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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
CORRIGENDUM TO THE
OBSERVATIONS OF THE VO2 TEAM OF LEGAL REPRESENTATIVES OF VICTIMS IN
ACCORDANCE WITH DIRECTIONS ICC 01/04 01/06-2923 A A2 A3 OA21**

Source: VO2 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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CORRIGENDUM TO THE

OBSERVATIONS OF THE VO2 TEAM OF LEGAL REPRESENTATIVES OF VICTIMS IN

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I. 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 *Forces Patriotiques pour la Libération du Congo* and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute from early September 2002 to 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 submitted an application for leave to appear in respect of specific issues related to 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 representatives for the unrepresented applicants and to provide it with the applications for reparations that have been received thus far, as 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 benefit from an order for collective reparations.⁸

5. On 18 April 2012, the legal representatives of victims filed their submissions on the principles to be applied by the Chamber with regard to reparations and the procedure to be followed.⁹

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

² *Idem*, para. 1358.

³ *Scheduling order concerning timetable for sentencing and reparations*, ICC-01/04-01/06-2844, 14 March 2012.

⁴ *Idem*, para. 8.

⁵ *Ibid.*, para. 10.

⁶ “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 *Decision on the OPCV’s request to participate in the reparations proceedings*, ICC-01/04-01/06-2858, 5 April 2012.

⁸ *Idem*, para. 13.

⁹ “Observations du groupe de victimes VO2 concernant la fixation de la peine et des réparations”, ICC-01/04-01/06-2869, 18 April 2012. “Observations on issues concerning reparations”, ICC-01/04-

6. On 7 August 2012, the Chamber issued its *Decision establishing the principles and procedures to be applied to reparations* (the “Impugned Decision”).¹⁰

7. On 13 August 2012, the Defence filed its “Defence application for leave to appeal against the *Decision establishing the principles and procedures to be applied to reparation* of 7 August 2012”¹¹ pursuant to article 82(1)(d) of the Rome Statute and rule 155 of the Rules of Procedure and Evidence.¹²

8. On 17 August 2012, the OPCV and the V02 team of legal representatives filed a “Joint response to the Defence application for leave to appeal against the *Decision establishing the principles and procedures to be applied to reparation* of 7 August 2012”,¹³ 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.¹⁴

9. On 24 August, the OPCV and the V02 team of legal representatives filed their appeal pursuant to article 82(4).¹⁵

10. 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*, by which it granted the Defence leave to appeal with respect to four issues.¹⁶

11. On 3 September 2012, the V01 team of legal representatives in turn filed an appeal pursuant to article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.¹⁷

12. On 6 September 2012, the Defence filed an appeal against the Decision in its entirety, also on the basis of article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.¹⁸

01/06-2863, 18 April 2012. “Observations on the sentence and reparations by Victims 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, and a/1622/10”, ICC-01/04-01/06-2864, 18 April 2012.

¹⁰ *Decision establishing the principles and procedures to be applied to reparations*, ICC-01/04-01/06-2904, 7 August 2012.

¹¹ “Defence application for leave to appeal against the *Decision establishing the principles and procedures to be applied to reparation* issued on 7 August 2012”, ICC-01/04-01/06-2905, 13 August 2012.

¹² *Idem*, para. 4.

¹³ “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.

¹⁴ *Idem*, paras. 12-15.

¹⁵ Appeal against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparation* of 7 August 2012, ICC-01/04-01/06-2909.

¹⁶ *Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations*, ICC-01/04-01/06-2911.

¹⁷ “Appeal against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparation* of 7 August 2012”, ICC-01/04-01/06-2914.

