



Lubanga Case

Q & A on ICC Landmark Decision on Reparations for Victims

On 7 August 2012, Trial Chamber I established, for the first time in the ICC's history, the principles that are to be applied to providing reparations for victims in the Lubanga case.¹ On 14 March 2012, Thomas Lubanga Dyilo was found guilty of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities.² He was sentenced on 10 July 2012 to a total of 14 years of imprisonment.³

The Chamber considered that it is of paramount importance that the victims, together with their families and communities, participate in the reparations process, and be able to express their points of view, their priorities and the obstacles they have encountered in their attempts to secure reparations.

While the Chamber set principles, it will be up to the Trust Fund for Victims to implement them as the Judges decided that reparation should be awarded "through" the Trust Fund.

What are the principles established by the Chamber?

The Chamber promoted a gender- and ethnic- inclusive approach. The principles recognize that:

1. The right to reparations is well-established and a basic human right.
2. Victims should be treated fairly and equally, irrespective of whether they participated in the trial proceedings. The needs of all the victims should be taken into account and particularly children, the elderly, those with disabilities and victims of sexual or gender violence. Victims should be treated with humanity and respect for their dignity, human rights, safety and well-being. Reparations should be granted and implemented without any discrimination, such as regards age, ethnicity or gender. Reparations should avoid further stigmatization of the victims and discrimination by their families and communities.
3. Reparations may be granted to direct and indirect victims, including the family members of direct victims, but also legal entities (see below).
4. Reparations should be accessible to all the victims, following a gender-inclusive approach. The victims, together with their families and communities should be able to participate throughout the reparations process, and be provided with adequate support.
5. Reparations should take into account the sexual and gender based-violence that victims may have suffered as well as the complex consequences of these crimes. The approach adopted should enable women and girls to access justice.
6. Reparations should take into account the age of the victims along with the need to rehabilitate children formerly associated with armed groups within their communities. They should be guided by the Convention on the Rights of the Child and ensure the development and respect for the rights of the child.

¹ Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, ICC-01/04-01/06, <http://www.icc-cpi.int/Menu/Go?id=f491ef55-3612-4205-a195-d44a7b90ca0a&lan=en-GB>

² Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>

³ Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, ICC-01/04-01/06-2901, <http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf>

7. Reparations may be individual and/or collective (see below). Individual reparations should be awarded in a manner that avoids creating tensions within communities. When collective reparations are granted, these should address the harm victims have suffered on an individual and collective basis, and should reach currently unidentified victims.
8. Reparations can notably take the form of restitution, compensation, rehabilitation, or other, more symbolic, forms such as outreach activities (see below).
9. Victims should receive appropriate, adequate and prompt reparations. Reparations should be proportionate to the harm, injury, loss and damage resulting from the crimes charged. Reparations should aim at reconciling the victims with their families and all the communities affected by the charges. Reparations should reflect, whenever possible, local cultural and customary practices unless these are discriminatory, exclusive or deny victims equal access to their rights.
10. The "damage, loss and injury," which form the basis of a reparations claim, must have resulted from the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities. However, reparations should not be limited to "direct" harm or "immediate effects" of these crimes, but should instead be based on the standard of "proximate cause".
11. The facts that are relevant to an order for reparations should be proven on "a balance of probabilities". When reparations are awarded from the resources of the Trust Fund for Victims or from any other source, a wholly flexible approach to determining factual matters is appropriate.
12. Nothing in these principles will prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial.
13. States parties should cooperate fully in the enforcement of reparations orders and the implementation of awards.
14. These principles and any reparation proceedings before the Court should be publicized by all necessary means, including by outreach activities with the national authorities, local communities and the affected populations.

Who can be a beneficiary?

In the Chamber's view, it would be inappropriate to limit reparations to the relatively small group of victims that participated in the trial and those who applied for reparations.

The Chamber thus noted that pursuant to Rule 85 of the Rules, reparations *may* be granted to:

- **Direct victims**, who suffered harm resulting from the crimes of enlisting, conscripting and using children under the age of 15 in Ituri in the Democratic Republic of Congo (DRC), from 1 September 2002 to 13 August 2003.
- **Indirect victims**, including family members of direct victims, along with individuals who intervened to help the victims or to prevent the commission of these crimes. Indirect victims needs to demonstrate a close personal relationship between them and a direct victim, for instance as exists between a child soldier and his or her parents.
- **Legal entities**, such as NGO or hospitals.

The Chamber recognized that priority might be given to vulnerable victims, including victims of gender-based violence or severely traumatized children.

Collective or individual reparations?

