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No.: ICC-01/04-01/06

Date: 1 October 2012

Appeals Chamber

Before:

Judge Erkki Kourula
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Anita Ušacka and
Judge Ekaterina Trendafilova

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

Public document

**Observations in response to the
*Direction on the conduct of appeal proceedings***

Source: The Trust Fund for Victims

Document to be notified in accordance with regulation 31 of the***Regulations of the Court to:*****The Office of the Prosecutor**

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I. Procedural History

1. On 14 March 2012, the Chamber delivered the Judgment pursuant to Article 74 of the Statute.¹
2. On 7 August 2012, the Trial Chamber issued its "Decision establishing the principles and procedures to be applied to reparations"², ("Decision of 7 August" or "impugned decision") having considered the submissions of the parties, the Office of the Public Counsel for the Victims (the OPCV), various *amici curiae*, the Registry and the Trust Fund for Victims (the "Trust Fund" or the "TFV").
3. On 13 August 2012, the defence filed a request for leave to appeal the Decision of 7 August on eight separate issues relating to the principles and procedures established therein³ to the Trial Chamber under Article 82 (1) (d) of the Statute and Rule 155 of the Rules of Procedure and Evidence.
4. On 24 August 2012, the OPCV and the Legal Representatives of Victims V02 jointly filed an appeal against the decision of 7 August 2012 directly to the Appeals Chamber, interpreting the decision of 7 August 2012 to constitute an order for reparations in the sense of Article 75 and 82 (4) of the Statute and Rule 150 of the Rules of Procedure and Evidence.
5. On 29 August 2012, the Trial Chamber issued its "Decision on the defence request for leave to appeal the Decision establishing the

¹ Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC 01/04-01/06-2842

² Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, ICC-01/04-01/06-2904

³ Requête de la Défense sollicitant l'autorisation d'interjeter appel de la "Decision establishing the principles and procedures to be applied to reparations" rendue le 7 août, 13 August 212, ICC-01/04-01-06-2905

principles and procedure to be applied to reparations.”⁴ (“Decision on leave to appeal”). This decision grants leave to appeal on four separate issues and declines leave to appeal for a further four issues.

6. On 3 September 2012, the Legal Representatives of Victims V01 filed an appeal against the decision of 7 August 2012 directly to the Appeals Chamber, interpreting the decision of 7 August 2012 to be an order for reparations in the sense of Article 75 and 82 (4) of the Statute and Rule 150 of the Rules of Procedure and Evidence.
7. On 6 September 2012, the defence filed an appeal against the decision of 7 August directly to the Appeals Chamber, this time considering the decision of 7 August 2012 to be an order for reparations in the sense of Article 75 and 82 (4) of the Statute and Rule 150 of the Rules of Procedure and Evidence. In this appeal, the defence indicates that it will appeal the decision of 7 August in its entirety.
8. On 10 September 2012⁵, the defence filed a document in support of its interlocutory appeal of 13 August 2012. In this document it elaborates its views on the four issues, for which the Trial Chamber has granted leave in its decision of 29 August 2012.
9. On 17 September the Appeals Chamber issued “Directions on the conduct of the appeal proceedings”⁶. It asked the legal representatives of victims to indicate whom they represent in proceedings. It further

⁴ Decision on the defence request for leave to appeal the Decision establishing the principles and procedure to be applied to reparations, 29 August 2012, ICC-01/04-01/06-2911

⁵ Document déposé par la Défense à l'appui de l'appel à l'encontre de la « Decision establishing the principles and procedures to be applied to reparation » rendue par la Chambre de première instance I le 7 août 2012, 10 September 2012, ICC-01/04-01/06-2919

⁶ Directions on the conduct of the appeal proceedings, 17 September 2012, ICC-01/04-01/06-2923

invited, without prejudice to who has a standing in appeals proceedings, the various legal representatives of victims, the OPCV, as well as Mr Thomas Lubanga Dyilo, the Prosecutor and the Trust Fund for Victims to comment on three procedural issues. These include 1) the nature of the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, and 2) whether Mr Thomas Lubanga Dyilo, who was not ordered to make any specific reparations, and claimants for reparations, including those whose right to participate in the proceedings was withdrawn by virtue of the Trial Chamber's "Judgment pursuant to Article 74 of the Statute" of 14 March 2012 (ICC-01/04-01/06-2482) as well as those victims who may be affected by an order for collective reparations, have the right to appeal it under article 82 (4) of the Statute. 3) The Appeals Chamber also asked for observation on the suspensive effect requested by the defence.