13. On 10 September 2012, the Defence filed a document in support of its appeal in accordance with regulation 58 of the Regulations of the Court.¹⁹

14. On 17 September 2012, the Appeals Chamber issued directions to the parties and participants in a document entitled *Directions on the conduct of the appeal proceedings*, inviting observations on the admissibility of the appeals.²⁰

15. In accordance with the aforementioned Appeals Chamber directions, the VO2 team of legal representatives of victims respectfully submits the following:

II – PERSONS REPRESENTED BY THE VO2 TEAM

16. For the purposes of the appeals procedure in question, the VO2 team represents three groups of victims:

- a. Applicants for reparations: a/0078/06, a/0105/06, a/0026/10, a/0027/10, a/0028/10, a/0029/10, a/0030/10, a/0031/10, a/0032/10, a/0033/10, a/0034/10, a/0035/10, a/0036/10, a/0037/10.
- b. Other applicants granted leave to participate in the trial, who have described the harm they have suffered but have not yet had the opportunity to state whether or not they intend to participate at the reparations stage: a/0016/06, a/0051/06, a/0154/06, a/0221/06, a/0224/06, a/0226/06, a/0227/06, a/0228/06, a/0230/06, a/0231/06, a/0232/06, a/0233/06, a/0234/06, a/0236/06, a/0237/06, a/0238/06, a/0239/06, a/0240/06, a/0241/06, a/0242/06, a/0243/06, a/0244/06, a/0245/06, a/0246/06, a/0247/06, a/0248/06, a/0250/06, a/0001/07, a/0004/07, a/0054/07, a/0055/07, a/0056/07, a/0057/07, a/0058/07, a/0059/07, a/0060/07, a/0061/07, a/0062/07, a/0063/07, a/0064/07, a/0065/07, a/0066/07, a/0168/07, a/0169/07, a/0170/07, a/0171/07, a/0172/07, a/0173/07, a/0174/07, a/0175/07, a/0176/07, a/0177/07, a/0178/07, a/0179/07, a/0180/07, a/0181/07, a/0182/07, a/0183/07, a/0184/07, a/0185/07, a/0187/07, a/0188/07, a/0189/07, a/0190/07, a/0191/07, a/0250/07, a/0251/07, a/0252/07, a/0253/07, a/0254/07, a/0255/07, a/0256/07, a/0257/07, a/0272/07, a/0273/07, a/0274/07, a/0275/07, a/0276/07, a/0277/07, a/0278/07, a/0280/07, a/0281/07, a/0282/07, a/0283/07, a/0284/07, a/0285/07, a/0122/08, a/0123/08, a/0124/08, a/0125/08, a/0126/08, a/0128/08, a/0130/08, a/0060/09, a/0335/10, a/1610/10, a/1615/10, a/1616/10, a/1619/10, a/1621/10
- c. Applicants having indicated that they wish to participate at the appeal stage (some already belong to one of the two aforementioned groups): a/0016/06, a/0051/06, a/0221/06, a/0224/06, a/0226/06, a/0227/06, a/0228/06,

¹⁸ “Appeal of the Defence of Mr Thomas Lubanga against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparation* rendered on 7 August 2012”, ICC-01/04-01/06-2917.

¹⁹ ICC-01/04-01/06-2919.

²⁰ *Directions on the conduct of the appeal proceedings*. ICC-01/04-01/06-2923.

a/0249/06, a/0250/06, a/0154/06, a/0234/06, a/0236/06, a/0237/06, a/0239/06, a/0240/06, a/0241/06, a/0001/07, a/0004/07, a/0042/07, a/0054/07, a/0055/07, a/0056/07, a/0057/07, a/0059/07, a/0060/07, a/0061/07, a/0062/07, a/0063/07, a/0064/07, a/0065/07, a/0066/07, a/0168/07, a/0169/07, a/0170/07, a/0171/07, a/0172/07, a/0173/07, a/0174/07, a/0175/07, a/0176/07, a/0177/07, a/0178/07, a/0179/07, a/0180/07, a/0181/07, a/0182/07, a/0183/07, a/0184/07, a/0185/07, a/0187/07, a/0188/07, a/0189/07, a/0190/07, a/0191/07, a/0250/07, a/0251/07, a/0252/07, a/0253/07, a/0254/07, a/0255/07, a/0256/07, a/0257/07, a/0271/07, a/0272/07, a/0273/07, a/0274/07, a/0275/07, a/0276/07, a/0277/07, a/0278/07, a/0279/07, a/0280/07, a/0281/07, a/0282/07, a/0283/07, a/0284/07, a/0285/07, a/0122/08, a/0123/08, a/0124/08, a/0125/08, a/0126/08, a/0128/08, a/0130/08, a/0060/09, a/0335/10.

