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No.: ICC-01/04-01/06
Date: 5 February 2013

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Anita Ušacka
Judge Sanji Mmasenono Monageng
Judge Ekaterina Trendafilova

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

Public Document

Document in support of the appeal against the *Decision establishing the principles and procedures to be applied to reparations* of 7 August 2012

Source: Legal representatives of the V01 group of victims

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

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I. PROCEDURAL BACKGROUND

1. On 7 August 2012, Trial Chamber I issued the *Decision establishing the principles and procedures to be applied to reparations*¹ (“Decision”).
2. On 13 August 2012, the Defence filed an application for leave to appeal against the Decision under article 82(i)(d) of the Statute and rule 155 of the Rules of Procedure and Evidence.²
3. On 24 August 2012, Principal Counsel of the OPCV and the legal representatives of the V02 group of victims lodged an appeal against the Decision³ under article 82(4) of the Statute and rule 150 of the Rules of Procedure and Evidence.
4. On 29 August 2012, the Chamber rendered the *Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations*,⁴ granting the Defence leave to appeal.
5. On 3 September 2012, the legal representatives of the V01 group of victims lodged an appeal against the Decision of 7 August 2012 under article 82(4) of the Statute and rule 150 of the Rules of Procedure and Evidence.⁵
6. On 6 September 2012, the Defence also lodged an appeal under article 82(4) of the Statute and rule 150 of the Rules of Procedure and Evidence.⁶

¹ ICC-01/04-01/06-2904. *Decision establishing the principles and procedures to be applied to reparations*. Pre-Trial Chamber I, 7 August 2012. “Decision”.

² ICC-01/04-01/06-2905-tENG, 13 August 2012.

³ ICC-01/04-01/06-2909-tENG, 24 August 2012.

⁴ ICC-01/04-01/06-2911, 29 August 2012. “Decision Granting Leave to Appeal”.

⁵ ICC-01/04-01/06-2914-tENG, 3 September 2012.

⁶ ICC-01/04-01/06-2917-tENG A3, 6 September 2012.

7. On 3 September 2012, the legal representatives of the V01 group of victims lodged an appeal against the Decision under article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.⁷
8. On 14 December 2012, the Appeals Chamber issued the *Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings*,⁸ by which it found the Defence appeal pursuant to article 82(1)(d) to be inadmissible and the direct appeals of the Defence and the legal representatives of victims to be admissible.
9. The Appeals Chamber invited the legal representatives to file a document in support of their appeal against the impugned Decision by 5 February 2013,⁹ which document is hereby filed.

II. GROUNDS OF APPEAL

10. The Legal Representatives are appealing against the impugned Decision on the following three grounds:
 - 1) *The Trial Chamber erred in law by dismissing the individual applications for reparation without examining them.*
 - 2) *The Trial Chamber erred in law by absolving the convicted person from any obligation as regards reparations.*
 - 3) *The Chamber erred in deciding that the Prosecutor and the Defence (alternative submission) remain parties to reparation proceedings.*

⁷ ICC-01/04-01/06-2904.

⁸ ICC-01/04-01/06-2953 A A2 A3 OA21, 14 December 2012.

⁹ *Ibid.*, p. 4.

1) The Trial Chamber erred in law by dismissing the individual applications for reparation without examining them

11. In respect of a series of individual applications for reparation, the Trial Chamber decided

[...] not to examine the individual application forms for reparations and instructs the Registry to transmit to the TFV all the individual application forms received thus far.

12. Article 75 of the Rome Statute vests victims with the right to submit applications for reparation before the Court.

13. Rule 94 provides that victims can apply for reparations to the Court and sets out the relevant application procedure. Regulation 88 of the Regulations of the Court even provides for the use of a specific form. A number of victims submitted such individual applications.

