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

Date: **1 October 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**

**Defence observations pursuant to the *Directions on the conduct of the appeal proceedings* issued on 17 September 2012**

**Source:** Defence team for Mr Thomas Lubanga Dyilo

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

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## PROCEDURAL BACKGROUND

1. On 7 August 2012, the Trial Chamber rendered the *Decision establishing the principles and procedures to be applied to reparations* (“Decision on Reparations”).<sup>1</sup>
2. On 10 August 2012, Trial Chamber I informed the parties and participants that the decision was “[TRANSLATION] to be considered to have been officially notified in English” and that it “[TRANSLATION] was not a reparation order within the meaning of rule 150”.<sup>2</sup>
3. On 13 August 2012, the Defence sought authorisation to appeal the Decision on Reparations on the basis of article 82(1)(d) and rule 155(3).<sup>3</sup>
4. On 24 August 2012, the Office of Public Counsel for Victims and the V02 team of Legal Representatives appealed the Decision on Reparations.<sup>4</sup> The V01 team of Legal Representatives filed its own appeal on 3 September 2012.
5. On 29 August 2012, Trial Chamber I authorised the Defence to appeal against the Decision on Reparations on four issues,<sup>5</sup> confirming that the Decision on Reparations did not constitute an “order for reparations” within the meaning of article 82(4).<sup>6</sup>
6. Pursuant to the Appeals Chamber’s directions of 17 September 2012,<sup>7</sup> the Defence makes the submissions set out below.

### **a) The nature of the 7 August 2012 *Decision establishing the principles and procedures to be applied to reparations***

7. Contrary to the information provided by the Trial Chamber,<sup>8</sup> the Defence submits for the reasons set out below that the Impugned Decision must be

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<sup>1</sup> ICC-01/04-01/06-2904.

<sup>2</sup> E-mail from the Chamber to the parties and participants on 10 August 2012.

<sup>3</sup> ICC-01/04-01/06-2905.

<sup>4</sup> ICC-01/04-01/06-2909.

<sup>5</sup> ICC-01/04-01/06-2911.

<sup>6</sup> ICC-01/04-01/06-2911, para. 20.

<sup>7</sup> ICC-01/04-01/06-2923.

considered as falling under article 75, more specifically article 75(1), and is rightfully appealable under article 82(4):

8. Firstly, by virtue of its subject and findings, the Impugned Decision falls indubitably under the provisions of article 75(1), which deals with the “principles applicable to reparations”.
9. Secondly, the Trial Chamber has confirmed that it will issue no further decision or order on reparations in the case at bar.<sup>9</sup>
10. Thirdly, the Trial Chamber has charged the Trust Fund for Victims (TFV) with the implementation of the decision.<sup>10</sup> However, since the TFV is a non-judicial organ which lacks the power to issue “orders”, its decisions cannot be considered to be “orders for reparations” within the meaning of article 82(4) and rule 150. They can only be viewed as measures to execute the Chamber’s decisions on reparations. Accordingly, the Impugned Decision, which determines matters clearly falling under article 75(1) is, in the procedural approach erroneously adopted by the Chamber, the only decision which may be qualified as an order for reparations as defined in the Statute and the Rules of Procedure and Evidence.<sup>11</sup>
11. It follows that the Impugned Decision must be considered as an “order for reparations” within the meaning of article 82(4) which the Defence may appeal in accordance with rule 150.

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<sup>8</sup> On 10 and 29 August 2012, the Trial Chamber stated that the Decision on Reparations rendered on 7 August 2012 was not an order for reparations within the meaning of rule 150.<sup>8</sup> The Chamber’s position on this point is inconsistent with its decision of 4 May 2012 wherein it stated that once it issued its decision on reparations under article 75 of the Statute, the Defence would have the opportunity to appeal under article 82(4); ICC-01/04-01/06-2874, paras. 27-29.

<sup>9</sup> ICC-01/04-01/06-2904, para. 287.

<sup>10</sup> ICC-01/04-01/06-2904, para. 261.

<sup>11</sup> Moreover, the procedure outlined by the Trial Chamber with regard to reparations sets out no arrangements for Defence participation in the procedures of the TFV or for keeping the Defence informed of the TFV’s decisions (ICC-01/04-01/06-2904, para. 282-285); on account of the non-adversarial nature of these procedures, they cannot give rise to judicial “orders”.

