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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 of the V02 group of victims on sentencing and reparations

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

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OBSERVATIONS OF THE V02 TEAM OF LEGAL REPRESENTATIVES OF VICTIMS ON SENTENCING AND REPARATIONS

I - BACKGROUND

1. On 14 March 2012, Trial Chamber I issued its *Scheduling order concerning timetable for sentencing and reparations*,¹ in which the Legal Representatives of Victims were invited to file written submissions by 4 p.m. on 18 April 2012 on the procedure to be adopted for sentencing under article 76 of the Statute and the principles to be applied by the Chamber when it is considering the appropriate sentence to be imposed,² and their observations on the principles to be applied by the Chamber with regard to reparations and the procedure to be followed.³
2. On 28 March 2012, the Registry⁴ and the Trust Fund for Victims⁵ filed their reports concerning reparations. The Registry also filed reports on the Victims Participation and Reparations Section missions conducted in 2010 and December 2011.⁶
3. Pursuant to articles 75 and 76 of the Statute, the Legal Representatives of Victims hereby make their submissions on sentencing and reparations.

II - SUBMISSIONS

A - Sentencing

4. The Chamber will take into account the submissions of the parties and the relevant evidence presented at trial to finalise the principles or criteria to be applied in determining the appropriate sentence for the person found guilty.
5. These are principles, or more accurately, considerations, such as the gravity of the crime and the personal circumstances of the convicted person, the existence of mitigating and aggravating factors, the nature of the unlawful behaviour of the convicted person, the means employed to execute the crime, the degree of participation and intervention of the convicted person, the circumstances of time and place of the offence, the age, education, social and economic condition of the convicted person and, lastly, the scope and extent of the harm caused to the victims and their family members.
6. All these factors can only be considered on the basis of the submissions and evidence presented primarily by the Office of the Prosecutor, but also on the basis of the Registry report specifically on the personal circumstances of the convicted person and the victims'

¹ ICC-01/04-01/06-2844.

² ICC-01/04-01/06-2844, para. 3.

³ ICC-01/04-01/06-2844, para. 8.

⁴ ICC-01/04-01/06-2847.

⁵ ICC-01/04-01/06-2803-Red.

⁶ ICC-01/04-01/06-2851 + Anxs 1 & 2 -Red.

submissions, especially with regard to the scope and extent of the harm they and their family members suffered.

7. The Chamber will take account of the submissions of the parties and the relevant evidence. It may also take account of mitigating and aggravating factors. It must consider the circumstances of the convicted person and the circumstances of the crimes.
8. It will also consider the scope and extent of the harm caused to the victims and their family members.
9. The Chamber will consider the means employed to execute the crime, the degree of participation and intervention of the convicted person.
10. The Chamber will also take into account the circumstances of time and place of the offence as well as the age and education of the convicted person.

Finally, the Chamber will take account of the social and economic condition of the convicted person.

B - Reparations

11. The Chamber will establish the principles relating to reparations to, or in respect of victims, such as restitution, compensation and rehabilitation. To this end, the Chamber will consider the following questions:

B1 - Should reparations be individual or collective?

12. The principle: the legal instruments governing the ICC do not make “express” provision for collective reparations; rather, they are contemplated implicitly – article 75(2) of the Statute uses the expression “to, or in respect of, victims”: “[t]he Court may make an order against a convicted person specifying appropriate reparations to, or in respect of, victims [...]”.
13. The scope of the principle: for individual reparations, the Chamber may have regard to the various legal instruments governing the Court. However, for collective reparations, it may rely on the general principles of international law and international custom.
 - (a) Relying on article 21(1)(b) of the Rome Statute: “[i]n 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”;
 - (b) United Nations basic principles of justice for victims of crime and abuse of power, 1985 (United Nations General Assembly resolution 40/34 of 29 November 1985); and
 - (c) United Nations basic principles on the right to a remedy and reparation, 2005 (Principle 15 stipulates: “Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law”).

