

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: French

No.: ICC-01/04-01/06
Date: 3 September 2012

THE APPEALS CHAMBER

Before: Judge Erkki Kourula
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Anita Ušacka
Judge Sanji Mmasenono Monageng

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public Document

Appeal against Trial Chamber I's *Decision establishing the principles and procedures to be applied to reparation of 7 August 2012*

Source: V01 team of legal representatives

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

Office of the Prosecutor

Ms Fatou Bensouda

Mr Manoj Sachdeva

Counsel for the Defence

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Mr Paul Kabongo Tshibangu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

Ms Paolina Massidda

Ms Sarah Pellet

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar and Deputy Registrar

Ms Silvana Arbia and Mr Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. BACKGROUND

1. On 7 August 2012, Trial Chamber I issued its *Decision establishing the principles and procedures to be applied to reparations* (“the Impugned Decision”).¹
2. On 13 August, the Defence sought leave to appeal that decision.²
3. On 24 August, the OPCV and the V02 victims’ team appealed the decision.³
4. On 29 August 2012, the Chamber issued its *Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations*.⁴
5. The Legal Representatives hereby also appeal that decision pursuant to article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.

II. LEGAL FOUNDATION OF THE APPEAL

- a. The Legal Representatives submit that, having regard to its content and tenor, the Impugned Decision constitutes an “order for reparations” under article 75 of the Rome Statute and within the meaning of article 82(4) of the Rome Statute and rule 150 of the Rules

¹ See the *Decision establishing the principles and procedures to be applied to reparations* (Trial Chamber I), No. ICC-01/04-01/06-2904, 7 August 2012 (“the Impugned Decision”).

² ICC-01/04-01/06-2905.

³ ICC-01/04-01/06-2909-tENG. (OPCV Appeal).

⁴ ICC-01/04-01/06-2911, (“the 29 August Decision”).

of Procedure and Evidence.

6. The Chamber ruled that it would not entertain the individual applications, which would be transmitted to the Trust Fund for Victims (“the TFV”), which it vested with the unfettered discretion to decide whether the applicants were to be included in its reparation programmes.⁵ In so doing, the Chamber made a final determination on the individual applications and thus issued an order for reparations, at least as concerns this aspect.
7. The Chamber further ruled with finality that “Mr. Lubanga is only able to contribute to non-monetary reparations [and] [a]ny participation on his part in symbolic reparations, such as a public or private apology to the victims, is only appropriate with his agreement”,⁶ thereby dismissing all of the applications brought against the convicted person.
8. Accordingly, the Legal Representatives submit that the Decision is indeed an order for reparations within the meaning of article 82(4).
9. Of note is the Registry’s classification of the other legal representatives’ appeal as being based on rule 150.

III. GROUNDS OF APPEAL

10. The Legal Representatives wish to appeal the Impugned Decision on the following three grounds.

⁵ *Idem.*, paras. 284 and 289(a).

⁶ *Ibid.*, para. 269.

(1) The Trial Chamber erred in law by dismissing the individual applications for reparation without entertaining them

11. The Legal Representatives will hereby show that the Trial Chamber erred in law by deciding to dismiss the individual applications for reparation without entertaining them.

12. Article 75 of the Rome Statute vests victims with the right to submit applications for reparation before the Court. It behoves the Court firstly to adjudge the applications for reparation before it and, secondly, to award reparations of its own motion in exceptional circumstances.⁷

13. In the event of applications from victims, the competent chamber is duty-bound to “determine the scope and extent of any damage, loss and injury to, or in respect of, victims and [...] state the principles on which it is acting.”⁸

14. Whereas the Chamber was at liberty to transmit the individual applications to the TFV or other bodies for their opinion, it ought to have remained seized, as it so ruled in relation to collective reparations: “The Chamber... Remains seized... collective reparations that are to be developed in each locality, which are to be presented to the Chamber for its approval”.⁹

⁷ See article 75(1) of the Rome Statute.

⁸ See article 75(1) of the Rome Statute.

⁹ Decision, para. 289(c).

15. By deciding not to entertain the individual applications for reparation before it, the Chamber failed to comply with article 75 of the Rome Statute, depriving the individual victims of the right to the due consideration and adjudication of their applications for reparation.

