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

Date: **8 April 2013**

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

**Response of the Defence for Mr Thomas Lubanga to the documents filed by the
victims in support of their appeals against the Trial Chamber's
*Decision establishing the principles and procedures to be applied to reparations of
7 August 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:

Office of the Prosecutor

Ms Fatou Bensouda
Mr Fabricio Guariglia

Counsel for the Defence

Ms Catherine Mabille
Mr Jean-Marie Biju-Duval
Mr Marc Desalliers
Ms Caroline Buteau

Legal Representatives of Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Paul Kabongo Tshibangu
Mr Joseph Keta

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

1. In accordance with the Appeals Chamber's Decision of 14 December 2012,¹ the Defence for Mr Thomas Lubanga wishes to submit the following observations in response to the documents filed by the victims² in support of their appeals against the *Decision establishing the principles and procedures to be applied to reparations* issued by the Trial Chamber on 7 August 2012.³

PART I: DEFENCE RESPONSE TO THE DOCUMENT FILED BY THE V01 GROUP OF VICTIMS IN SUPPORT OF THE APPEAL AGAINST THE DECISION ON REPARATIONS

SECOND GROUND OF APPEAL: THE TRIAL CHAMBER ERRED IN LAW BY ABSOLVING THE CONVICTED PERSON FROM ANY OBLIGATION AS REGARDS REPARATIONS

2. The Legal Representatives of the V01 group of victims submit that the Trial Chamber erred in determining that no reparations would be ordered against the convicted person, and that he would not be bound to contribute financially to the reparations to be ordered.
3. They argue that the Chamber's finding breaches article 75(2) and rule 98.
4. This ground of appeal is unfounded.
5. Under the combined provisions of rules 97, 98 and article 75(2), reparations awards may be collective or individual; in accordance with rule 98(1), only individual awards shall be made directly against a convicted person.
6. In asserting that article 75(2) "states that all orders for reparation shall be made against the convicted person",⁴ the Legal Representatives misconstrue the article. On the contrary, article 75(2) states that "the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims".⁵ Furthermore, it states that "the Court may order

¹ ICC-01/04-01/06-2953.

² ICC-01/04-01/06-2970 and ICC-01/04-01/06-2973.

³ Decision ICC-01/04-01/06-2904.

⁴ ICC-01/04-01/06-2973, para. 30 [emphasis added].

⁵ Emphasis added.

that the award for reparations be made through the Trust Fund provided for in article 79".⁶

7. It is for the Court to assess "the appropriate types and modalities of reparations"⁷ in order to determine which reparations are to be implemented. However, in the event that financial compensation for victims is contemplated as reparation, there is no provision to compel the Court to order that the sum of compensation should be paid in whole or in part by the convicted person.
8. In the present case, the Trial Chamber ruled that it would be preferable to adopt a "collective approach".⁸
9. Yet no provision states that collective reparations shall be ordered against the convicted person.
10. Furthermore, the Trial Chamber rightly considered that because the convicted person is indigent, he has insufficient means to contribute to reparations other than non-monetary reparations, and that his participation in symbolic reparations may be contemplated only with his agreement.⁹ This finding is consistent with rule 98.
11. It follows that the Legal Representatives' ground of appeal is wholly unfounded.
12. Lastly, in any event and as argued below, since the convicted person is affected by reparations proceedings, regardless of whether the awards are individual, he must, in all fairness,¹⁰ have the opportunity to be heard on all aspects concerning reparations.

⁶ Emphasis added.

⁷ Rule 97(2).

⁸ ICC-01/04-01/06-2904, para. 219.

⁹ ICC-01/04-01/06-2904, para. 269.

¹⁰ In accordance with articles 64, 67 and 68 and rule 97(3).

THIRD GROUND OF APPEAL: THE CHAMBER ERRED IN DECIDING THAT THE PROSECUTOR AND THE DEFENCE (ALTERNATIVE SUBMISSION) REMAIN PARTIES TO REPARATION PROCEEDINGS

13. The Legal Representatives submit that the Prosecutor should not be authorised to participate in the reparations stage under any circumstances and that the Defence should be authorised to participate only if the proceedings are to result in the award of reparations against the convicted person.