14. Pursuant to rule 95, the Court may award reparations to victims on its own motion after an accused has been found guilty. The Registry is then to notify the decision to the known victims, who may file applications for reparation. Rule 95 expressly provides that

that request will be determined as if it had been brought under rule 94.

15. Consequently, it behoves the Trial Chamber to make a determination in respect of applications for reparation filed by victims under rule 94 prior to any decision on guilt and of applications brought subsequently if it decides, pursuant to rule 95, to award reparations on its own motion.

16. In both cases, the Trial Chamber is duty-bound to

determine the scope and extent of any damage, loss and injury to, or in respect of, victims and [...] state the principles on which it is acting.¹⁰

17. This procedure is different from that for collective reparations provided for in rule 98(2) and 98(3).

18. In its Decision of 7 August 2012, the Trial Chamber decided to implement collective reparation proceedings. However, it also elected not to make a determination in respect of applications from individual victims and ordered the Registry to transmit all the applications to the Trust Fund for Victims (TFV) to deal with them at discretion:

If the TFV considers it appropriate, victims who have applied for reparations could be included in any reparations program that is to be implemented by the TFV¹¹

19. This decision is hard to reconcile with the letter of article 75 and rules 95 to 98, and, consequently, violates the victims' right to a determination on their applications.

20. The Legal Representatives consider that the Chamber could have sought the views of the TFV or other entities regarding the existing applications and any which may be brought by other victims,¹² without, however, absolving itself of its obligation under the Statute and the Rules to make a determination on individual applications, by surrendering its jurisdiction in favour of the absolute discretionary power of a non-judicial entity.

¹⁰ See article 75(1) of the Rome Statute.

¹¹ ICC-01/04-01/06-2904. *Decision establishing the principles and procedures to be applied to reparations*. Trial Chamber I, 7 August 2012. "Decision", para. 284.

¹² See rule 96(1), which expressly provides for reparation proceedings to be public so that other victims are informed.

21. The Chamber decided in its disposition that it would remain seized of proceedings in respect of collective reparations:

[The Chamber] c. Remains seized of the reparations proceedings, in order to exercise any necessary monitoring and oversight functions in accordance with Article 65(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.¹³

22. The justification given means that a differently composed chamber will in fact be seized of this issue.¹⁴

23. The Legal Representatives do not wish to comment on the composition of the chamber entrusted with oversight of the reparation proceedings; nor do they necessarily object to the reparation applications' being examined by another chamber, which could be one with expertise in this area.¹⁵

24. According to the Decision, this chamber would nevertheless be seized only of the collective reparations, since the individual applications would not be examined. Yet it is precisely for individual applications that article 75 of the Statute and rule 94 require a judicial decision.

25. The Legal Representatives recall rule 97(3), which states:

In all cases, the Court shall respect the rights of victims [...].

26. They are of the opinion that by depriving victims who have submitted individual applications for reparation of the right to have such applications examined and adjudged, the Chamber has violated that right.

¹³ ICC-01/04-01/06-2904, para. 289(c).

¹⁴ ICC-01/04-01/06-2904, para. 261.

¹⁵ The appeals by the Defence and by the OPCV and the V02 team on this point have not been followed by the V01 team of legal representatives.

2) The Trial Chamber erred in law by absolving the convicted person from any obligation as regards reparations

27. The Trial Chamber determined that the sole contribution of the convicted person to the reparations process would be a possible voluntary apology to the victims.¹⁶

28. It follows from the above decision and that of 29 August¹⁷ that the convicted person is under no obligation to contribute to reparations involving a pecuniary cost or even to non-monetary reparations, absent his consent. No order for payment or any other Court order has been issued against him.¹⁸

29. Reparation orders are issued directly and exclusively to the TFV without any judicial directive requiring the convicted person to indemnify the TFV for the payments it disburses, even in part.

30. The Legal Representatives are of the view that this constitutes a violation of article 75(2), which states that all orders for reparation shall be made against the convicted person, and “through” the TFV, where appropriate. Otherwise put, the TFV must ordinarily execute all orders for reparation on behalf of the convicted person.