14. The primary victims of recruitment (enlistment or conscription) into the UPC are child soldiers.
15. Each recruited child soldier who was authorised to participate in the proceedings is a victim.
16. Hence reparations should be primarily awarded on an individual basis because it was the child who suffered personally. It so happens that not all the child soldiers were fortunate to participate in the proceedings. Efforts should therefore be made to ensure that child soldiers are not viewed negatively in their communities for having been forced to take up arms and commit crimes against their communities. Accordingly, consideration should be given to collective reparations which would include all the child soldiers recruited by the UPC.
17. For this purpose, the lists of CONADER, the DDR, and other organisations which assisted these child soldiers, such as IRC, UNICEF, Save the Children, COOPI and the transit centre (CTO) through which they passed before their reunification could be used.
18. To discourage the phenomenon of child soldiers so that other children in the community in which the enlistments occurred should not consider that taking up arms is a good thing, thereby giving the impression that child soldiers are being rewarded for doing something positive, collective reparations should be envisaged.
19. Thus, reparations should also be collective, thereby bringing together all the child soldiers in the locations where recruitment took place (village, community), regardless of whether they participated in the proceedings. For collective reparations, the community, other child soldiers and family members should be considered.
20. In conclusion, reparations should be both individual and collective:
 - Individual: with regard to restitution and compensation;
 - Collective: with regard to rehabilitation in the community.
 Hence the importance of these two forms of reparations.

B2 – For both collective and individual reparations:

21. Who should be the beneficiaries of individual reparations?
22. The beneficiaries of individual reparations are the child soldiers enlisted into the UPC who are participating in the proceeding before the Chamber or their rightful claimants.
23. What criteria should be applied in awarding reparations?
24. For individual reparations: take into account the specificity of the harm (existence of a range of factors linked to the harm, such as physical suffering, death, disease, mental suffering, loss of property, loss of education, etc.); emphasis should be laid on stigma, especially for survivors of sexual violence.
25. For collective reparations: awards for collective reparations should reflect local cultural and customary practices.

26. How should the damage for individual reparations be assessed?

27. The starting-point should be the victim's circumstances prior to their enlistment, that is, preparation of a table of the victims so as to take their wishes into account. The assessment should be based on the victims' statements in their application forms for participation, relying on the reports of experts (to be appointed by the Chamber upon proposal of the Legal Representatives of Victims) including, in particular, physicians and psychologists.

- (a) Damage may be assessed in pecuniary terms and in terms of local or professional care.
- (b) The wishes of the victims as expressed in their applications for participation should be considered and updated during the reparations stage by meeting with the victims during field missions authorised by the Registry or through telephone contact with resource persons in the field who can facilitate contact with the victims.
- (c) The age and level of education of the victim at the time of recruitment should be known in order to calculate the victim's likely level of education if his or her schooling had not been interrupted.
- (d) Similarly, the victim's vocational skills, apart from handling weapons, should be assessed: can the victim learn a trade which would be actually useful in civilian life? The victim will be unable to make up for the delay in his or her schooling.
- (e) Reparations could also be assessed in terms of the victim's age at the time he or she was compelled to abandon schooling and the number of years of separation from his or her family.
- (f) The psychological development of the child after enlistment should be known. Therefore, the services of psychologists should be required.
- (g) For girl soldiers who were raped, it would be useful to consider how, apart from reintegration and learning a trade, their customs can be applied by giving their families the items required as part of a bride price, which might include 7 goats and 3 cows, which could serve as compensation in the form of livestock to the family of the raped girl. This livestock could reproduce and be a source of wealth to the family of the raped girl, since it seems highly improbable that such a girl would be able to marry normally after having been rejected by her family and the community.
- (h) Following this custom with regard to reparations (for rape and forced marriage whether or not it resulted in unwanted offspring or even illegitimate children of known or unknown paternity) would dispel the affront to the girl and her family.
- (i) Girls should be introduced to a trade and receive economic assistance. For example, sewing workshops, of potential interest to both boys and girls, could be set up, as could masonry and carpentry workshops.
- (j) Other criteria for the assessment of reparations could be the number of years the victims spent with the UPC and the fact of their having suffered physical injury, psychological trauma and/or rape.

- (k) Hence there should be an estimate of the damage by means of a psychological and/or sociological expert assessment which would consider the child's capacity to reintegrate into society and the expected duration of the reintegration process.

28. Who should receive collective reparations?

29. With regard to collective reparations, rule 85 of the Rules of Procedure and Evidence stipulates that the term "victim" may also include organisations and institutions in respect of their property dedicated to religion, education, etc. The Chamber could target villages in which training camps were set up, as well as schools, churches and markets, etc. which were used for the forcible recruitment of children.

