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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

Prosecution's Submissions further to the Appeals Chamber's "Directions on the conduct of the appeal proceedings"

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Introduction

1. The Office of Public Counsel for Victims ("OPCV"), the legal representatives groups V01 and V02, and Thomas Lubanga have filed notices that they are appealing, directly to the Appeals Chamber, Trial Chamber I's "Decision on the principles and procedures to be applied to reparations" (the "Decision"). They all maintain that the Decision constitutes a final reparations order under Article 75 of the Statute thereby authorizing a direct appeal under Article 82(4) and Rule 150 of the Rules of Procedure and Evidence ("Rules").¹ Thomas Lubanga also separately appealed the Decision under Article 82(1)(d).²
2. The Appeals Chamber invited submissions on the admissibility of these appeals and on the question of standing. On the issue of admissibility, the Prosecution asserts that the appeals under Article 82(4) should be rejected *in limine*. The Decision is not a final reparations order triggering the regime set out in Article 82(4) and Rule 150. Rather, as reiterated and clarified by the Trial Chamber, the Decision is an interim measure as it establishes the principles and procedures applicable to reparations but does not order reparations.³ Even without the Trial Chamber's confirmation on this point, the very terms of the Decision reflect its interlocutory nature; most notably, the final disposition states that the judiciary will remain seized of the reparations proceedings to monitor them, adjudicate any contested issues that arise and, most importantly, *approve proposals for collective reparations*.⁴ These provisions make it clear that a final reparations order has yet to be rendered. It follows that an appeal of the Decision can only lie through an application for leave to appeal under Article 82(1)(d) and Rule 155.
3. In relation to the issue of standing, the Prosecution reiterates that Thomas Lubanga has no standing to appeal the Decision, either under Article 82 (1) (d) or

¹ ICC-01/04-01/06-2909, paras.12-15; ICC-01/04-01/06-2914, paras.5-8; ICC-01/04-01/06-2917, paras.6, 9-11.

² ICC-01/04-01/06-2919.

³ ICC-01/04-01/06-2911, para.20.

⁴ ICC-01/04-01/06-2904, para.289(c).

under Article 82 (4) (accepting *arguendo* that the Decision could qualify as a reparations order) given that he will not contribute to any reparations and would thus be unaffected by any reparations order.

4. As for the standing of victims seeking to appeal, Article 82(4) provides that victims can solely appeal a “reparations order”. If, as the Prosecution urges, this Decision is not a final reparations order under that provision, the victims necessarily cannot appeal it. The only possible avenue to challenge the ruling on appeal would be through a successful application for leave to appeal under Article 82(1)(d) and this would also be unavailable to victims, since Article 82(1)(d) is reserved to the parties (Prosecution and Defence).
5. Should the Chamber consider that the Decision is sufficiently final as to permit an appeal by victims under Article 82(4), the Prosecution submits that only one class of victims presently has standing, namely those persons who currently have a recognized status as victims. Standing requires a procedural status in the case and a real – not abstract or theoretical – interest in the outcome. It follows that only those persons whose applications were assessed on a *prima facie* level by the Trial Chamber and granted the status of victims during the proceedings have a genuine interest in the Decision. Unfortunately, those individuals whose status as victims was withdrawn after review by the Trial Chamber are no longer participants in these proceedings. They do not have standing to appeal the Decision.
6. Similarly, those victims who have not yet been recognized as potential beneficiaries but who *may* be affected by an order for collective reparations do not have standing in the instant appeals. These claimants have not yet been identified, the collective reparations have not yet been determined and, in any event, the Chamber has not yet approved such final proposals for reparations. In such circumstances, it is premature to provide an anonymous and undefined class of persons standing in this matter. Once determinations are made as to the class

or classes of claimants and the proposed collective awards, and once a final reparations order is rendered, then this class of claimants will have a real, tangible interest in those decisions with corresponding rights of standing on appeal.

7. Finally, the Prosecution opposes Thomas Lubanga's request for suspensive effect. There is no irreparable prejudice to him if the process set out in the Decision commences.

Procedural Background

8. On 7 August 2012, Trial Chamber I ("Trial Chamber") issued its "Decision establishing the principles and procedures to be applied to reparations" ("Decision").⁵
9. On 10 August 2012, the Trial Chamber informed the parties that the Decision does not constitute a reparations order within the meaning of Rule 150.⁶
10. On 13 August 2012, Thomas Lubanga filed a request for leave to appeal the Decision.⁷ On 29 August 2012, the Trial Chamber granted him leave to appeal the Decision on four issues.⁸ On 10 September 2012, Thomas Lubanga filed his document in support of the Article 82(1)(d) appeal, which included a request for suspensive effect.⁹ On 13 September 2012, the OPCV filed a request for leave to participate in his appeal under Article 82(1)(d).¹⁰ On 21 September 2012, the Prosecution filed its response.¹¹
11. Meanwhile, on 24 August 2012, the Office of Public Counsel for Victims ("OPCV") and legal representatives group V02 jointly filed a notice to appeal the

⁵ ICC-01/04-01/06-2904.