31. This principle is confirmed by rule 98(1), which states that “[i]ndividual awards for reparations shall be made directly against a convicted person”, and/or rule 98(3), which states that “[t]he Court may order that an award for reparations against a convicted person be made through the Trust Fund...”.

¹⁶ ICC-01/04-01/06-2904. *Decision establishing the principles and procedures to be applied to reparations*. Trial Chamber I, 7 August 2012. “Decision”, para. 241.

¹⁷ ICC-01/04-01/06-2911, *Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations*, para. 39.

¹⁸ ICC-01/04-01/06-2904, para. 269.

32. An order by the Chamber to the TFV to disburse advances from its own resources¹⁹ does not alter the nature of such payments, because it merely entails executing an order against the convicted person through the TFV.
33. The Chamber appears to hold the erroneous view that the reparation amount awarded against a convicted person depends on that person's income, or assets provisionally seized by the Registry.²⁰
34. The Rules of Procedure and Evidence state that in assessing applications for reparation and the appropriate types and modalities of reparations, the Chamber must take into account:
- the scope and extent of any damage, loss or injury (rule 97(1));
 - expert opinions, as appropriate (rule 97(2));
 - the feasibility of making individual awards to each victim (rule 98(2));
 - the number of victims (rule 98(3)).
35. However, none of the Court's texts requires that the amount of reparations take into account the financial situation of the convicted person or the feasibility of implementing any order.
36. The Trial Chamber appears to be confusing the decision on reparations with the implementation of said decision, which is normally the province of the States Parties, pursuant to article 75(5). By declining to issue an order against the convicted person, the Chamber is pre-empting the person's potential ability to contribute to the reparations owed to the victims even after serving his sentence.

¹⁹ ICC-01/04-01/06-2904, para. 270.

²⁰ ICC-01/04-01/06-2904, para. 269.

37. This decision precludes any implementation by the States Parties, even if assets were later discovered or the convicted person obtained a well-paid position after his release. The reasoning in paragraphs 276 to 280 of the Decision is, therefore, merely an *obiter dictum* with no direct consequences for reparations in the instant case, as the Chamber itself acknowledged in its 29 August decision:

[T]he Decision states simply that States Parties should provide the Court with timely and effective assistance pursuant to Article 93(1)(k) and notes that “the ICC requires the cooperation of States Parties and non-states parties” before recommending that the Registry and TFV establish standard operating procedures, confidentiality protocols and financial reporting obligations. Therefore, the issue identified by the defence is based on an erroneous reading of the Decision.²¹

38. The award of reparations against a convicted person clearly does not preclude instructing the TFV to use other resources to pay the reparations awarded to the victims, as expressly authorised by rule 98(5), either in implementing a collective reparation programme or in disbursing advances to individual victims, in lieu of the convicted person.

3) The Chamber erred in deciding that the Prosecutor and the Defence (alternative submission) remain parties to reparation proceedings

39. The Trial Chamber ruled that

As already indicated, the reparations phase is an integral part of the trial proceedings, but unlike the Article 74 or the sentencing stages when the principal focus is on the defence and the prosecution, the Court is mainly concerned at this juncture with the victims, even though the prosecution and the defence are also parties to the reparations proceedings.

²¹ 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, para. 39.

40. The Chamber is right to implicitly consider that the victims are (also) full parties to the reparation proceedings. This is clear, not only from the Statute and the Rules of Procedure and Evidence, but also from the simple fact that at this stage of the proceedings, the victims who have made applications for reparation are the originators of the proceedings and are not, therefore, merely “participants” in proceedings instituted by another party.