II. Observations

1. On the nature of the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012

10. The nature of the impugned decision, and the proper form to file an appeal against it, may be interpreted in different ways. The determination of this issue will not only be important for setting the time limits for submissions but also decide on who may appeal and what scope appeals before the Appeals Chamber may have. The Trust Fund therefore welcomes that it was invited to comment on this important issue.

Appreciation by the Trial Chamber

11. The Trust Fund respectfully observes that the Trial Chamber itself viewed the decision of 7 August 2012 as a decision setting out a procedure rather than constituting an “order for reparations” in the sense of Article 82 (4) of the Statute. It stated explicitly: “The Chamber repeats that the Decision of 7 August 2012 does not constitute an “order for reparations” in the sense of Article 82 (4), given that reparations were not ordered in that decision.” Already the title of the impugned decision, “*Decision establishing the principles and procedure to be applied to reparations*”, underlines this intent of the Trial Chamber.

Applicability of Article 82 (4)

12. However, the Trial Chamber’s interpretation is not finally determinative of the nature of the impugned decision. Instead, the nature of the decision must be determined in view of its content and the context in which it was issued.
13. The Trust Fund respectfully submits that in its view, the impugned decision must be regarded to constitute an order for reparations in the sense of Article 75 of the Statute and hence, Article 82 (4) of the Statute should apply. In coming to this conclusion, it has considered the following arguments:

Dissolution of the Chamber

14. The Trust Fund recalls that the Chamber viewed reparations to be an integral part of the overall trial process.⁷ However, in this context it also stated that it “considers that it is unnecessary for the present judges of Trial Chamber I to remain seized throughout the reparations

⁷ Impugned decision, paragraph 260

proceedings. Therefore, reparations in this case will be dealt with principally by the TFV, monitored and overseen by a differently composed Chamber. During the implementation process, as indicated below, the Chamber will be in a position to resolve any contested issues arising out of the work and the decisions of the TFV.”⁸

15. The impugned decision constitutes the only comprehensive decision by the trial judges on the principles as well as substance of reparations applicable in the present case. If reparations are indeed an integral part of the trial process, this fact seems to support the view that the impugned decision must be understood as the order for reparations in the sense of Article 75 of the Statute in the present case, issued by the judges who heard the evidence throughout the main trial. The impugned decision then triggers an implementation phase to be overseen by a different set of judges.

Procedural situation as reflected by the Regulations of the Trust Fund

16. The Trust Fund respectfully submits that not only the context in which it was issued but also the substance of the decision support the interpretation that the impugned decision contains an order for reparations. The impugned decision contains the necessary constitutive elements of an order for reparations: the impugned decision orders collective reparations “through the Trust Fund”. Endorsing a phased approach,⁹ the Trial Chamber tasks the Trust Fund with implementing and overseeing community-based consultations with a view to elaborating proposals for collective reparations. These proposals are then

⁸ Impugned decision, Paragraphs 261 and 262

⁹ Impugned decision, paragraph 282

to be submitted to the Chamber for its approval. Accordingly, the impugned decision has set out a generally defined order for reparations, activating the implementation phase.

17. The Trust Fund notes that the Trial Chamber in the impugned decision states that it “remains seized of the reparations proceedings, in order to exercise any necessary monitoring and oversight functions in accordance with Article 64(2) and (3) (a) of the Statute (including considering the proposals for collective reparations that are to be developed in each locality, which are to be presented to the Chamber for its approval).” Furthermore, the Trial Chamber declines to issue specific orders to the Trust Fund given that the reparations will be funded using voluntary contributions provided to the Trust Fund.
18. The Trust Fund considers that the procedural situation that arises from the impugned decision corresponds to the situation described in Regulation 54-58 of the Regulations of the Trust Fund. This section of the Regulations presupposes that an order for reparations in the sense of Article 75 of the Statute has been made and that the implementation phase of reparations has thus begun.
19. In particular, Regulation 54 states that “when the Court orders that an award for reparations against a convicted person (...) be made through the Trust Fund in accordance with rule 98, sub-rules 2 to 4, of the Rules of Procedure and Evidence, the Secretariat shall prepare a draft plan to implement the order of the Court” (...). (Emphasis added). Regulation 57 then requires the Trust Fund to submit to the relevant Chamber the draft implementation plan for approval and to consult the relevant Chamber,

as appropriate, on any questions that arise in connection with the implementation of the award.

