

ICC issues first appeal judgment on reparations *The Prosecutor v. Thomas Lubanga Dyilo*

3 March 2015

Today, the Appeals Chamber of the International Criminal Court (ICC) issued its first judgment on reparations for victims in the case of Thomas Lubanga Dyilo (Lubanga). The Appeals Chamber held that the Trial Chamber committed a number of errors in its decision of August 2012, which established the principles and procedures to be applied to reparations in the case, and amended the decision accordingly. Significantly, the Appeals Chamber rejected the Trial Chamber's holding that reparation awards should be formulated and implemented to include victims of sexual and gender-based violence.

Lubanga, the first person to stand trial before the ICC, is the founder and former President of the *Union des patriotes congolais* (UPC), and former Commander-in-Chief of the *Forces patriotiques pour la libération du Congo* (FPLC), a militia group operating in the Ituri region of the eastern Democratic Republic of the Congo (DRC). Lubanga was convicted on 14 March 2012 for the war crimes of conscripting, enlisting and using children under the age of 15 to participate actively in hostilities from 1 September 2002 to 13 August 2003. On 10 July 2012, Trial Chamber I sentenced Lubanga to 14 years' imprisonment. Both the conviction and sentence were upheld on appeal, by majority, on 1 December 2014. The Lubanga case lasted nearly nine years with a trial involving 204 days of hearings, two stays of proceedings, an adjournment, 67 witnesses, 1,373 items of evidence and the participation of 129 victims.

The Women's Initiatives for Gender Justice had been granted leave by the Trial Chamber to participate in the reparations proceedings, and on 10 May 2012, filed observations from a gender perspective.¹ The observations emphasised key reparations principles including a gender-inclusive approach; non-discrimination; the importance of effective consultation with victims/survivors including women and girls; a broad concept of harm; and the transformative function of reparations.

In its judgment, the Appeals Chamber decided that a reparation order must contain a minimum of five essential elements, including that it must "define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted".² The Appeals Chamber held that the Trial Chamber erred by delegating this task to the Trust Fund for Victims (TFV) and thus amended the decision in order to define the harm in the context of the case. Ultimately, the Appeals Chamber concluded that sexual and gender-based violence could not be defined as harm resulting from the

¹ ICC-01/04-01/06-2876. The Women's Initiatives submitted observations on principles and procedures to be applied to reparations, in particular regarding the following issues: (i) whether reparations should be awarded on a collective or an individual basis; (ii) to whom reparations are to be directed, how harm is to be assessed and the criteria to be applied to the awards; (iii) whether it is possible or appropriate to make a reparations order against the convicted person pursuant to Article 75(2); and (iv) whether it would be appropriate to make an order for an award for reparations through the Trust Fund for Victims pursuant to Article 75(2).

² ICC-01/04-01/06-3129, para 1.



crimes for which Lubanga was convicted and as such, Lubanga could not be held liable for reparations in relation to such harm. The Appeals Chamber reasoned that the Trial Chamber had declined to include sexual and gender-based violence as an aggravating factor in sentencing and failed to explain why it nonetheless considered Lubanga should be found liable for reparations with respect to these crimes.

Today's ruling is the latest in a series of ICC decisions in the Lubanga case, which have failed to adequately recognise the harm suffered by victims of sexual and gender-based crimes, despite evidence suggesting the commission of rape and other forms of sexual violence by Lubanga's troops, including against child soldiers. While the Prosecution did not bring charges for these crimes, during the trial it raised the alleged commission of these crimes specifically against child soldiers within the UPC and at least 15 prosecution witnesses spoke about sexual violence during the trial. Given the absence of sexual violence in the charges, the majority of the Trial Chamber held that it could not take allegations of sexual violence into account in the judgment; nor could sexual violence be considered as an aggravating factor in Lubanga's sentencing.

Despite its holding that Lubanga could not be held liable for reparations related to sexual and gender-based violence, the Appeals Chamber, in line with the Trial Chamber's decision, indicated that "[a] gender-inclusive approach should guide the design of the principles to be applied to reparations, ensuring that they are accessible to all victims in their implementation".³ The Appeals Chamber also indicated that its judgment does not preclude victims of sexual and gender-based violence from benefiting from assistance activities the TFV may undertake. The Appeals Chamber found that it was for the TFV's Board of Directors to consider, within its discretion, whether such victims could be included in its assistance mandate.

As a next step, the Appeals Chamber directed the TFV to implement the amended order for reparations, and to prepare a draft implementation plan to be submitted to a newly composed Trial Chamber which will monitor and oversee the process. The Appeals Chamber considered that the draft implementation plan should include a referral process to qualified NGOs in the affected locations that offer services to victims of sexual and gender-based violence.

The Women's Initiatives, together with our partners, has been working on the Lubanga case since 2006. Our involvement includes a filing to the Judges regarding the exclusion of sexual violence charges, girl soldiers and the impact of the limited charges on victims participation issues; undertaking documentation missions in Ituri and interviewing victims/survivors of sexual and gender-based crimes allegedly committed by Lubanga's UPC militia group; the submission of a dossier to the Office of the Prosecutor in August 2006 including interviews with 31 victims/survivors of sexual and gender-based crimes allegedly committed by the UPC; the relocation of several women's human rights defenders in Ituri due to threats to their safety as a result of their local advocacy for victims and accountability;

³ ICC-01/04-01/06-3129-AnxA, para 18.



support for victim participants and their legal representatives to ensure the gender dimensions and experiences of former girl soldiers were recognised in the public record of the case; as well as our filing before the Trial Chamber on gender and reparations issues as they apply to this case.

For more information about the Lubanga case please see:

- Read the [press statement](#) by the Women’s Initiatives on the 1 December 2014 final Appeal Judgments on the guilty verdict and sentence
- Read the Women's Initiatives for Gender Justice [Request for Leave to Submit Observations](#) before the Appeals Chamber on 8 March 2013
- Read the [press statement](#) by the Women’s Initiatives on the 10 July 2012 Sentencing Judgment
- Read the Women’s Initiatives for Gender Justice’s [Observations on Reparations](#) submitted to the Trial Chamber on 10 May 2012
- Read the [press statement](#) by the Women’s Initiatives on the 14 March 2012 Trial Judgment
- For a detailed analysis of the 14 March 2012 Trial Judgment, see the Special Issues of *Legal Eye on the ICC*, available [here](#)
- See further analysis of the Lubanga case in the Women’s Initiatives’ annual *Gender Report Card*, 2008 through 2014, available [here](#)
- For an analysis of the gender aspects of this case, see ‘The ICC, child soldiers and gender justice’, *Brigid Inder*, 21 November 2011, available [here](#)
- In May and July 2006, the Women’s Initiatives conducted two documentation missions in Ituri, eastern DRC, and interviewed victims/survivors of gender-based violence, committed by a range of militias, including the UPC. We produced a dossier, which we subsequently shared with the Office of the Prosecutor, detailing 51 individual interviews with predominantly women victims/survivors of rape and other forms of sexual violence. Of these, 31 interviewees were victims/survivors specifically of acts of rape and sexual slavery allegedly committed by the UPC. On 16 August 2006, the Women's Initiatives submitted the confidential report and a letter to the Office of the Prosecutor describing our grave concerns that gender-based crimes have not been adequately investigated in the case against Thomas Lubanga and providing information about the commission of these crimes by the UPC. A redacted version of this confidential letter submitted to the Office of the Prosecutor is available [here](#)
- Read the [previous filings](#) submitted by the Women’s Initiatives for Gender Justice to the ICC