**b) The right of appeal provided in article 82(4) of the Statute**

**i) The right of the convicted person to appeal the decision of 7 August 2012**

12. Article 82(4) expressly affords the convicted person the right to appeal the article 75 decision without differentiating between whether or not decisions rendered under that article are rendered directly against the convicted person.
13. The same holds true for rule 150, which also makes no such distinction.
14. This right of appeal of the convicted person against any decision on reparations awarded to persons who are victims of the crimes held against him is legitimate and justified, in particular for the following reasons.
  - a. **The Rome Statute vests the convicted person with the status of party during all stages of the proceedings concerning him or her, including the reparations stage**
15. The founding instruments of the ICC expressly provide for the participation of the convicted person in the assessment stage of reparations: the convicted person is notified of the reparations proceedings under rule 95; his or her submissions are required under article 75(3); and he or she may request the appointment of an expert under rule 97. Lastly, the convicted person is specifically mentioned in rule 97(3) which provides that his or her rights must be respected in all cases.
16. Indeed, Trial Chamber I rightly recalls that the Defence is a party to the reparations proceedings<sup>12</sup> and in this capacity will be able to raise any matters pertaining to the TFV's work and decisions as regards reparations.<sup>13</sup> The Chamber's reasoning regarding the participation of the convicted person at this stage of the proceedings is consistent with the provisions of the Statute and the Rules,<sup>14</sup> in particular rule 97(3) which provides that at the reparations

<sup>12</sup> ICC-01/04-01/06-2911, para. 23 and ICC-01/04-01/06-2904, para. 267.

<sup>13</sup> ICC-01/04-01/06-2911, para. 23 and ICC-01/04-01/06-2904, paras. 262 and 286.

<sup>14</sup> Articles 64(2), 67(1), 68(3), 82(4) and rule 97(3).

stage “[in all cases, the Court shall respect the rights of victims and the convicted person” [emphasis added].

17. None of the aforementioned provisions differentiates between whether or not orders for reparations are “made directly” against the convicted person.
18. Hence the right to appeal against the Decision on Reparations afforded to the convicted person by article 82(4), as a “Party” to the reparations proceedings, cannot seriously be called into question.

**b. The convicted person is necessarily affected by the orders for reparations, whether or not they are “made directly” against him**

19. The implementation of victim participation at all stages of the proceedings, including at the reparations stage, should in no way jeopardise the fairness of the trial.<sup>15</sup>
20. The Defence submits that the convicted person is unavoidably affected by any order for reparations in the proceedings against him by the International Criminal Court regardless of whether the award is made “made against him”.
21. By its nature, the allegation in reparations proceedings of individual and collective harm caused by the actions of the convicted person is a new and separate “civil” charge, against which the convicted person must be able to defend himself in the same conditions as for the criminal trial; that some “orders for reparations” may not “directly” affect the proprietary interests of the convicted person is immaterial in that his moral rights are unarguably affected.
22. This position is shared by the Trial Chamber, which notes in its 29 August 2012 decision that the reparations ordered will be the “expression of the Court's disapproval and condemnation of the wrongdoing of the convicted

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<sup>15</sup> Articles 67 and 68 and rule 97(3): 1. The participation of victims at the reparations stage must be conducted in a manner which is not prejudicial to or contrary to the right of the defence and the requirements of a fair and impartial trial.

person". Trial Chamber I concludes thereby that "Mr Lubanga is affected by the reparations awards even though they will not be funded using his assets or property".<sup>16</sup>

23. Ruling on the Defence application for authorisation to appeal the 7 August 2012 decision on reparations, the Trial Chamber further noted that four of the eight issues submitted by the Defence are likely to affect its rights by affecting the fairness of the proceedings.<sup>17</sup>
24. This approach is moreover consonant with the rules applicable before the only other international criminal court which provides for reparations for victims of war crimes and crimes against humanity, the Extraordinary Chambers in the Courts of Cambodia (ECCC).<sup>18</sup>
25. Nonetheless, the application of these rules does not impede the TFV from funding general projects for the benefit of the victims in Ituri, as it has done up until now, with no connection to the case at bar and without the involvement of the convicted person.<sup>19</sup> However, it is primordial that the independent payment of this compensation by the TFV be dissociated from the reparations awarded by the Court at the end of the judicial proceedings against Mr Lubanga, whose rights are safeguarded by the Statute.
26. It follows that the interpretation according to which the standing of the convicted person is exclusively linked to his ability to contribute to the funding of the reparations is wholly groundless.

