France, seem to give a very extensive opportunity for compensation, by establishing a compensation commission and organizing the complementarity between damages granted by criminal courts at the end of the criminal trial and compensation awarded by the commission, irrespective of the outcome of the criminal case.

18. Should the Chamber conclude that such a right to reparation exists under the Court's legal framework, the next question submitted for its determination would be whether such right can be addressed by way of collective or individual reparation measures. The Registrar refers to her earlier observations on this issue,¹⁵ and observes that all domestic sources listed in annex provide for individual reparation measures only. The Registrar did not identify domestic sources allowing for collective reparations measures, which seem to be mainly contemplated by international jurisdictions.

(ii) To whom reparations should be directed; how harm is to be assessed; applicable criteria

19. These issues are covered in paragraphs 25 to 47 and 67 to 73 of the Second report on reparations - to whom reparations are to be directed, depending on whether there should be individual or collective reparations (or both) -, paragraphs 15 to 24 - how harm is to be assessed - and paragraphs 74 to 120 - the criteria to be applied to the awards.
20. In its Second report on reparations, the Registrar recommended that both a scoping assessment of potentially eligible beneficiaries and an impact assessment on different forms of reparations and methods of prioritisation be carried out prior to a reparations award being made.¹⁶ In the Registrar's view, such assessments would assist the Chamber in determining what forms of

¹⁵ ICC-01/04-01/06-2806, paras. 60-73.

¹⁶ ICC-01/04-01/06-2806, paras. 208-211.

reparations are likely to be most meaningful while avoiding those that may create instability or otherwise have a negative impact on the local community. The assessments could be requested on the basis of the Chamber's power to appoint appropriate experts under rule 97(2) of the Rules.

21. The Registrar further observes that relevant principles recognized at the international level emphasise the importance of those affected by reparations being consulted in their design,¹⁷ and that this should include not only victims themselves but also other members of affected communities.¹⁸ Beyond the possibility for participating victims to present their views and concerns, the Registrar has already recommended that other victims be afforded the opportunity to present observations through a legal representative.¹⁹ The interactions that the Registry has had during its various activities on the ground lead the Registrar to support the view that consultations should include the wider communities in which the victims reside.²⁰ The Registrar does not view the Registry's interactions, as reported in several mission reports, as comprising consultations that should be relied upon in this regard, but rather as demonstrating the importance of fuller consultations by relevant experts being conducted. The Registrar notes that such interactions have pointed towards the importance in which reconciliation and healing of communities is viewed by most interlocutors. The individual applications for reparations submitted by 85 victims and summarised in the First report on applications,²¹ which focus on specific individual and collective requests, are

¹⁷ UN Secretary General's Report to the Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (S/2004/616), 2004, paras. 16, 18 and 26; Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, 1997, 2(b); Inter-American Commission on Human Rights, *Principal Guidelines for a Comprehensive Reparations Policy* (OEA/Ser/L/V/II.131 Doc. 1), 1998, paras. 4 and 13.

¹⁸ Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), 2005, Principle 32; Inter-American Commission on Human Rights, *Principal Guidelines for a Comprehensive Reparations Policy* (OEA/Ser/L/V/II.131 Doc. 1), 1998, para. 15.

¹⁹ ICC-01/04-01/06-2806, para. 184; ICC-01/04-01/06-2847, para. 19.

²⁰ See ICC-01/04-01/06-2851.

²¹ ICC-01/04-01/06-2847.

therefore to be viewed in this wider context. An assessment report would assist the Court to identify what will be perceived by victims and their communities as meaningful in the context of the justice that the Court is able to deliver.

22. The Registrar had also noted in her Second report on reparations the importance of the timing of such exercises.²² Now that there has been a decision on guilt, the Registrar advises the Chamber to conduct assessments promptly.

23. It is submitted that an assessment exercise could also look into any programmes that may already be in place and what material or other benefits, if any, victims of the case may already have received.²³

24. In the Registrar's view, it is also appropriate for the terms of reference of such assessments to include a consideration of the broader bearing that any decisions of the Court on reparations in the case may have in the Democratic Republic of Congo, outside the context of the case, such as, for instance, on any complementary steps that might be taken at national level.

(iii) Whether it is possible or appropriate to make reparations order against the convicted person pursuant to Article 75(2) and

(iv) Whether it is appropriate to make reparations award through the TFV pursuant to Article 75(2)

25. These two issues are discussed extensively at paragraphs 121-147 and 156-159 of the Second report on reparations.

26. The Registrar is aware that different views may be submitted by Parties and participants – or have been already -. Such a profuseness of different and educated contributions to this important debate will assist the Chamber in its

²² ICC-01/04-01/06-2806, paras. 160-165.

²³ ICC-01/04-01/06-2806, paras. 45-46.

historic determination. However, because the Registrar is neither a Party nor a participant and her role is limited, pursuant to regulation 110(2) of the Regulations of the Registry, to “present[ing] information or recommendations regarding matters such as the types and modalities of reparations” in order to assist the Chamber, she will not answer the legal arguments that have been developed against its own submissions. At this stage, the Registrar does no more than refer the Chamber to her earlier submissions and inform the Chamber that the Registry stands ready, should the Chamber request so, to provide further observations or clarifications on issues already covered in the Second report on reparations.

27. The Registrar also insists on an important characteristic of the present case: the convicted person’s total lack of identified resources at this stage, as highlighted in paragraphs 10-11 of the Second report on reparations. This factual consideration has already led the Registrar to conclude that the only reparations the convicted person may be in a position to directly support should be those forms not requiring financially significant resources.²⁴ The Registrar’s view remains that financially-significant reparation measures, if any, could only be ordered through the Trust Fund for Victims, as described in paragraphs 121-147 of the Second report on reparations.

(v) Whether the Parties or participants seek to call expert evidence pursuant to Rule 97 of the Rules

28. The Registrar notes that the Registry is in a position to assist the Chamber in identifying appropriate experts.²⁵ The Registrar recommends that, to conduct the assessments recommended in this report, it would be appropriate to appoint a team of experts, rather than one single expert, and that such a team could include individuals from a range of disciplines and comprise both Congolese and international members. Expertise might be sought, for

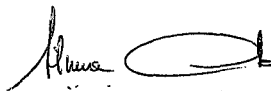
²⁴ ICC-01/04-01/06-2806, par. 76-81.

²⁵ Regulation of the Registry 110(2), and ICC-01/04-01/06-2806 para. 186.

instance, in victim consultation, design of reparations programmes, familiarity with aspects of the local context including the communities in Ituri and DDR programmes, as well as specialists in child protection and gender based violence.

29. The Registrar further observes, as submitted already in her Second report on reparations, that it may not be necessary for the Chamber to take a decision in advance and in principle as to whether it will order reparations on an individual or a collective basis or both. In practice such concepts are neither entirely distinct nor mutually exclusive, and may be best determined on a case-by-case basis on the basis of factors such as the manner of implementation.²⁶

30. In the Registry's view, such a context makes it preferable to move rapidly to appoint experts who would come up with a concrete set of proposals that the parties, participants and other interested parties could respond to.



Silvana Arbia, Registrar

Dated this 18 April 2012

At The Hague, The Netherlands

²⁶ ICC-01/04-01/06-2806, paras. 60-66.