- d. Applicants granted leave to participate in the trial who do not belong to any of the above groups and who have not yet submitted an application for reparations, due to their counsel not having been able to reach them on account of approval not having been given for missions on the ground, but who might ultimately submit their applications for reparations: a/0002/07, a/0003/07, a/0005/07, a/0333/10, a/0334/10, a/0336/10, a/0738/10, a/7339/10, a/0740/10, a/0002/06, a/0006/07, a/0612/08, a/0613/08.
- e. Applicants who have had their status of participating victim withdrawn in accordance with the provisions of the Judgment ICC-01/04-01/06-2842, but who remain, nonetheless, applicants for reparations: a/0225/06, a/0229/06, a/0270/07.
- f. The thirty-three applicants, clients of Mr Keta, represented temporarily by the OPCV (some of whom belong to the above groups): a/0241/06, a/0189/07, a/0032/10, a/0034/10, a/0036/10, a/0737/10, a/1610/10, a/1611/10, a/1613/10, a/1618/10, a/1621/10, 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/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/2931/11.²¹

III – THE NATURE OF THE IMPUGNED DECISION

17. The VO2 team considers that because of its content and formulation, the Impugned Decision constitutes an order for reparations rendered under 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.

18. Indeed, the Trial Chamber:

²¹ ICC-01/04-01/06-2903 30-07-2012.

- ✓ established the principles to be applied to the forms of reparations on the basis of article 75(1); it also decided not to examine the individual applications for reparations; in both cases, the decision constitutes an order for reparations;
- ✓ rejected the individual applications received by the Registry without an examination on the merits and ordered that they be transmitted to the Trust Fund for Victims (“TFV”), allowing the TFV unfettered discretion to decide which of those applicants are to be included in its reparations programmes;²² and
- ✓ approved collective reparations using the “community based approach” and found that “Mr Lubanga is only able to contribute to non-monetary reparation and any participation on his part in symbolic reparation such as a public or private apology to the victims is only appropriate with his agreement”.

19. The Trial Chamber delegated its own responsibilities for matters of reparations to two non-judicial entities.

20. It delegated to the TFV responsibility for selecting and appointing appropriate experts and overseeing their work, determining the appropriate forms of reparations and implementing them and identifying the victims and beneficiaries for the purposes of reparations.

21. Secondly, the Trial Chamber delegated to the Registry responsibility for deciding on the modes in which victims should participate in the reparations proceedings in order to express their views and concerns.

22. The Chamber endorsed the reparations implementation plan suggested by the TFV and the TFV’s method of assessing the harm suffered by victims.

23. Lastly, the Chamber reserved to a newly constituted chamber only “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”.

24. The measures taken by the Chamber vis-à-vis the TFV and the Registry constitute an order for reparations in that its decision is an order made against Mr Thomas Lubanga and it delegates to the TFV responsibility for performing tasks which fall within the discretion of a Trial Chamber. In fact, the victims represented by the VO2 team had sought individual reparations; they are therefore entitled to challenge that decision; the delegation of responsibility for matters of reparations to two non-judicial entities is prejudicial to victims who consider those two entities as supporting the LRV.

²² Decision establishing the principles and procedures to be applied to reparation, rendered on 7 August 2012; Decision ICC-01/04-01/06-2907 of 17 August 2012.

IV – VICTIM PARTICIPATION IN THE INTERLOCUTORY APPEAL

A – Admissibility

25. In the event that the Appeals Chamber were to decide that the impugned decision constitutes an order for reparations, the victims represented by the VO2 team will be entitled to appeal and their appeal will be declared admissible pursuant to article 82(4).

26. Article 82(4) makes no distinction between paragraphs 1 and 2 of article 75; in fact, a decision ordering reparations in respect of a victim and a decision refusing reparations in respect of a victim are still orders and are, accordingly, open to appeal; in the first case, it is the Defence which may appeal, while in the second, it is the victims; the appeal filed by the victims represented by the VO2 team is admissible because they have standing to appeal.