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<sup>16</sup> ICC-01/04-01/06-2911, para. 23 [emphasis added].

<sup>17</sup> ICC-01/04-01/06-2911, paras. 23, 33, 36 and 38.

<sup>18</sup> Orders for reparations are made at the same time as the judgment, which the convicted person may appeal in its entirety. Internal Rules (Rev.5), Rule 105(1)(b): the Accused has the right to file an appeal against the entire judgment.

<sup>19</sup> See, for example, the numerous projects funded by the TFV to assist the victims in rebuilding their community, which have so far benefitted more than 81 500 victims in the DRC and Uganda: TFV/DRC/2007/R2/027, TFV/DRC/2007/R1/004, etc. <http://www.trustfundforvictims.org/projects>. See "Earmarked Support at the Trust Fund for Victims", p. 6, available at <http://www.trustfundforvictims.org>.

**ii) The right of the victims to appeal against the 7 August 2012 decision**

27. The Defence submits that only victims whose identity is known to the Defence, since they have been authorised to participate in the proceedings and have filed a reparations form, have standing to appeal the 7 August 2012 Decision on Reparations or to intervene in the appeals lodged against the 7 August 2012 Decision on Reparations.
28. Based on the information available so far, it appears that the OPCV is representing the interests of three groups of victims:
- Four victims whose authorisation to participate in the proceedings was withdrawn, *viz.* a/0047/06, a/0048/06, a/0050/06 and a/0052/06;<sup>20</sup>
  - Victim a/0198/09, who filed an application for reparations under rule 94<sup>21</sup> but did not file an application for participation; and Victim a/2917/11 who filed an application for participation/reparations,<sup>22</sup> but was not authorised to participate in the proceedings as a victim following a decision of the Trial Chamber;
  - Victims who did not file applications but who “may benefit from an award for collective reparations”.<sup>23</sup>
29. For his part, according to the information available to date, Mr Joseph Keta, a member of the V02 team, represents the interests of two groups of victims:
- Victims a/0241/06, a/0189/07, a/1610/10 and a/1621/10 whose applications for participation were expressly rejected by the Trial

<sup>20</sup> ICC-01/04-01/06-2842 (Judgment), para. 484 (Witnesses P-0010, P-0011, P-0007 and P-0008).

<sup>21</sup> This information appears at footnote 23 of document ICC-01/04-01/06-2921.

<sup>22</sup> This information appears at footnote 23 of document ICC-01/04-01/06-2921.

<sup>23</sup> ICC-01/04-01/06-2858.



Chamber in decisions rendered on 15 December 2008<sup>24</sup> and 30 June 2011;<sup>25</sup>

- Individuals who submitted applications for reparations but did not seek authorisation to participate in the proceedings, or who were not authorised to participate in the proceedings following a decision of the Trial Chamber.<sup>26</sup>

30. For their part, the V01 team of legal representatives represent, *inter alia*, Victim a/0002/06 and his father, who were also stripped of their right to participate in the proceedings by the Trial Chamber's judgment,<sup>27</sup> as were several other victims who have so far not filed applications for reparations as provided for in rule 94.<sup>28</sup>
31. The combined provisions of article 68 and rules 89 and 94 show that the right to appeal provided for in 82(4) is only enjoyed by victims expressly authorised by decision of the Chamber to participate in the reparations proceedings.
32. The application of this principle calls forth the following submissions:
33. Firstly, as concerns the victims whose right to participate was withdrawn by the Trial Chamber in its judgment,<sup>29</sup> the Defence is of the view that the Chamber's findings confirm that those individuals do not fulfil the criteria to be considered as "victims" within the meaning of rule 85. Moreover, the Chamber found that the testimony of those individuals was wholly devoid of

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<sup>24</sup> ICC-01/04-01/06-1556-Corr.

<sup>25</sup> See the Chamber's decision rejecting their applications for participation: ICC-01/04-01/06-2764-Conf; In spite of this decision, the Registry appointed the OPCV as their legal representative for the reparations stage.