20. The fact that the impugned decision does not define in detail the nature and size of the award does not determine whether the impugned decision already contains an order for reparations in the sense of Article 82 (4). The Regulations of the Trust Fund¹⁰ explicitly foresee that, subject to the order of the Court, the Trust Fund may be tasked with determining the nature and/or size of awards. Because the Regulations also specify that in doing so it should take into account factors such as “the nature of the crimes, the particular injuries to the victims and the nature of the evidence to support such injuries, as well as the size and location of the beneficiary group”¹¹, it is clear that in reparations proceedings the Trust Fund may carry out determinations on behalf of the Court.

The issue of individual applications

21. The Trust Fund further notes that the Chamber decided not to examine individual application forms for reparations. Instead, the Chamber ordered that all individual applications be transmitted to the Trust Fund for Victims. In doing so, it stated “if the TFV considers it appropriate, victims who applied for reparations could be included in any reparation programme that is to be implemented by the TFV.”¹² The Trust Fund agrees with the submission of the Legal Representatives of Victims V01 in their appeal of 3 September 2012 that “thereby the Chamber made its

¹⁰ See Regulation 54-58; Regulation 69 Regulations of the Trust Fund

¹¹ See Regulation 55 Regulations of the Trust Fund

¹² See impugned decision, paragraph 84

final determination on the individual applications and thus issued an order for reparations, in as far as concerns this aspect.”¹³

Practical considerations

22. Aside from the legal arguments made above, the Trust Fund would like to respectfully submit some practical considerations.

23. The Trust Fund shares the concern voiced in the appeal filed by the OPCV and Legal Representatives of Victims V02 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 2012 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.” In the view of the Trust Fund, it is of great importance that victims may at the present stage present their views in the appeals proceedings. It therefore supports that they should have a standing to appeal, as explicitly foreseen in Article 82 (4) of the Statute.

24. Furthermore, the Trust Fund views that it may be a practical necessity to understand the implementation of the five phases described in the impugned decision as being an integral part of the implementation process of a reparations order. The Trust Fund will need to allocate considerable resources and staff time to implement the phases set out in the impugned decision. In doing so, the Trust Fund will need a degree of

¹³ See ICC-01/04-01/06-2914-tENG, of 3 September 2012, by V01 team of legal representatives, paragraph 6

discretion and flexibility to manage and move forward a complex consultative process, in order to keep it efficient while at the same time guaranteeing the rights of the defence and victims.

25. In addition, in the Trust Fund's view, once victims and their communities have developed suggestions for specific awards as a result of the consultative process envisaged in the impugned decision, these cannot easily be ignored. Such a consultative process will have raised the expectations of victims and their communities, who would have committed to engage in the reparations process. Any subsequent successful litigation resulting in a judicial determination that the outcomes of the consultative process, or even the process as such, cannot be approved for legal reasons would be likely to have problematic repercussions with victims and their communities and could erode the trust of the primary stakeholders in the reparations process. It might also become very difficult to ask victims and the affected communities for further cooperation in the reparations process and to hold new consultations, should this be necessary.
26. Because the impugned decision calls for an elaborate and resource intensive process to be managed by the Trust Fund, it is a practical necessity to achieve as much legal clarity at as early a stage as possible. The Trust Fund is mindful that in these first ever reparation proceedings before the International Criminal Court there have already been four separate appeals at present, raising fundamental questions.
27. In conclusion, in the Trust Fund's view, it seems advisable to allow for the more comprehensive appeals proceedings set out in Article 82 (4).

2) Standing to appeal under article 82 (4) of the Statute

- **Mr. Thomas Lubanga Dyilo**

28. In the Trust Fund's view, it is clear that Mr Lubanga, being the convicted person, should have the right to appeal the impugned decision because this decision directly affects him.
29. The principle of individual criminal responsibility underlies reparations as set out in Article 75 of the Statute. In other words, that the impugned decision is considering judicial reparations is a direct result of the fact that Mr. Lubanga has been found guilty. Accordingly, to provide for reparations is the primary legal responsibility of Mr. Lubanga as the convicted person; the question of whether and how he can contribute to their implementation is secondary.
30. Therefore and notwithstanding that the Trial Chamber found 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", the reparations order is directed against him as the "convicted person" and personally concerns him.
31. This understanding of reparations under Article 75 of the Statute is reflected in the Trial Chamber's finding in its decision of 29 August 2012 which states "it is misconceived for the prosecution to submit that because assets belonging to Mr. Lubanga have not been identified he is

unaffected by the reparations process, because this misrepresents the overall aim of the reparations system.¹⁴''

32. It is also reflected by the fact that Article 82 (4) of the Statute explicitly lists the convicted person as one of the possible appellants in Article 82 (4) proceedings against an order for reparations.

