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Date: **24 August 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 reparations of 7 August 2012***

**Source: Office of Public Counsel for Victims
V02 team of legal representatives**

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

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I. PROCEDURAL BACKGROUND

1. On 14 March 2012, Trial Chamber I handed down its *Judgment pursuant to Article 74 of the Statute*,¹ by which it found Mr Thomas Lubanga Dyilo guilty of the crimes of conscripting and enlisting children under the age of fifteen years into the *Force Patriotique pour la Libération du Congo* and using them to participate actively in hostilities pursuant to articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute between early September 2002 and 13 August 2003.²

2. On the same day, the Chamber issued its *Scheduling order concerning timetable for sentencing and reparations*,³ by which it invited the parties and participants to file submissions on issues related to reparations and the procedure to be followed.⁴ It also invited “other individuals or interested parties” to apply in writing for leave to file submissions on issues related to reparations.⁵

3. On 28 March 2012, the Office of Public Counsel for Victims (“OPCV”) submitted an application for leave to appear before the Chamber in respect of specific issues concerning reparations.⁶

4. On 5 April 2012, the Chamber issued its *Decision on the OPCV’s request to participate in the reparations proceedings*,⁷ by which it (i) instructed the Registry to appoint the OPCV as the legal representative for the unrepresented applicants and to provide it with the applications for reparations that have been received thus far, as

¹ See *Judgment pursuant to Article 74 of the Statute* (Trial Chamber I), ICC-01/04-01/06-2842, 14 March 2012.

² *Idem.*, para. 1358.

³ See *Scheduling order concerning timetable for sentencing and reparations* (Trial Chamber I), ICC-01/04-01/06-2844, 14 March 2012.

⁴ *Idem.*, para. 8.

⁵ *Ibid.*, para. 10.

⁶ See “Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on issues related to reparations proceedings”, ICC-01/04-01/06-2848, 28 March 2012.

⁷ See *Decision on the OPCV’s request to participate in the reparations proceedings* (Trial Chamber I), ICC-01/04-01/06-2858, 5 April 2012.

well as any future applications from unrepresented victims; and (ii) instructed the OPCV to file submissions on the principles to be applied by the Chamber with regard to reparations and the procedure to be followed, on behalf of those victims who have not submitted applications but who may fall within the scope of an order for collective reparations.⁸

5. On 18 April 2012, the OPCV filed its submissions on the principles to be applied by the Chamber with regard to reparations and the procedure to be followed.⁹ That same day, the other legal representatives of victims also filed their submissions on the issue.¹⁰

6. On 7 August 2012, the Chamber issued its *Decision establishing the principles and procedures to be applied to reparations* (“Impugned Decision”).¹¹

7. On 13 August 2012, the Defence filed its “*Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Decision establishing the principles and procedures to be applied to reparation » rendue le 7 août 2012*”¹² pursuant to article 82(1)(d) of the Rome Statute and rule 155 of the Rules of Procedure and Evidence.¹³

8. On 17 August 2012, Principal Counsel of the OPCV and the V02 team of legal representatives filed a “*Réponse conjointe à la « Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Decision establishing the principles and procedures to*

⁸ *Idem.*, para. 13.

⁹ See “Observations on issues concerning reparations”, ICC-01/04-01/06-2863, 18 April 2012.

¹⁰ See “*Observations du groupe de victimes VO2 concernant la fixation de la peine et des réparations*”, ICC-01/04-01/06-2869, 18 April 2012, and “*Observations sur la fixation de la peine et les réparations de la part des victimes a/0001/06, a/0003/06, a/0007/06 a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, et a/1622/10*”, ICC-01/04-01/06-2864, 18 April 2012.

¹¹ See *Decision establishing the principles and procedures to be applied to reparations* (Trial Chamber I), ICC-01/04-01/06-2904, 7 August 2012 (“Impugned Decision”).

¹² See “*Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Decision establishing the principles and procedures to be applied to reparation » rendue le 7 août 2012*”, ICC-01/04-01/06-2905, 13 August 2012.

¹³ *Idem.*, para. 4.

be applied to reparation » rendue le 7 août 2012”,¹⁴ in which they submitted that the Impugned Decision constitutes an “order for reparations” pursuant to article 75 of the Rome Statute, within the meaning of article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.¹⁵

9. Principal Counsel of the OPCV, in her capacity as legal representative of victims,¹⁶ and the legal representatives of the V02 team (“the Legal Representatives”), hereby lodge an appeal against the Impugned Decision pursuant to article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.

II. LEGAL BASIS FOR THE APPEAL

10. The Legal Representatives submit that, in view of its content and wording, the Impugned Decision constitutes an “order for reparations” issued pursuant to article 75 of the Rome Statute within the meaning of article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.