<sup>26</sup> ICC-01/04-01/06-2903, ICC-01/04-01/06-2910, ICC-01/04-01/06-2883 and ICC-01/04-01/06-2925.

<sup>27</sup> ICC-01/04-01/06-2842 (Judgment), para. 484 (Witnesses P-0298 and P-0299, who bear the victim number a/0002/06).

<sup>28</sup> For example, Victims a/0149/06, 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. See ICC-01/04-01/06-2926, para. 26.

<sup>29</sup> Victims a/0225/06, a/0229/06, a/0270/07, a/0047/06, a/0048/06, a/0050/06 and a/0052/06, a/0002/06 and his father. See ICC-01/04-01/06-2842, paras. 484 and 502.

credibility or reliability.<sup>30</sup> In these circumstances, any further participation of those individuals in the proceedings in any manner whatsoever is groundless and would adversely affect Mr Lubanga's rights.

34. The same applies to the participation of Victims a/0241/06, a/0189/07, a/1610/10 and a/1621/10 whose applications for participation were expressly rejected by the Trial Chamber.
35. Secondly, with regard to victims who did not file applications in accordance with rules 89 and 94 but who "may benefit from an award for collective reparations", the Defence submits that the rules governing the participation of victims in the proceedings make no provision whatsoever for the representation of the general interests of unidentified victims. On the contrary the reparations stage, like the trial stage, deals with the specific interests of victims authorised to participate in the proceedings.<sup>31</sup>
36. Thirdly, only victims who have complied with the procedure set forth in rule 94 and have been expressly authorised to participate in the reparations proceedings<sup>32</sup> have a right to appeal the Decision on Reparations of 7 August 2012 under article 82(4) and to participate in the appeals lodged by other parties against the Decision on Reparations.
37. In this regard, the Court will note that many victims have not filed reparations forms within the meaning of rule 94.<sup>33</sup>
38. At the reparations stage, whilst the victim is granted the right to lodge an appeal under article 82(4), and thereby has the role of a "party", it is all the

<sup>30</sup> See ICC-01/04-01/06-2842, paras. 484 and 502.

<sup>31</sup> ICC-01/04-01/06-1432, para. 61.

<sup>32</sup> The Defence refers in particular to the Trial Chamber decisions authorising victims to participate in the proceedings: ICC-01/04-01/06-2764, ICC-01/04-01/06-2659, ICC-01/04-01/06-2115, ICC-01/04-01/06-2063, ICC-01/04-01/06-2035, ICC-01/04-01/06-1562 and ICC-01/04-01/06-1556.

<sup>33</sup> For example, Victims a/0149/06, 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. See ICC-01/04-01/06-2926, para. 26.

more reasonable for the victim's participation to be subject to a procedure that allows the Defence to exercise its rights.

39. In the case at bar, the Defence was not in a position to make submissions regarding many individuals<sup>34</sup> represented by Mr Joseph Keta and the OPCV who were referred to in the appeal filed on 24 August 2012.<sup>35</sup>
40. In this regard, the Court will note that Victims a/0032/10, a/0034/10, a/0036/10, a/0198/09, a/0737/10, a/1611/10, a/1613/10, a/1618/10, a/2015/11, a/2016/11, a/2017/11, a/2018/11, a/2019/11, a/2020/11, a/2021/11, a/2916/11, a/2917/11, a/2918/11, a/2919/11, a/2920/11, a/2921/11, a/2922/11, a/2923/11, a/2924/11, a/2925/11, a/2926/11, a/2927/11, a/2928/11, a/2929/11, a/2930/11 and a/2931/11 were never expressly authorised to participate in the reparations stage or in any other stage of the proceedings. These alleged victims not having been authorised to participate in the proceedings, they cannot be authorised to participate in any way whatsoever in the reparations proceedings and with more reason, they cannot be authorised to appeal against the final decision of the Trial Chamber concerning reparations.
41. Accordingly, to grant the right of appeal to these individuals who have never applied to participate in the proceedings and in regard to whom the Defence has not been in a position to make submissions would be antithetical to fair trial requirements.
42. Fourthly, only victims who have disclosed their identity to the Defence should be authorised to participate in the reparations stage and have the right to appeal against the Decision on Reparations under article 82(4).
43. This position is consistent with the Trial Chamber's decision of 18 January 2008 which stated: "The greater the extent and the significance of the

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<sup>34</sup> The Defence refers in particular to the individuals who are the subject of decision ICC-01/04-01/06-2903.