(2) The Trial Chamber erred in law by absolving the convicted person from any obligation as regards reparations

16. Finally, the Legal Representatives will hereby demonstrate that the Trial Chamber erred in law by determining that the sole contribution of the convicted person to the reparations process would be a possible voluntary apology to the victims.¹⁰

17. The decisions of 7 and 24 August make clear that the convicted person is under no obligation to contribute to those reparations incurring a pecuniary cost or even to non-monetary reparations, absent his consent. No order for payment or any other Court order has been issued against him.¹¹

18. Orders for reparations are issued directly to the Trust Fund for Victims, without any order to the convicted person to indemnify it for the payments it disburses, even in part.

19. The Legal Representatives are of the view that this constitutes a violation of article 75(2), which states that all orders for reparation shall be made

¹⁰ Decision, para. 241.

¹¹ Decision, para. 269.

against the convicted person and “through” the TFV, where appropriate. Otherwise put, the TFV must ordinarily execute all orders for reparations on behalf of the convicted person. An order by the Chamber to the TFV to disburse advances from its own resources¹² does nothing to diminish the lawfulness of such payments, which constitute the execution of an order against the convicted person through the TFV.

(3) The Chamber erred in deciding that the Defence and the Prosecutor remain parties to reparation proceedings (alternative submission)

20. This third ground is submitted in the alternative, were the Appeals Chamber to declare the second unfounded. In such an eventuality, the reparation proceedings would have no financial or material repercussions for the convicted person and the funding of the operation would rest exclusively with the Trust Fund for Victims. It is impossible to conceive why a person should be party to proceedings which do not or only indirectly affect him.

21. In the decision on the Defence application, the Chamber explained its reasoning on the matter by the symbolic interest which the convicted person may have in the victims not being awarded reparations, even from a third party, since such reparations could underscore the Court’s disapproval of the wrongdoing of the convicted person.

¹² Decision, para. 270.

22. The Chamber erred in considering that the mere act of awarding reparations to the victims of a crime could prejudice the person convicted of these crimes. While reparations indeed denote “the Court’s disapproval and condemnation” of the crimes, such symbolic condemnation simply echoes the actual conviction heretofore handed down by the Court and from which the victims’ right to reparation ensues.
23. The involvement of the Defence in the reparations process implemented by the TFV would entail the right to contest before the Court any TFV decision, including any collective measures it decides, and a disproportionate and pointless squandering of the Court’s resources. A proliferation of petitions and motions from the Defence might ensue, to which the Registry, TFV, Prosecutor and legal representatives of victims would have to respond, greatly increasing the workload of the Chamber at considerable cost to the Court, whereas the Chamber has acknowledged that the TFV’s decisions could, at most, hold indirect and symbolic significance by marking the consequences of the crimes sanctioned.
24. It would be disproportionate to mobilise such resources solely to obviate the semblance of responsibility on the part of the convicted person for the harm to a certain number of victims, which the Chamber itself has heretofore determined on several occasions.
25. Finally, disclosure to the Defence of the identities of all of the victims

applying to the TFV for reparations, so that it may appraise their situation with a view to objecting, may logically be contemplated in proceedings where such applications are directed against the convicted person, but has no sense in a reparations programme funded without any contribution on his part.

26. The involvement of a person convicted of international crimes in a collective reparation programme is unprecedented in the history of international justice. Those convicted at Nuremberg had no part in the reparation programme initiated by the German State, and those convicted by the Iraq Special Tribunal were not individually concerned by the reparation process established by the United Nations Compensation Commission.

27. Finally, the involvement of the Defence in the work of the Trust Fund for Victims would be likely to cause considerable security problems and could prompt large numbers of victims to desist from seeking reparations.

Accordingly, the Legal Representatives respectfully pray the Appeals Chamber to:

- **SET ASIDE** the Impugned Decision insofar as it: (i) dismisses the individual applications for reparation, absent any consideration of their merits; (ii) declines to order the convicted person to pay reparations; and (iii) – alternatively submitted – retains the Defence and the Prosecutor as parties in a process implemented by the Trust

Fund for Victims.

- **DIRECT** Trial Chamber I to rule anew on the matter of reparations under article 75 of the Rome Statute in light of the findings of the Appeals Chamber.

For the V01 team of victims, the Legal Representatives

[signed]

Luc Walley

[signed]

Franck Mulenda

Dated this 3 September 2012.

At Brussels and Kinshasa, Democratic Republic of the Congo.