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No.: ICC-01/04-01/06
Date: **28 September 2012**

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Anita Ušacka
Judge Ekaterina Trendafilova

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

Public Document

Observations on the appeals against the *Decision establishing the principles and procedures to be applied to reparations*

Source: V01 team of legal representatives of victims

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

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I. BACKGROUND

1. On 7 August 2012, Trial Chamber I issued the *Decision establishing the principles and procedures to be applied to reparations* (“Impugned Decision”).¹
2. On 13 August 2012, the Defence sought leave to appeal this decision under article 82(1)(d) and rule 55.²
3. On 24 August, the OPCV and the team representing the V02 group of victims lodged an appeal under article 82(4).³
4. On 29 August 2012, the Chamber rendered the *Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations*, granting the Defence leave to appeal on four issues.⁴
5. On 3 September 2012, the legal representatives of the V01 team also filed an appeal under article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.
6. On 6 September 2012, the Defence filed an appeal against the entirety of the decision, also on the basis of article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.⁵
7. On 10 September 2012, the Defence filed the document in support of its appeal in accordance with regulation 58 of the Regulations of the Court.⁶
8. On 17 September 2012, the Appeals Chamber issued *Directions on the conduct of the appeal proceedings* to the parties and participants, seeking observations, *inter alia*, on the admissibility of the appeals.

¹ ICC-01/04-01/06-2904, 7 August 2012.

² ICC-01/04-01/06-2905.

³ ICC-01/04-01/06-2909.

⁴ ICC-01/04-01/06-2911.

⁵ ICC-01/04-01/06-2917.

⁶ ICC-01/04-01/06-2909.

9. Pursuant to the Appeals Chamber's directions, the legal representatives make the following submissions.

II. THE LEGAL CHARACTER OF THE IMPUGNED DECISION

10. Like the Defence, the legal representatives take the view that in light of its content and wording, the Impugned Decision constitutes an "order under article 75" within the meaning of article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.

11. Both the wording and operative part of the Impugned Decision refer to article 75(1) in setting forth the principles applicable to the forms of reparation. However, the Chamber also decides not to examine individual applications for reparations. In this wise, despite the language used, the Impugned Decision is also an article 75(2) order in that the Chamber ultimately refuses to make an order against the convicted person stating the appropriate reparation to be awarded to the victims and/or to make any order in respect of the Trust Fund for Victims ("TFV").

12. The Chamber ruled that it would not itself examine individual applications, which will be forwarded to the TFV, which it vested with the full discretion to decide whether applicants will be included in its reparation programmes.⁷ In so doing, it made a final ruling on individual applications and thereby issued a final order on reparations, albeit one denying reparations.

13. If all decisions awarding reparations to victims are orders for reparations, then all decisions refusing reparations are necessarily the same.

⁷ *Idem.*, paras. 284 and 289(a).

III. ADMISSIBILITY OF THE APPEAL AUTHORISED BY THE TRIAL CHAMBER

14. According to the wording of the document filed on 10 September,⁸ this is the document in support of the appeal lodged on 6 September 2012 against an article 75 order: “Pursuant to the joint provisions of article 82(4), rules 150 and 153 and regulation 57 of the Regulations of the Court, the Defence hereby appeals against the whole of Trial Chamber I’s decision [...] rendered on 7 August 2012”.⁹

15. No document in support of the appeal for which leave was sought in the 13 August application and granted by the 29 August decision has been filed within the time limit stipulated in regulation 65(4). Neither the appeal of 6 September nor the document of 10 September can be considered as such when the filing party states the contrary.

16. The legal representatives consider that it will not be for the Appeals Chamber to decide *proprio motu* to recharacterise the 10 September document filed under rule 155 in support of the appeal authorised by the Chamber, especially as the Defence itself does not seek such recharacterisation.

17. No document in support authorised by the Chamber on 29 August having been filed within the time limit fixed by regulation 65(4) of the Regulations of the Court, this appeal was not validly lodged and should be inadmissible if it is appropriate to rule on this matter.

18. Should this argument not find favour with the Appeals Chamber, the legal representatives would submit in regard to any document filed in support of the appeal authorised by the Chamber the same challenge to admissibility as that raised in respect of the 6 September appeal at paragraphs 22 *et seq.*

⁸ ICC-01/04-01/06-2919.