27. In so far as the Appeals Chamber should consider that the impugned decision does not constitute an order for reparations and is not therefore covered by the appeals procedure pursuant to article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence, the VO2 team hereby most respectfully submits as follows.

28. The jurisprudence of the Appeals Chamber concerning victim participation in interlocutory appeals filed under article 82(1)(d) of the Rome Statute provides:

- ✓ For an application for leave to participate in the appeal;²³
- ✓ That the Appeals Chamber shall satisfy itself that the person wishing to participate is a “victim” authorised to participate in the case at issue;²⁴ and
- ✓ That the application for leave to participate in the appeal must demonstrate how the personal interests of the victim are affected by that appeal; why the presentation of his or her views and concerns would be appropriate at that stage, demonstrating that such participation would not be in breach of or damaging to the rights of the defence.

29. It is noteworthy that the above-mentioned jurisprudence of the Appeals Chamber concerns only victim participation at the trial stage. The issue of appeal at the reparations stage of a case has never before been raised.

30. This is therefore a new element that could militate for a review of the jurisprudence on the subject of victim participation in an interlocutory appeal in reparations proceedings that substantively affect their interests.

31. Such was the reasoning of the Appeals Chamber in its decision ICC-01/05-01 /08-566 OA2. The Chamber refers therein to the possibility of reviewing its jurisprudence governing the participation of victims in interlocutory appeal proceedings where there are “convincing reasons to depart from its previous jurisprudence”.

²³ ICC-01/04-450OA4, para. 1.

²⁴ ICC-01 /04-01/06-452 OA12.

32. The VO2 team of legal representatives of victims considers that there are convincing reasons for the Appeals Chamber to depart from its previous jurisprudence concerning the participation of victims in interlocutory appeals.

33. In fact, this is the first time that the Appeals Chamber has been seized of an application by victims to participate in an interlocutory appeal at the reparations stage pursuant to article 82(1)(d) of the Rome Statute against a decision concerning reparations proceedings pursuant to article 75 of that Statute.

B - Participation

34. At this stage, the victims are in the front line and their personal interests are affected. These are reparations that could have consequences for their futures. That is why, at this stage, the Rome Statute bolsters the skills and staff of the teams of legal representatives and the Registry has decided not to modify their joint representation.²⁵

35. There is therefore no need for applicant victims and victims who are not applicants but who may benefit from an application for collective reparations, to apply to participate in the appeal as the reparations stage directly affects their personal interests.

36. The same holds true for victims who apply to participate in the reparations proceedings and those who, when they submitted their application to participate in the trial stage, mentioned therein their intention to participate in the reparations stage.

37. In proceedings which resulted in the conviction of the Accused and which gave rise to an order for reparations, those most affected must include victims seeking to participate in the proceedings and victims not making applications but hoping for collective reparations.

38. In sum, the number of individual victims at the reparations stage or the number of collective victims cannot in any way affect the rights of the convicted person or fair-trial guarantees.

39. In light of the foregoing, the VO2 team of legal representatives of victims considers that the participation in the interlocutory appeal of victims having submitted an individual application for reparations and victims who could be affected by an order for collective reparations is appropriate, given that the impugned decision affects their personal interests.

40. Four categories of victim are represented by the VO2 team (see paragraph 16 *supra*):

- a) Those having submitted a reparations form.
- b) Those having participated in the trial without having submitted a reparations form.

²⁵ "Notification of appointment of the legal representatives of victims and applicants for reparations", ICC-01/04-01/06-2910, 28-08-2012.

- c) Those having participated at the trial stage and who subsequently had their victim status withdrawn (225/06, 0229/06, 0270/06); on their forms, they asked to participate in the reparations stage. The decision of Trial Chamber I which withdrew their victim status did not rule as to their applications for reparations. It was only by the decision of 07/08/12 that their applications for reparations were rejected by the Chamber. Consequently, they have an interest in having that decision set aside.
- d) Applicants for reparations (33 applications) who have not yet been granted victim status. They have an interest in having the decision of 07/08/12 set aside since it deprives them of their right to submit an application for reparations to the Court pursuant to rule 94(1) and Regulation 88 of the regulations of the Court which do not set a time limit for the submission of an application for reparations.