- **Claimants for reparations**

33. In the Trust Fund's view it is also clear that victims who have claimed reparations should have a right to appeal the impugned decision through their legal representatives at the present stage.

34. While the main trial prior to the conviction is about the guilt and innocence of the accused, reparation proceedings concern as their main focus the rights of victims to reparations and the obligation of the convicted person to redress the harm he or she has caused to these victims. Accordingly, Article 82 (4) explicitly foresees that "a legal representative of the victims" may appeal the reparations order. Moreover, in the present case, victims' interests are directly concerned by the impugned decision: as discussed above, the decision contains the constitutive elements of an order for reparations, including the determination that reparations should be "collective" and "through the Trust Fund".

- **Those whose right to participate in the proceedings was withdrawn by virtue of the Trial Chamber's "Judgment pursuant to Article 74 of the Statute" of 14 March 2012 (ICC-01/04-01/06-2482)**

¹⁴ Decision on the defence request for leave to appeal the Decision establishing the principles and procedure to be applied to reparations, 29 August 2012, ICC-01/04-01/06-2911, paragraph 23

35. The Trust Fund recalls that the persons for whom the right to participate was withdrawn had the dual status of victim/witnesses. The Trial Chamber held that they could no longer be considered to have a victims' status because it established that its original *prima facie* evaluation that they meet the criteria for victims' participation was incorrect. The concerned individuals presented contradictory evidence when testifying as witnesses in trial, which the Trial Chamber deemed could not be relied upon for the conviction of Mr. Lubanga. For example, material doubts emerged in some the cases whether they in fact had been engaged in the armed forces of the convicted person or, in other cases, whether they were under the age of 15 at the relevant time.
36. Accordingly, it seems that it would be consequential with a view to safeguarding the rights of the convicted person who is the subject of the reparations order, to consider that the concerned individuals have also lost their status to participate in reparation proceedings.
37. However, the Trust Fund also takes note of Judge Odio-Benito in her partial dissent¹⁵ and shares the Judge's concerns. Judge Odio-Benito recalled that according to the expert heard by the Trial Chamber severely traumatized children might likely give flawed evidence; yet they could still in fact be victims.
38. Furthermore, the impugned decision indicates that the standard of proof for reparation proceedings may be more flexible than that required in the main trial.

¹⁵ ICC-01/04-01/06-2842 Verdict, Separate and Dissenting Opinion of Judge Odio-Benito of 14 March 2012, paragraph 30

39. In light of these considerations, the Trust Fund proposes to the Appeals Chamber to make a case-by-case determination for each concerned individual whose right to participate in the proceedings was withdrawn by virtue of the Trial Chamber's Judgment, applying the standard of proof relevant to reparation proceedings.

- **Those victims who may be affected by an order for collective reparations?**

40. In answering this question, the Trust Fund would firstly like to recall that in its view, as set out previously¹⁶, it is explicitly foreseen in the applicable legal framework (including the Regulations of the Trust Fund) that also victims who have not filed an application for reparations may be eligible to benefit from reparations. This applies to both collective and individual forms of reparations.

41. The Trust Fund notes the challenge that at the present stage not all those victims who may be affected by an order for collective reparations have been identified yet. This will make it impossible to properly consult with them. Nonetheless, by definition, both the impugned decision and the present appeals proceedings concern them.

42. In the Trust Fund's view, however, appeals proceedings concerning reparations should take note of the interests of all those concerned by the reparations order. As illustrated by the list in Article 82 (4), this would include the convicted person, victims, and *bona fide* owners of adversely affected property. In order to resolve the dilemma presented by yet

¹⁶ Public redacted version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations, of 23 March 2012, paragraphs 374-378

unidentified victims who may be affected by an order for collective reparations, the Trust Fund suggests that the Court take their interests into account on its own motion. Legal counsel could also speak on behalf of this group of affected victims, but only in general terms, given that at this stage they will be unable to consult with these yet to be identified victims.