Under article 75 victims have a right to seek reparations. As a claimant for reparations, such victims are clearly “parties” and have an explicit right under article 82, paragraph 4 to appeal an order for reparation.²²

41. Article 75(3) requires the Chamber to take account of representations from the convicted person, victims, other interested persons or interested States but makes no mention of the Prosecutor. Nor does the Prosecutor have a right to appeal against a reparations decision, precisely because the Prosecutor is not a party to such proceedings.

42. As for the participation of the Defence as a party to the reparation proceedings, the third ground is submitted in the alternative. If this ground is found to have merit, the Defence will clearly be entitled to participate as a party to any proceedings likely to result in a reparations order against the convicted person. Were the Appeals Chamber to find the second ground to be without merit, there would be no justification for the Defence to participate in the proceedings instituted by the TFV.

43. Rules 94 to 97 provide for the participation of the person against whom the applications for reparation are submitted or “against whom the Court is considering making a determination”. Conversely, these rules do not contemplate the participation of a convicted person against whom the

²² Helen Brady in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, ed. Roy Lee, International Publishers, p. 595.

chamber is not considering making a determination, as is the case in the impugned Decision.

44. Were the second ground of appeal to be dismissed, the reparation proceedings would have no financial or material repercussions for the convicted person, and the funding of the operation would rest exclusively with the TFV. There is no reason why a person should be party to proceedings which do not affect him or her.

45. In the decision on the Defence application, the Chamber explained its reasoning on the matter by the symbolic interest which the convicted person may have in the victims' not being awarded reparations, even from a third party, since such reparations could underscore the Court's disapproval of the wrongdoing of the convicted person:

Although the reparations approved by the Chamber, once the five-step implementation plan has been implemented, are likely to be by way of collective awards, they will also have an important symbolic function. Not least, they will be an expression of the Court's disapproval and condemnation of the wrongdoing of the convicted person. Thus, Mr Lubanga is affected by the reparations awards even though they will not be funded using his assets or property.²³

46. The Chamber essentially considers that the mere act of awarding reparations to the victims of a crime could cause prejudice to the person convicted of those crimes because it could convey an impression... of the Court's "disapproval and condemnation" of the crimes.

47. In the Rome Statute system, reparations are not an expression of the "Court's disapproval and condemnation" of the crimes committed. They are not a form

²³ *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, para. 23.

of sanction for the crimes. Disapproval and condemnation of the crimes are expressed in the decisions taken pursuant to articles 74 and 76 of the Statute.

48. Reparations are not awarded to victims on the basis of the gravity of the offences committed or the severity with which they are judged by the Chamber. They are based solely on the harm caused to the victims. Rule 97 on the assessment of reparations mentions only elements which are independent of the facts and their characterisation but are focused on the scope and extent of the damage, loss or injury caused to the victims. Whether the Chamber relies on aggravating or mitigating circumstances and whether it decides to hand down a harsh sentence as an example or, conversely, a lenient sentence has no bearing on reparations.

49. The Criminal Court does not possess a system of “punitive damages”, in which reparations serve as a means of expressing the judge’s view of the offences committed and, *in fine*, as a form of sanction, possibly with a symbolic function. The framework established by article 75 and rule 97 is influenced by civil law systems²⁴ and international human rights law, which perforce focus on the victim, not the perpetrator. The instruments and jurisprudence of the Court reflect the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”,²⁵ which the Chamber itself confirms contributed to its determination of the principles underpinning its decision:

185. The Chamber accepts that the right to reparations is a well-established and basic human right, that is enshrined in universal and regional human rights treaties, and in other international instruments, including the UN Basic

²⁴ See Peter Lewis and Hakan Friman in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, ed. Roy Lee, International Publishers: “Some delegations saw reparations as a method for victims to enforce their civil claims through the Court.... This view of reparations as a form of civil remedy to satisfy civil claims had a profound effect on the negotiations of the rules on reparations.”

²⁵ Resolution 60/147 adopted by the United Nations General Assembly on 16 December 2005.