41. In the alternative, the legal representatives of the victims submit that in the event that the Appeals Chamber holds that victim participation in the interlocutory appeal under article 82(1)(d) of the Rome Statute arising from the reparations proceedings under article 75 of the Rome Statute must be subject to the same regime established in its previous rulings, the victims whom they represent should be authorised to participate in the appeal.

42. For the purposes of this appeal, the VO2 team represents victims having submitted an individual application for reparations, as well as victims who may benefit from an order for collective reparations in so far as their participation is appropriate, in light of the fact that the Impugned Decision precisely and specifically affects their personal interests.

43. When they submitted their applications to participate in the proceedings, most of the victims wished to participate in the reparations stage without knowing in advance whether the Accused would be convicted and if the reparations stage would actually occur. Those victims are both individual applicants for reparations and individuals who have not applied but who could benefit from collective reparations.

V - THE RIGHT OF VICTIMS TO APPEAL AGAINST THE IMPUGNED DECISION UNDER ARTICLE 82(4) OF THE ROME STATUTE

44. In the event that the Appeals Chamber were to hold that the impugned decision constitutes an order for reparations under article 75 of the Rome Statute, the VO2 team of legal representatives of victims submits that the right to appeal the Impugned Decision under article 82(4) of the Rome Statute should extend to all victims whose personal interests are affected – those who have applied to participate in the reparations stage and those who have not applied but could benefit from collective reparations – given that those victims were given leave to participate in the proceedings.

VI – VICTIMS’ RIGHT TO FILE SUBMISSIONS IN RESPONSE TO APPEALS AGAINST THE IMPUGNED DECISION PURSUANT TO ARTICLE 82(4) OF THE ROME STATUTE

45. The VO2 team of legal representatives submits that victims who were granted leave by Trial Chamber I to participate in the reparations proceedings in the context of this case and whose interests are affected by the Impugned Decision should be able to file submissions in response to any appeal lodged pursuant to article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.

46. Under regulation 59 of the Regulations of the Court, participants may file a response within sixty days of notification of the document in support described in regulation 58.

47. That right of response under regulation 59 is granted to the Defence, the Prosecution and victims participating in the proceedings and at the trial stage and having a personal interest as to the matters under examination.

48. The victims are entitled to appeal against any order for reparations under article 82(4).

49. Thus, in the context of application of article 82(1)(d), victims having been authorised to participate in the trial proceedings should also be entitled to file a response. Thus, the VO2 team requests that the Appeals Chamber grant the said victims leave to file submissions in response to the appeals against the impugned decision pursuant to article 82(4) of the Rome Statute, whether they be applicant victims at the reparations stage, those having participated in the trial or those not yet having submitted an application for reparations.

VII - RIGHT OF THE DEFENCE TO APPEAL AGAINST THE IMPUGNED DECISION PURSUANT TO ARTICLE 82(4) OF THE ROME STATUTE

50. The Trial Chamber decided not to examine the applications for reparations and, as an order in accordance with article 75, that decision may be set aside.

51. Since the Trial Chamber refused to make an order for reparations against the convicted person, the VO2 team considers that the Defence has no standing to participate in the reparations stage.

52. Mr Thomas Lubanga was not ordered to pay any reparations. Given that the Court has considered him to be indigent, it follows that his participation in the reparations stage would do nothing more than delay proceedings.

53. Mr Thomas Lubanga’s appeal would be understandable had the order for reparations or the Impugned Decision of the Trial Chamber made provision for payment of reparations out of his property or assets. Given that he is considered to be “indigent”, it would be logical not to involve him in any debate in which he has no standing.

FOR THESE REASONS**May it please the Appeals Chamber:**

- To allow the interlocutory appeal filed by the victims;
- To grant them leave to respond to all submissions filed by all participants in that appeal.

AND JUSTICE SHALL BE DONE.

Dated this 1 October 2012

At Kinshasa, Democratic Republic of the Congo

[signed]

Carine Bapita Buyangandu

[signed]

Paul Kabongo Tshibangu

[signed]

Joseph Keta Orwinyo

Legal Representatives of Victims