43. The Trust Fund also respectfully requests the Appeals Chamber to clarify, if it deems appropriate, the distinction that the Trial Chamber seems draws between “victims” and “beneficiaries”, which may be of relevance to fully understand the aspect of those concerned by the collective reparations order. In particular, it requests the Appeals’ Chamber to further elaborate on the finding of the Trial Chamber in its decision of 29 August 2012 where it states:

“Indeed, reparations will not be limited to those who participated in the trial and those who have applied for reparations, but they may benefit other individuals residing in the communities where the collective reparation programmes will be developed. However, these latter beneficiaries will not be granted victim status. For these reasons, the possibility that victim status may be granted in breach of the Rome Statute framework is not an issue that arises from the Decision.¹⁷”

3) Suspensive effect

44. The present appeals raise fundamental and complex legal and practical issues related to the determination of the final scope and form of the reparation awards. The Trust Fund therefore supports the request for suspensive effect.

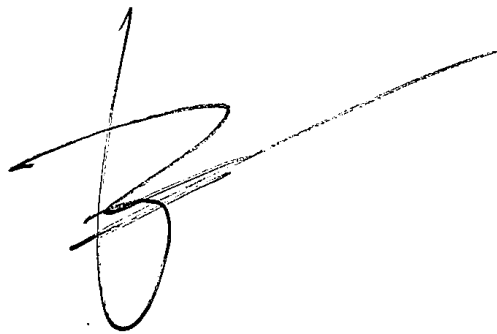
¹⁷ Decision on the defence request for leave to appeal the Decision establishing the principles and procedure to be applied to reparations, 29 August 2012, ICC-01/04-01/06-2911, paragraph 29

45. It would be very unfortunate, from an operational perspective, if any consultation with practitioners for advising on the design of the implementation plan and engagement with victims and their communities would commence, and then have to be halted or revised, following a legal determination that this had been inappropriate. In the Trust Fund's experience, re-traumatisation of victims and affected communities that could result from an interrupted or (partially) reversed implementation process must be avoided.
46. Moreover, supposing that the impugned decision is indeed to be considered an order for reparations in the sense of Article 75, Rule 150 of the Rules of Procedure and Evidence would apply. It states that decisions on appeal shall become final if an appeal is not filed. One could therefore argue that, *e contrario*, reparations are to be considered not final in the present case where appeals have been filed.
47. However, whilst advocating for suspensive effect to be granted, the Trust Fund is crucially aware of how this may affect the expectations and draw upon the patience of victims and their communities, considering also the amount of time that has passed since the crimes for which charges have been brought. The Trust Fund intends to be prepared to immediately make reparations for victims as reality once all legal matters are clarified. It is currently proceeding to establish a network of experts on the multi-disciplinary dimension of the design and implementation of Court-ordered reparations and may hold consultative meetings around these issues. To the extent possible, the Trust Fund will continue to engage with the Registry to prepare and align administrative processes related to the unprecedented implementation phase of Court-ordered reparations.

48. Finally, the Trust Fund respectfully requests the Appeals Chamber to clarify already at this stage, should it deem appropriate to do so, the related question of whether a potential appeal against the conviction as such may have a suspensive effect on reparation proceedings in the present case; and if so, whether this would also result in a suspension of the design of the implementation plan, including halting of activities such as a mapping and/or consultations with victims and affected communities. As the Trust Fund has previously submitted¹⁸, in its view, an appeal against the conviction would directly affect the implementation of a reparations order because of the principle of individual criminal responsibility, underlying Article 75. The implementation of reparations will affect Mr. Lubanga. Once granted, reparations will hardly be reversible should the conviction be overturned.

¹⁸ Public redacted version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations, of 23 March 2012, paragraphs 403-411

FOR THE FOREGOING REASONS, the Executive Director of the Secretariat of the Trust Fund for Victims, on behalf of the Board of Directors of the Trust Fund for Victims, respectfully requests the Appeals Chamber to take into account its observations when clarifying the open procedural issues and to grant suspensive effect.

A handwritten signature in black ink, consisting of a large, stylized 'P' followed by a horizontal line extending to the right.

Pieter W.I. de Baan

Executive Director of the Secretariat of the Trust Fund for Victims,
on behalf of the Board of Directors of the Trust Fund for Victims

Dated this 1 October 2012

At The Hague, The Netherlands