⁹ ICC-01/04-01/06-2917, para. 6.

IV. ADMISSIBILITY OF THE APPEALS FROM A PROCEDURAL STANDPOINT

19. This issue is determined by article 82(4) which provides: “[a] legal representative [...], the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order [...] as provided in the rules of Procedure and Evidence”.

20. This provision makes no distinction between article 75(1) and article 75(2), thus reflecting the intention of the Statute’s drafters to allow all decisions under article 75 to be appealable. However, even if the Appeals Chamber were to hold that such an appeal would only be allowable against an order made under article 75(2), excluding a decision taken under article 75(1), the Impugned Decision must necessarily also be examined as such (see part III).

21. A decision whereby the Chamber orders reparations for victims and a decision refusing such reparations cannot be distinguished by labelling the former an “order for reparations” (which is directly appealable) and the latter a “decision” which is not appealable by the victims. In the former case, it is the defence, and in the latter case it is the victims who have standing to lodge an appeal. To distinguish between the two types of decision would negate the rights of the victims to appeal against a decision rejecting their applications for reparations, a situation certainly not intended by the drafters of the Statute. Appeals lodged by victims are therefore admissible and the Defence’s 6 September appeal is not inadmissible from this perspective.

V. INADMISSIBILITY OF THE 6 SEPTEMBER APPEAL FOR LACK OF STANDING

22. The Appeals Chamber properly seeks to determine whether the appeals are also admissible from the perspective of the appellants' standing.

23. No reparations have been awarded against Mr Thomas Lubanga. The legal representatives therefore consider that he has no standing to seek a review of the Impugned Decision, and therefore his appeal is inadmissible.

24. Admittedly, the Court's instruments do not state whether an appeal may be lodged by a party which has no interest at stake, or only a purely subjective interest (such as an acquitted person who appeals because he or she disagrees with the Chamber's grounds for acquittal), but such appeal should be considered as an abuse of right.

25. Conversely, the Defence has standing to participate in the victims' appeals in that the victims are seeking awards for reparations against Mr Lubanga personally.

V. ADMISSIBILITY OF THE VICTIMS' APPEALS

26. The legal representatives filed an appeal and are making the present submissions on behalf on the victims grouped under the codes a/0001/06 (three persons) and a/0002/06 (two persons) who submitted applications for reparations, but also on behalf of victims represented under the codes a/0149/08, a/0003/06, a/0007/08, a/0049/06, a/0409/08, a/0610/08, a/0407/08, a/0398/09, a/0404/08, a/0162/07, a/0405/08, a/0611/08, a/0149/07, a/0523/08, a/0249/09, a/0155/07, a/0406/08, a/0156/07, a/0292/09, a/1622/10, a/0149/08 and a/0053/08, who participated in the proceedings but are yet to submit applications for reparations.

27. Although the Chamber stripped Victims a/0002/06 of the authorisation to participate in the criminal proceedings against the Accused, this does not imply that

it has ruled on these victims' applications for reparations, or that it excluded these victims from the discussion of their applications for reparations. It is only in the 7 August decision that the Chamber rejected these victims' applications for reparations. Accordingly, these victims have an interest in securing an amendment of the decision. The Chamber moreover held that the criteria for receiving reparations must be more flexible than those sanctioning participation (or, as applicable, continued participation) in the criminal proceedings against the Accused.

28. Victims a/0149/08, a/0003/06, a/0007/08, a/0049/06, a/0409/08, a/0610/08, a/0407/08, a/0398/09, a/0404/08, a/0162/07, a/0405/08, a/0611/08, a/0149/07, a/0523/08, a/0249/09, a/0155/07, a/0406/08, a/0156/07, a/0292/09, a/1622/10, a/0149/08 and a/0053/08, who participated in the entire proceedings but have not yet submitted applications for reparations, have an equally valid interest in the amendment of the Impugned Decision in that it deprives them of the right to submit applications for reparations to the Court under rule 94(1).

29. Neither the Statute, nor rule 94, nor regulation 88 of the Regulations of the Court require applications for reparations to be submitted before a particular stage of the proceedings. Moreover, many other applications were filed during the proceedings. These proceedings have not been completed.