Principles; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime; the Nairobi Declaration; the Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa; and the Paris Principles. These international instruments, as well as certain significant human rights reports have provided guidance to the Chamber in establishing the present principles.²⁶

50. The system conceived in the Rome Statute does not seek *per se* to restore the *status quo ante* for victims, especially as it provides for collective reparations. Rather, it is profoundly victim-oriented and is not intended as a form of additional sanction.
51. Even if reparation were to imply condemnation of the offences and emphasise their seriousness, this would be nothing more than a confirmation of the decisions taken by the Trial Chamber pursuant to articles 74 and 76 of the Statute and should not necessitate the convicted person's involvement in the reparations process implemented by the TFV and exclusively funded by its own resources.
52. Such involvement would entitle the Defence to contest all collective reparation decisions of the TFV before the Court, which would give rise to an avalanche of appeals and applications to which the Registry, the TFV and the legal representatives of the victims would have to respond.
53. The Defence has a role in reparation proceedings against the convicted person which may result in orders for reparations against him, even if this greatly increases the workload of the Chamber and generates significant cost, including for legal assistance for the various parties, which could exceed the resources available for the reparations.

²⁶ ICC-01/04-01/06-2904, para. 185.

54. Conversely, it would serve no purpose and be disproportionate, not to say a waste of the funds of the Court and the States Parties, to mobilise such resources solely to obviate the semblance of responsibility on the part of the convicted person for the harm done to a certain number of victims, which the Chamber itself has heretofore determined on several occasions.
55. Finally, disclosure to the Defence of the identities of all of the victims applying to the TFV for reparations, so that it may appraise their situation with a view to challenging their applications where appropriate, may logically be contemplated in proceedings where such applications are directed against the convicted person, but has no sense in a reparation programme funded without any contribution on his part.
56. The involvement of a person or persons convicted of international crimes in a collective reparation programme is unprecedented in the history of international justice. Those convicted at Nuremberg had no part in the reparation programme initiated by the German State, and those convicted by the Iraq Special Tribunal were not individually concerned by the reparation process established by the United Nations Compensation Commission.
57. Finally, the involvement of the Defence in the work of the Trust Fund for Victims, and disclosure of the identities of all the beneficiaries of the reparation programmes, would be likely to cause considerable security problems and could prompt a number of victims to desist from seeking reparations.

III. MEASURES SOUGHT

58. The Legal Representatives request the Appeals Chamber to set aside the impugned Decision in accordance with rule 153, such that the Trial Chamber will be duty-bound to decide anew in respect of reparations, taking into account the existing individual applications for reparation and any which may be made after the Chamber implements the procedure provided for in rule 95(1).

59. It would not seem appropriate for the Appeals Chamber to implement the reparation proceeding itself.²⁷ In any event, the Legal Representatives would then request the Appeals Chamber to apply rule 95; to set a time limit for the submission of new applications and the completion of existing applications; to accept the filing of supporting documentation; and to rule on all the applications, if necessary after seeking the opinion of one or more experts, if such a request is made pursuant to rule 97(2), and after authorising the victims and the convicted person to make observations on the reports of the experts.

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

- **SET ASIDE** the Impugned Decision insofar as it
 - (i) dismisses the individual applications for reparation without examining their merits;
 - (ii) declines to order the convicted person to pay any reparations; and

²⁷ Application made by the OPCV and the V02 group of victims, ICC-01/04-01/06-2909-tENG OA21

- (iii) retains the Prosecutor and, alternatively submitted, the Defence as parties in a process implemented by the Trust Fund for Victims.

- **DIRECT** Trial Chamber I to rule anew on the matter of reparations under article 75 of the Rome Statute in light of the findings of the Appeals Chamber.

For the V01 team of legal representatives of victims,

[signed]

Luc Walleyrn

[signed]

Franck Mulenda

Dated this 5 February 2013

At Brussels, Belgium, and Kinshasa, Democratic Republic of the Congo