The Chamber declared that reparations could be awarded on an individual or collective basis. However, in view of the indigence of Mr Lubanga, it was decided that reparations in the *Lubanga* case will be implemented "through" the Trust Fund for Victims (TVF), using the resources that the Fund has made reasonable efforts to set aside for this eventuality

The Chamber indicated that reparations funded by the TFV using its own resources will tend to be collective, endorsing the Fund's suggestion of a community based approach rather than individual reparations, given the limited funds available and the fact that this approach does not require costly and resource intensive verification procedures.

What about victims who have already submitted an individual application for reparations?

While the Chamber has not examined individual application forms for reparations received so far, it ordered that these applications be transmitted to the TFV. In the end, these individual victims may benefit from collective reparation measures that will be implemented by the Fund.

What about victims currently participating in the proceedings?

The Registry will decide the most appropriate manner in which the current victims participating in the proceedings, along with the broader group of victims who may ultimately benefit from a reparations' plan, are to be represented in order to express their views and concerns.

What forms can reparations take?

The Chamber submitted that reparations could take the form of restitution, compensation and rehabilitation measures and specified that:

Restitution should, as far as possible, restore the victim to his or her circumstances before the crime was committed. This might include return to his or her family, education and previous employment, or returning lost or stolen property.

Compensation is to be approached on a gender-inclusive basis and awards should avoid reinforcing previous structural inequalities. This economic relief should encompass all forms of damage, loss and injury, including:

- physical harm including causing an individual to lose the capacity to bear children;
- moral and non-material damage resulting in physical, mental and emotional suffering;
- material damage, including lost earnings and loss of property;
- lost opportunities, including those relating to employment, education, social benefits, social status or legal rights;
- costs such as legal experts, medical services or social assistance.

Rehabilitation should be implemented on a non-discriminatory and gender-inclusive basis. It should include the provision of medical services, psychological, psychiatric and social assistance and any relevant legal and social services. Specific measures should be adopted to rehabilitate and reintegrate former child soldiers, such as the provision of education and sustainable work opportunities. Symbolic reparations, such as commemorations and tributes, might also help avoid further victimization.

In addition, the Chamber considered that **symbolic reparations** may be appropriate. This includes for example the publication of Mr Lubanga's conviction and his sentence.

Finally, **other forms of reparations** may include campaigns to improve the position of victims; issuing certificates acknowledging the harm suffered; outreach information activities and educational programmes, directed at reducing the stigmatisation and marginalisation of the victims. Measures may also address the shame felt by some former child soldiers, and prevent further victimization, particularly for victims of sexual violence, torture and inhumane and degrading treatment following recruitment.

While Mr Lubanga has been declared indigent, it is open to him to volunteer an apology to the victims, on a public or confidential basis.

How will the beneficiaries be identified and how will they be consulted?

The Chamber has not ruled on the merits of applications for reparation received so far nor has it stated exactly who will be entitled to reparation. Instead, the Chamber has delegated those tasks to the **Trust Fund for Victims**.

The Chamber recommended that the TVF appoint a **multidisciplinary team of experts** to provide assistance in the preparation and implementation of a reparations plan. The team ought to include representatives from the DRC, international representatives and specialists in child and gender issues. The Chamber left it to the Trust Fund to select the experts though indicated that they may assist in the following areas:

- assessing the harm suffered by the victims;
- assessing the effect that the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities had on their families and communities;
- identifying the most appropriate form of reparations, in close consultation with the victims and their communities;
- establishing those individuals, bodies, groups or communities who should be awarded reparations; and
- accessing funds for these purposes.

The Chamber also endorsed the TFV **five-step implementation plan** through which victims will obtain reparations.

The Trust Fund for Victims in conjunction with the Registry, the Office of Public Counsel for Victims and the experts are expected to:

1. Identify the localities which ought to be involved in the reparations process (focusing particularly on the places referred to in the Judgment and where the crimes were committed);
2. Launch a consultation process in the identified localities to enable victims to express their propositions and priorities regarding reparations;
3. Assess the harm suffered by the victims;
4. Carry out public debates in each locality in order to explain the reparations principles and procedures, and to address the victims' expectations;
5. Collect proposals for collective reparations measures, developed in each locality.

The proposals will be subsequently submitted to the Chamber for its approval. Upon receiving **approval by the Chamber**, the TFV, monitored and overseen by the Chamber, will be able to implement the reparations.

Where will the funds come from?

Lubanga has been declared **indigent** and has no assets or property that can be used for the purposes of reparations. The Chamber stated, therefore, that Mr Lubanga will only be able to contribute to non-monetary reparations, on a voluntary basis.

Reparations will thus be funded by **the Trust Fund's resources**. These resources are primarily generated through voluntary contributions by **States**, as well as by **private donations**. In this respect, the Chamber asked for cooperation and voluntary contributions from States Parties - including particularly the DRC - and non-states parties to the Rome Statute.