30. How should damage be assessed for the purposes of collective reparations?

31. With regard to collective reparations, rule 85 of the Rules of Procedure and Evidence stipulates that the term "victim" may also include organisations and institutions in respect of their property dedicated to religion, education, etc. The Chamber could target villages in which training camps were set up, as well as schools, churches and markets, etc. which were used for the forcible recruitment of children.

32. The standards of international law should be followed and international humanitarian assistance or development assistance should be considered. The experts to be appointed could include sociologists, ethnologists, legal experts and human rights NGOs.

33. Who should be entitled to collective reparations?

34. The beneficiaries of collective reparations should for the most part be the family members of the victims and their community of origin.

- (a) In fact, to award only individual reparations would be poorly received by the community and could encourage other children (whether or not they have been soldiers before) to think that it is beneficial to be recruited by armed groups. Given that this phenomenon is again gaining ground in eastern DRC, these children risk (re-) enlisting for war.

- (b) It follows that collective reparations should also be awarded. In some villages, for instance, schools served as military camps for the UPC. So did some health centres.

35. How should damage be assessed for the purposes of collective reparations?

36. By assessing the harm suffered by the community as a result of the enlistment of child soldiers by the UPC.

- (a) It would be useful to appoint experts to assess the feasibility of re-building schools and health centres destroyed by the UPC in the communities where enlistment occurred, for the purposes of rehabilitation.

- (b) Experts could also assess the feasibility of constructing vocational centres for child soldiers who did not continue school, in order to help their reintegration into society.

- (c) Reparations should also be awarded for the destruction of farms and some livestock by child soldiers in the UPC. Consideration should be given to the manner in which the community can be assisted by being provided with seeds and agricultural inputs with a view to reviving agricultural activity.

37. What criteria should be applied in awarding reparations?

- a) For individual reparations:
- Enlistment into the UPC and participation in proceedings before the Chamber.
 - The age of the victim at the time of enlistment and recruitment.
 - The number of years during which schooling was interrupted.
 - The physical and psychological injuries of the victim.
- b) For collective reparations: devise criteria depending on whether the victims acted as a group: training camps, combat zones, whether they were under a single commander, whether they suffered the same type of harm, and whether they saw combat in the same zone.

B3 - Is it possible or appropriate to make an order for reparations against the convicted person under article 75(2) of the Statute?

38. It does not appear possible or appropriate to make an order against the convicted person, especially as Mr Thomas Lubanga Dyilo alleges indigence, was recognised as indigent by the Pre-Trial Chamber on 31 March 2006, and is receiving legal assistance from the ICC.⁷

39. It might be opportune to award reparations against Mr Lubanga and charge the Trust Fund for Victims (TFV) with implementing the reparations since the convicted person is indigent. See rule 98(2), 98(3) and 98(4) of the Rules of Procedure and Evidence. In some wise, this would be akin to vicarious civil liability. The TFV and the Court could make provision for mechanisms for restitution and/or compensation by the convicted person if he were subsequently discovered to have property.

B4 - Would it be appropriate for the compensation to be paid through the TFV, as provided for in article 75(2) of the Statute?

40. It would be appropriate for the compensation by way of reparation to be paid through the TFV.

41. Since the convicted person lacks the financial resources to make reparation for the harm suffered by the victims, it would be fitting for the compensation awarded as reparation to the victims to be paid through the TFV.

42. This might limit the discussion of the issue of reparations to the TFV only, without a Defence presence.

⁷ ICC-01/04-01/06-63.

B5 - Do the parties or participants seek the appointment of experts as provided for in rule 97 of the Rules?

43. Yes, under rule 97 of the Rules, legal representatives of victims may request the appointment of experts in psychology and psychiatry to assess the emotional state of the victims and the appointment of experts who can assess the scope and extent of the destruction of community property as a result of the enlistment of child soldiers into the UPC.
44. The experts could be appointed by the Chamber upon proposal of the Legal Representatives of Victims for individual reparations and upon proposal of local NGOs for collective reparations.

Done at Kinshasa and Tours,

18 April 2012

[signed]
Ms Carine Bapita Buyangandu

[signed]
Mr Paul Kabongo Tshibangu

[signed]
Mr Joseph Keta Orwinyo