- Participation of the Prosecution at the reparations stage

14. As for the Prosecution's participation in the reparations stage, this ground of appeal by the Legal Representatives essentially concurs with the Defence's submissions to Trial Chamber I on 18 April 2012¹¹ and to the Appeals Chamber on 9 October 2012,¹² whereby it contended the following points:
15. The provisions on reparations in no wise contemplate the Prosecutor's participation at the reparations stage: she is not notified of the reparations proceedings under rule 95, her observations are not invited under article 75(3), she cannot request the appointment of an expert under rule 97 and, specifically, she cannot appeal against the Decision under article 82(4). Finally, she is not one of the parties whose rights at this stage of the proceedings are provided for by rule 97(3), i.e. the victims and the convicted person alone.
16. Hence, the procedural regime governing the reparations stage of the trial, which canvasses exclusively "civil" (or "private" or "individual") interests, contemplates the participation only of the Defence and victims represented by their counsel and therefore excludes the Prosecutor, whose intervention at this stage in the proceedings, devoid of any foundation, would be prejudicial

¹¹ ICC-01/04-01/06-2866-tENG.

¹² ICC-01/04-01/06-2937-tENG.

to the rights of the convicted person.

- Participation of the Defence at the reparations stage

17. The Court's founding documents make no provision for any participation of the Defence in reparations proceedings which exceeds the judicial framework, and which is not presented as being linked to the case in question. Such is the case, for example, for certain general projects implemented by the Trust Fund in Ituri with the Court's agreement.¹³ Moreover, the Defence has never been involved in these projects.
18. However, in the matter at bar, the Legal Representatives of the Victims object to the convicted person's participation in the reparations proceedings in the present case if the awards are not made directly against him. The Legal Representatives submit that the convicted person's participation in the reparations stage is contingent on his material or financial contribution to the reparations awarded.¹⁴
19. Contrary to the Legal Representatives' allegation, the convicted person's interest in the reparations proceedings flowing from his conviction cannot seriously be challenged, since they are implemented within the framework of the case which concerns him. This stance is consistent with previous Court rulings, the applicable founding documents and the convicted person's fundamental rights.
20. Firstly, the convicted person's interest in the reparations proceedings concerning him has been recognised in previous Court rulings. For example, in its *Decision on the admissibility of the appeals against Trial Chamber I's "Decision*

¹³ See, for example, the numerous projects funded by the TFV, which have already benefited 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>.

¹⁴ ICC-01/04-01/06-2973, paras. 39-44.

*establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings*¹⁵ the Appeals Chamber noted that it did not agree with the statement “that monetary contributions to reparations awards by the convicted person are the only basis for determining whether or not that individual is affected by an order for reparations”.¹⁶

21. Trial Chamber I also found that Mr Lubanga’s interests are affected by the decisions awarding reparations, even if he does not contribute financially to such reparations.¹⁷
22. Secondly, the basic texts of the ICC clearly provide for the participation of a convicted person at the reparations stage and there is no provision which allows for his or her exclusion. Therefore, a convicted person is entitled to receive the notifications provided for in rules 94(2) and 95(1) and is consequently entitled to file observations under article 75(3). He or she may also request that experts be called to assist the Court on any issue concerning reparations. Lastly, a convicted person has the right to appeal against the decision pursuant to article 75, thereby confirming that he or she is directly affected by any decision made under that article.
23. As a result, the convicted person must, in all fairness, have the opportunity to be heard on all aspects concerning reparations before the Chamber makes its order under article 75.
24. Lastly, it is clear from articles 67 and 68 and rule 97(3) that the participation of victims at the reparations stage must occur in a manner which is not prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial.

¹⁵ ICC-01/04-01/06-2953.

¹⁶ *Idem*, para. 66.

¹⁷ ICC-01/04-01/06-2911, para. 23.