11. Firstly, the Trial Chamber has decided not to examine the individual applications for reparations received by the Registry,¹⁷ thereby rejecting them without considering them on their merits, and has ordered the Registry to transmit them to the Trust Fund for Victims (“TFV”), allowing the TFV the unfettered discretion to decide whether applicants are to be included in its reparations programmes.¹⁸ Furthermore, the Chamber has endorsed the collective form of

¹⁴ See “Réponse conjointe à la « Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Decision establishing the principles and procedures to be applied to reparation » rendue le 7 août 2012”, ICC-01/04-01/06-2907, 17 August 2012.

¹⁵ *Idem.*, paras. 12-15.

¹⁶ See *Decision on the OPCV’s request to participate in the reparations proceedings, supra*, footnote 7, para. 13. See also “Notification of appointment of the Office of Public Counsel of Victims as legal representative of unrepresented applicants for reparations”, ICC-01/04-01/06-2903, 27 July 2012, pp. 3 and 4.

¹⁷ See the Impugned Decision, *supra*, footnote 11, para. 289(a).

¹⁸ *Idem.*, paras. 284 and 289(a).

reparations based on a “community-based approach”¹⁹ in the present case, and ruled 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”.²⁰

12. Secondly, the Trial Chamber has delegated its own responsibilities for matters of reparations to two non-judicial entities. To the TFV it has delegated the tasks of (i) selecting and appointing appropriate experts and overseeing their work,²¹ (ii) determining the appropriate forms of reparations and implementing them,²² and (iii) identifying the victims and beneficiaries for the purposes of reparations,²³ and to the Registry it has delegated the task of deciding on the form in which victims should participate in the reparations procedure in order to express their views and concerns.²⁴ The Chamber has also endorsed (i) the reparations implementation plan suggested by the TFV²⁵ and (ii) the TFV’s method of assessing the harm suffered by the victims.²⁶

13. Lastly, the Chamber has left to a newly constituted chamber only the exercise of “monitoring and oversight functions” and the possibility of being seized of “any contested issues arising out of the work and the decisions of the TFV”,²⁷ emphasising that “[t]he Chamber will not otherwise issue, in this case, any order or instruction to the TFV on the implementation of reparations that are to be made through the TFV and funded by any voluntary contributions”.²⁸

¹⁹ *Ibid.*, para. 274.

²⁰ *Ibid.*, para. 269.

²¹ *Idem.*, para. 265.

²² *Ibid.*, para. 266.

²³ *Ibid.*, para. 283.

²⁴ *Ibid.*, para. 268.

²⁵ *Ibid.*, paras. 281 and 282.

²⁶ *Ibid.*, para. 283.

²⁷ *Ibid.*, para. 286.

²⁸ *Ibid.*, para. 287.

14. In light of the foregoing, the Legal Representatives submit that in the Impugned Decision the Trial Chamber has not only established the principles applicable to reparations²⁹ but also, at this stage, used its discretion to institute measures governing all essential aspects of the reparations proceedings under article 75 of the Rome Statute, both by delegating its responsibilities in respect of reparations to the TFV and the Registry and by approving specific measures suggested by the TFV for the purposes of implementing a Reparations Plan. It is not manifestly the Chamber's intention to review individual applications for reparations or intervene on any substantive issues relating to reparations, since it has delegated responsibility for any substantive decision in this regard to the TFV, while limiting the role of a newly constituted chamber to monitoring the decisions of the TFV. Accordingly, no decision emanating from a newly constituted chamber may be considered to be an "order for reparations" issued pursuant to article 75 of the Rome Statute within the meaning of article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.

15. The Legal Representatives further submit that in the event that the Appeals Chamber decides that the Impugned Decision does not constitute an "order for reparations" and does not warrant appeal under article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence, the reparations proceedings instituted by Trial Chamber I itself on 14 March 2012³⁰ would never give full effect to the victims' entitlement to participate effectively and expeditiously in the reparations proceedings or, in particular, to appeal against an order for reparations in accordance with article 82(4) of the Rome Statute.

²⁹ *Ibid.*, paras. 182-259.

³⁰ See *Scheduling order concerning timetable for sentencing and reparations*, *supra* note 3.

III. GROUNDS OF APPEAL

16. The Legal Representatives appeal the Impugned Decision on the following three grounds.

1) The Trial Chamber erred in law by dismissing the individual applications for reparations without considering them on their merits

17. The Legal Representatives intend to demonstrate that the Trial Chamber erred in law by deciding to dismiss the individual applications for reparations without considering them on their merits.