<sup>35</sup> ICC-01/04-01/06-2909.

proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself”.<sup>36</sup> The Chamber specified that in this respect, it would scrutinise the precise circumstances and the potential prejudice to the parties and other participants by the anonymous participation of the victims. Finally, on 26 February 2008, the Chamber emphasised that it would take into account the anonymity of a victim in determining the extent of his or her participation in order to safeguard the fairness of the proceedings.<sup>37</sup>

44. Yet, at the reparations stage, whilst victims are granted the right to lodge an appeal under article 82(4), thereby assuming a role equivalent to that of a “party”, their participation must necessarily be subject to the disclosure of their identity to the Defence in full respect of the Defence’s rights (article 68-1).
45. Although on 26 February 2008 the Chamber emphasised the exceptionality of maintaining the anonymity of victims,<sup>38</sup> the general rule has in fact been to conceal the identity of victims from the Defence. The Defence knows the identity of only one of the 85 victims who filed reparations forms.<sup>39</sup>
46. As regards the claims of insecurity which may be advanced by these victims, the Defence would emphasise that as it has demonstrated throughout the proceedings, it is extremely attentive to the protection of victims and witnesses.<sup>40</sup>
47. It follows that only victims who have disclosed their identity to the Defence, having filed an application for reparations within the meaning of rule 94 and

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<sup>36</sup> ICC-01/04-01/06-1119, para. 131.

<sup>37</sup> ICC-01/04-01/06-1191, para. 37.

<sup>38</sup> ICC-01/04-01/06-1191, para. 37.

<sup>39</sup> Save for a/0047/06, a/0048/06, a/0050/06, a/0052/06 and a/0002/06 who are no longer authorised to participate in the proceedings.

<sup>40</sup> The Defence has always conducted its investigation and verification with the utmost care for preserving the confidentiality of information which has been disclosed to it in accordance with the Chamber’s 3 June 2008 order governing the disclosure of confidential information to the public. ICC-01/04-01/06-1372.

having been authorised to participate in the proceedings by decision on the Chamber may appeal against the Decision on Reparations under article 82(4).

**c) The nature of the Defence filing ICC-01/04-01/06-2919 OA21 of 10 September 2012**

48. Contrary to the claim of the V01 team of legal representatives,<sup>41</sup> the document entitled “Defence document in support of the appeal against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparation*, rendered on 7 August 2012” was filed by the Defence on 10 September 2012 following the authorisation of the Trial Chamber<sup>42</sup> in accordance with regulation 65(4).
49. Regulation 58 was erroneously referenced at para. 7 of the Defence filing. That reference should be replaced by regulation 65(4). That clerical error cannot alter the nature of the Defence filing, which manifestly addresses only those issues which the Trial Chamber authorised in its decision of 29 August 2012.<sup>43</sup>
50. In any event, the document was properly registered as an interlocutory appeal lodged under rule 155. It is therefore appropriate for the document’s registration number to have been amended by the Registry on 10 September 2012 by adding the letters OA in accordance with regulation 26(4) of the Regulations of the Registry.<sup>44</sup>

**FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER:**

TO NOTE these submissions;

and

TO FIND that:

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<sup>41</sup> ICC-01/04-01/06-2926, paras. 14-18.

<sup>42</sup> ICC-01/04-01/06-2911.

<sup>43</sup> ICC-01/04-01/06-2911.

<sup>44</sup> E-mail sent by the Registry on Monday 10 September 2012 at 17:59.

- The 7 August 2012 decision must be considered as an “order for reparations” within the meaning of article 82(4) and rule 150(1);
- Mr Thomas Lubanga has the right to appeal under article 82(4) and rule 150(1);
- Only victims who have been authorised to participate in the present proceedings, filed an application for reparations, and disclosed their identity to the Defence have the right to appeal under article 82(4) and rule 150(1).

[signed]

**Ms Catherine Mabile, Lead Counsel**

Done this 1 October 2012 at The Hague, The Netherlands