25. Rule 97(3) provides that “[i]n all cases, the Court shall respect the rights of victims and the convicted person”. The rule does not differentiate between situations where reparations awards are ordered against the convicted person and those where, as in the present case, the convicted person is indigent.
26. Therefore, since a participating victim is alleging personal harm occasioned by a crime held against the convicted person, such allegations constitute a fresh and specific accusation against which that person must be able to mount a defence in accordance with the rights afforded to him under article 67.
27. Accordingly, the fairness of the trial ordains that the Defence be apprised of the applications for reparations submitted by the alleged victims and be afforded adequate time and resources to verify the truth of the allegations made by the individuals presenting themselves as victims, particularly as regards their civil status. The Defence furthermore must be afforded the opportunity to submit the result of its analyses and verifications to the Trial Chamber, where necessary by tendering evidence and/or seeking to call witnesses.
28. It is self-evident that the Defence’s exercise of this right must entail the lifting of the extensive redactions to the applications for reparations hitherto disclosed to the Defence, which have concealed the identity of the vast majority of victims or persons acting on their behalf, thereby preventing the Defence from knowing with sufficient precision the identity of the alleged victims and the factual circumstances cited in support of their applications.
29. On this point, the Defence refers to paragraphs 55 *et seq.* of its Appeal Brief against the *Decision establishing the principles and procedures to be applied to reparations* issued by the Trial Chamber on 7 August 2012.¹⁸

¹⁸ ICC-01/04-01/06-2972. The Defence raised this issue at the beginning of the proceedings before the Trial Chamber. See ICC-01/04-01/06-991, paras. 24 *et seq.*; ICC-01/04-01/06-1135, paras. 33-39; ICC-01/04-01/06-2866, paras. 8 *et seq.*; etc.

30. Lastly, the argument in paragraph 43 is based on a misinterpretation of the applicable texts. Rule 97 unequivocally states that “[i]n all cases, the Court shall respect the rights of victims and the convicted person”,¹⁹ without distinction of whether or not he or she would be called on to contribute financially to reparations awarded.

- Consequences of the convicted person’s participation

31. The Legal Representatives also contend that the involvement of the Defence at the reparations stage would entitle it to challenge before the Court any Trust Fund decisions pertaining to collective reparations and “[TRANSLATION] could give rise to an avalanche of appeals and applications to which the Registry, the Trust Fund and the Legal Representatives of the Victims would have to respond”.²⁰
32. However, it is clear from articles 67 and 68 and rule 97(3) that the participation of victims at the reparations stage must occur in a manner which is not prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial.
33. Rule 97(3) provides that “[i]n all cases, the Court shall respect the rights of victims and the convicted person”. The rule does not differentiate between situations where reparations awards are ordered against the convicted person and those where, as in the present case, the convicted person is indigent.
34. Hence it cannot reasonably be contended²¹ that the participation of the convicted person at a stage of the proceedings can be contested simply because the implementation of his or her fundamental rights under the Statute could lead to an increased workload for the other parties and significant costs for the Court.

¹⁹ Rule 97(3) [emphasis added].

²⁰ ICC-01/04-01/06-2973, para. 52.

²¹ ICC-01/04-01/06-2973, paras. 52-54.

- *Allegations of insecurity*

35. The allegations of insecurity made by the Legal Representatives in paragraph 57 of their observations to justify excluding the Defence from the work of the Trust Fund for Victims and to prevent disclosure of the victims' identity to the Defence are unfounded.
36. Firstly, the Legal Representatives provide no factual evidence to support their allegation.
37. Secondly, the Defence has always taken witness and victim protection very seriously, as has been evident throughout the proceedings. Thus, the Defence intends to participate in the reparations stage with the utmost consideration for the confidentiality of any information it receives, in accordance with article 68 and in compliance with any protection orders issued by the Court.