18. Article 75 of the Rome Statute grants victims the right to reparations and to submit applications for reparations to the Court. The Rome Statute requires the Court to give full effect to all rights and guarantees enshrined therein. It is incumbent upon the Court to rule on reparations, first and foremost, on the basis of an application for reparations and, secondly and in exceptional circumstances, on its own motion.³¹ When victims submit applications, it is incumbent upon the relevant chamber to order that the applications be notified to interested persons and invite them to submit observations.³² Lastly, it is incumbent upon the relevant chamber to examine the applications for reparations which are submitted and “in its decision [...] 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”.³³

19. Hence, by deciding not to examine the individual applications for reparations before it, the Trial Chamber failed in its obligation to give full effect to the victims’ right to reparations. The Chamber thereby deprived *de facto* the victims who had submitted the applications of the full exercise of their right to reparations under

³¹ See article 75(1) of the Rome Statute.

³² See article 75(3) of the Rome Statute and rule 94(2) of the Rules of Procedure and Evidence.

³³ See article 75(1) of the Rome Statute.

article 75 of the Rome Statute, that is, the right to have their applications for reparations duly examined and decided upon.

20. Moreover, the Chamber did not specify the “exceptional circumstances” which led it to rule on the matter of reparations on its own motion rather than on the basis of the applications for reparations submitted, in accordance with article 75(1) of the Rome Statute.

2) The Trial Chamber erred in law by deciding to refer the case to a newly constituted chamber at the reparations stage

21. The Legal Representatives further submit the Trial Chamber erred in law by deciding to refer the case to a newly constituted chamber at the reparations stage.

22. Firstly, the decision to refer the case contravenes the provisions of articles 39(2)(b)(ii), 74(1) and 76 of the Rome Statute and runs counter to the intent of the drafters of the Rome Statute.

23. Secondly, the decision is inconsistent with the Trial Chamber’s own previous decisions, which stipulate in particular that reparations proceedings are an integral part of the trial³⁴ and that there must be a full bench of three judges throughout the trial.³⁵ Thus, the decision gives rise to confusion and uncertainty in the application of jurisprudence of the Court and risks setting a precedent which is antithetical to the intent of the drafters of the Rome Statute.

24. Finally, the decision may affect, or compromise, the victims’ right to reparations under article 75 of the Rome Statute, since a new bench of judges who

³⁴ See the Impugned Decision, *supra* footnote 11, paras. 260 and 267.

³⁵ See the *Decision on whether two judges alone may hold a hearing – and – Recommendations to the Presidency on whether an alternate judge should be assigned for the trial* (Trial Chamber I), ICC-01/04-01/06-1349, 22 May 2008, paras. 12, 14(a) and 15.

have not previously heard the instant case risks omitting to consider relevant submissions and evidence, most of which have been presented during the main phase of the proceedings., including on the extent of the harm caused to the victims and their families; the cultural, social and economic context in which the crime was committed; the circumstances determining the gravity of the crime; etc.

3) The Trial Chamber erred in law by deciding to delegate its own reparations responsibilities to two non-judicial entities

25. Finally, the Legal Representatives submit that the Trial Chamber erred in law by deciding to delegate reparations responsibilities which are its sole preserve to two non-judicial entities: the TFV and the Registry.

26. In this connection, it is incumbent upon the relevant trial chamber to fulfil its own reparations responsibilities within a strictly judicial framework. It is obliged to establish principles to be applied to forms of reparations; determine the scope and extent of any damage, loss and injury to, or in respect of, victims³⁶; ensure the reparations proceedings are public;³⁷ appoint appropriate experts to assist it in determining the scope and extent of any damage, loss and injury to, or in respect of, victims and suggest various options concerning the appropriate types and modalities of reparations; and to invite, as appropriate, the persons affected to make observations on the reports of the experts.³⁸ There is no statutory provision for a trial chamber to delegate its own reparations responsibilities to another organ of the Court, particularly a non-judicial organ, or to an independent entity without judicial functions.

³⁶ See article 75(1) of the Rome Statute.

³⁷ See rule 96 of the Rules of Procedure and Evidence.

³⁸ See rule 97(2) of the Rules of Procedure and Evidence.

For these reasons, the Legal Representatives respectfully request the Appeals Chamber to

- **REVERSE** the Impugned Decision insofar as it provides for (i) the dismissal of the individual applications for reparations without examining them on their merits; (ii) the referral of the instant case to a newly constituted chamber; and (iii) the delegation by the Chamber of its own reparations responsibilities to the Trust Fund for Victims and the Registry; and

- **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.

[signed]

Paolina Massidda

[signed]

Carine Bapita Buyangandu

[signed]

Paul Kabongo Tshibangu

Dated this 24 August 2012

At The Hague, The Netherlands, and Kinshasa, Democratic Republic of the Congo