VI. PARTICIPATION OF VICTIMS IN THE APPEALS LODGED BY THE DEFENCE

30. In the event of an appeal lodged under rule 150, regulation 59 provides: "[a] participant may file a response within 60 days of notification of the document in support of the appeal described in regulation 58". The legal representatives of the victims who participated in the trial proceedings are therefore entitled to file a response.

31. It would be difficult to argue that only the Defence and the Prosecutor may be considered as “participants” for the purposes of this regulation and that victims who participated in the proceedings are not participants when, unlike the Prosecutor, they may appeal against any order for reparations under article 82(4). Conversely, it may be argued that the Prosecutor should substantiate his standing to intervene in such appellate proceedings since he may not challenge the decision by lodging an appeal.

32. However, if the Appeals Chamber were to find admissible the appeal authorised by the Trial Chamber under article 82(1)(d), the victims, or at least those victims who had been authorised to participate in the proceedings before the Trial Chamber, should also be entitled to file a response.

33. The legal representatives respectfully submit that the majority ruling of the Appeals Chamber regarding interlocutory appeals is contrary, at least in spirit, to rule 156(2), which employs the concept of “all parties who participated in the proceedings before the Chamber that gave the decision that is the subject of the appeal”, and that it is inconsistent with regulation 65(5), which imposes a 10-day time limit on participants to file a response, which is practically impossible if the Appeals Chamber first had to reissue the authorisation to participate in the proceedings. Moreover, there is no indication that the term “participants” used in regulation 65(5) is substantially different from the one defined in rule 156, which regulation 65(5) merely applies. This interpretation encompasses all the victims represented by the V01 team, excluding Victims a/0002/06, whose authorisation to participate was withdrawn.

34. In any event, the 7 August decision is either an order for reparations or at least a decision organising the framework for reparations, so that the victims who applied for reparations are to be considered as “parties” to the reparations proceedings and

not merely “participants”, as the Impugned Decision has just recalled.¹⁰ Victims a/0001/06 have submitted such an application.

35. All the victims of the crimes of which Mr Lubanga has been convicted have a personal interest in participating in proceedings which will determine the reparations to which they will be entitled. This applies to victims who have already filed an application for reparations who have an interest in seeing their applications determined in judicial proceedings before the Court, as the Defence argues in its first ground, but it equally applies to the other victims who may yet file such applications.

36. Moreover, all the victims of the crimes of which Mr Lubanga has been convicted have standing to participate in these appellate proceedings in that the Impugned Decision will determine the modalities under which they may receive reparations, if appropriate through the Trust Fund for Victims.

37. Should the Appeals Chamber consider that the victims authorised to participate in the reparations proceedings should again secure authorisation to participate in one of the pending appeals, the legal representatives hereby apply for such authorisation in the alternative.

VII. SUSPENSIVE EFFECT OF THE APPEAL

38. The victims have an interest in seeing the reparations proceedings instituted as soon as possible. Some victims filed applications for reparations more than six years ago. Nonetheless, institution of reparations proceedings during the appellate proceedings could create legal uncertainty. In that event, the legal representatives would have no objection to the appeal having suspensive effect.

¹⁰ ICC-01/04-01/06-2904.

For these reasons, the legal representatives respectfully request the Appeals Chamber:

- **TO FIND** the appeal authorised by the Trial Chamber inadmissible.
- **TO FIND** the appeals lodged by the victims under article 82(4) of the Statute admissible.
- **TO FIND** that the convicted person has not filed a document in support of the appeal authorised by the Trial Chamber.
- **TO FIND** therefore that the convicted person lacks standing to seek the amendment or reversal of the Impugned Decision.
- **TO FIND** that the Defence nonetheless has standing to participate in the proceedings pertaining to the appeals lodged by the victims.
- **TO FIND** the Defence appeal unfounded or at least inadmissible.

IN THE ALTERNATIVE, should the Appeals Chamber consider that the victims must secure prior authorisation to file a response within the framework of an appeal against a decision under article 75 of the Statute:

- **TO AUTHORISE** the victims to file a response to the appeals lodged by the Defence and OPCV.

For the V01 team of legal representatives of victims,

The Legal Representatives,

[signed]

Luc Walley

[signed]

Franck Mulenda

Dated this 28 September 2012

At Brussels and Kinshasa, Democratic Republic of the Congo