PART II: DEFENCE RESPONSE TO THE DOCUMENT FILED BY THE V02 GROUP OF VICTIMS AND THE OPCV IN SUPPORT OF THE APPEAL AGAINST THE DECISION ON REPARATIONS

- *Delegation of "reparations responsibilities to two non-judicial entities"*

38. The arguments raised by the Legal Representatives in paragraphs 55 to 57 have no bearing on the second issue under appeal; furthermore, these allegations are incorrect.
39. Contrary to the Legal Representatives' contention, the Trial Chamber has ensured that "measures are taken to give adequate publicity to reparation proceedings":²²

- On 14 March 2012, the Trial Chamber ordered the Registry to provide information as to the steps it was intending to take to notify the Judgment pursuant to rule 96 and the length of time this procedure

²² ICC-01/04-01/06-2970, para. 56.

would take;²³

- On 28 March 2012, the Registry informed the Chamber of the significant steps taken or to be taken by the Court's Public Information and Documentation Section (PIDS) and VPRS for the purposes of informing the people of Ituri of the consequences of the Judgment and the reparations proceedings.²⁴

40. Furthermore, the Legal Representatives cannot maintain that the number of victims eligible to participate in the case exceeds the number of victims who submitted applications for individual reparations.²⁵ Rather, the references cited²⁶ by the Legal Representatives show that the Chamber made no findings as to the number and proportion of children under the age of 15 years within the FPLC in its Judgment or the decision on sentencing.

- "*Relief sought*"

41. The Legal Representatives submit that, in accordance with rule 153(1), the Appeals Chamber should be seized of the issues pertaining to reparations within the meaning of article 75, "in lieu of the Trial Chamber".²⁷

42. The Defence is of the view that the remedy proposed by the Legal Representatives is inappropriate in the present case, because it would fall to the Appeals Chamber to conduct a first assessment of evidence which had never been assessed by a trial chamber and to issue a decision on this issue which would be considered *res judicata*; if such a decision were implemented, the Defence and the other participants in the reparations stage would lose their right to appeal enshrined in article 82(4).

²³ ICC-01/04-01/06-2844, para. 6.

²⁴ ICC-01/04-01/06-2850, paras. 3-11.

²⁵ ICC-01/04-01/06-2970, para. 55.

²⁶ ICC-01/04-01/06-2970, footnote 90.

²⁷ ICC-01/04-01/06-2970, paras. 59 *et seq.*

43. Rule 153(1) empowers the Appeals Chamber to confirm, reverse or amend a reparation order made under article 75. It presupposes that a reparation order has actually been issued by the Trial Chamber, which is not the case here. Article 75 does not authorise the Appeals Chamber to adjudge a matter which has not previously been adjudged by a trial chamber.
44. According to established case law before the ad hoc tribunals, the appeals procedure “is corrective and does not give rise to a *de novo* review of the case”.²⁸
45. In *Furundzija*, the ICTY Appeals Chamber confirmed:

The Appeals Chamber finds no merit in the Appellant’s submission which it understands to mean that the scope of the appellate function should be expanded to include *de novo* review. This Chamber does not operate as a second Trial Chamber. The role of the Appeals Chamber is limited, pursuant to Article 25 of the Statute, to correcting errors of law invalidating a decision, and errors of fact which have occasioned a miscarriage of justice.²⁹
46. Such a reading is confirmed by the specific procedure provided for at the ICC for appeals. For example, any participant who wishes to submit evidence which was not already submitted to the Trial Chamber must make a specific application pursuant to regulation 62.
47. Implementing the reparations procedure for the first time before the Appeals Chamber would be inconsistent with the rules governing appeals before the Court, since it would have to: (1) analyse the applications for reparations submitted by the applicants, (2) assess the evidence tendered and the reports submitted by experts to help the Court assess any injury, and (3) evaluate the observations submitted by the parties and participants, all for the first time.
48. It follows that the relief sought would deprive the parties of their right to appeal under the founding texts of the Court.

²⁸ *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, *Judgement*, 25 February 2004, para. 5; *Prosecutor v. Kupreškić*, Case No. 95-16-A, *Judgement*, 23 October 2001, para. 22.

²⁹ *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, *Judgement*, 21 July 2000, para. 40.

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

TAKE FORMAL NOTE of these observations;

DISMISS the second and third grounds of appeal submitted by the Legal Representatives of the V01 team;

and

REJECT the proposed “relief sought” by the Office of Public Counsel for Victims and the Legal Representatives of the V02 team.

[signed]

Ms Catherine Mabile, Lead Counsel

Dated this 8 April 2013, at The Hague