⁶ Email communication from the Legal Advisor of the Trial Division to the parties on 10 August 2012 at 16:53.

⁷ ICC-01/04-01/06-2905.

⁸ ICC-01/04-01/06-2911.

⁹ ICC-01/04-01/06-2919.

¹⁰ ICC-01/04-01/06-2921.

¹¹ ICC-01/04-01/06-2924.

Decision directly to the Appeals Chamber pursuant to Article 82(4).¹² On 3 September 2012, legal representatives group VO1 also filed a notice of appeal under Article 82(4).¹³

12. Notwithstanding that he had been granted leave to appeal under Article 82(1)(d), on 6 September 2012 Thomas Lubanga filed a notice to appeal the Decision under Article 82(4), which included a request for suspensive effect.¹⁴
13. On 17 September 2012, the Appeals Chamber issued “Directions on the conduct of the appeal proceedings” (the “Direction”) in which it invited the parties to address preliminary issues of admissibility and standing.¹⁵
14. The Prosecution hereby files its submission in response to the Direction, which includes its response to Thomas Lubanga’s request for suspensive effect.

The Prosecution’s Submissions

15. In its Direction, the Appeals Chamber invited the Prosecution, the legal representatives, OPCV, the Trust Fund for Victims and the Defence to file submissions on the admissibility of the Article 82(4) appeals and on the question of standing, including whether Thomas Lubanga and claimants for reparations (those whose right to participate in the proceedings was withdrawn by virtue of the Trial Chamber’s “Judgment pursuant to Article 74 of the Statute,”¹⁶ as well as those who may be affected by an order for collective reparations), have the right to appeal under Article 82(4) of the Statute.¹⁷
16. The Prosecution responded within the statutory time limit to Thomas Lubanga’s Article 82(1)(d) appeal.¹⁸ That response addressed the merits of his appeal and also included initial observations on Thomas Lubanga’s standing, noting that it

¹² ICC-01/04-01/06-2909.

¹³ ICC-01/04-01/06-2914.

¹⁴ ICC-01/04-01/06-2917.

¹⁵ ICC-01/04-01/06-2923 0A21.

¹⁶ ICC-01/04-01/06-2482.

¹⁷ ICC-01/04-01/06-2923 0A21, para.2(b).

¹⁸ ICC-01/04-01/06-2924, paras.12-16.

would separately file submissions on that issue in accordance with the Chamber's invitation. In retrospect, it appears that the Appeals Chamber intended to receive submissions solely on the issues of admissibility and standing of *both* the direct appeals under Article 82(4) and the Article 82(1)(d) appeal prior to hearing arguments on the merits of these appeals. Given that the Direction was issued only a few days prior to the expiry of the time limit to respond to Thomas Lubanga's Article 82(1)(d) appeal, and that the Prosecution understood it to relate mainly to the direct appeals, the Prosecution filed its substantive response to the Article 82(1)(d) appeal so as to ensure compliance with the statutory appeals deadlines. Should the Appeals Chamber find that Thomas Lubanga has standing to appeal under Article 82(1)(d), then the Prosecution's response on the merits of his appeal has already been filed.

17. The Prosecution hereby provides its submissions on the issues of admissibility and standing for both the Article 82(1)(d) and Article 82 (4) appeals.

(a) The Prosecution's response to the issue of admissibility

18. Contrary to the submissions of OPCV, the legal representatives V01 and V02 and Thomas Lubanga,¹⁹ the Decision is not a reparations order that gives rise to a direct right of appeal pursuant to Rule 150. It is not a final ruling. By its very nature, the Decision is interim: it only defines the parameters by which reparations will be considered and the process for arriving at the final reparations order. Nor does it make any determinations as to the awards that will be granted. To the contrary, the Decision anticipates steps that have yet to be undertaken before the Court renders its final reparation order.

19. The Trial Chamber made this clear when it stated that "The Chamber repeats and emphasises that the Decision of 7 August 2012 does not constitute an 'order for

¹⁹ ICC-01/04-01/06-2909, paras.10-15; ICC-01/04-01/06-2914, paras.5-8; ICC-01/04-01/06-2917, paras.6, 9-11.

reparations’ in the sense of Article 82(4), given reparations were not ordered in the Decision. Rather, the Decision establishes principles and procedures relating to reparations, pursuant to Article 75(1). On this basis, Article 82(1)(d) is the correct legal basis for the defence request”.²⁰

20. A plain reading of the Decision supports the Trial Chamber’s view and demonstrates its interlocutory effect. The Decision does not order reparations to any persons or groups. Instead, it sets out principles and procedures that the Court must respect when, in the future, it makes a final decision on reparations deciding on reparations.²¹

21. The Decision thus establishes prospective procedures for reparations to be taken under the supervision of the judiciary that will culminate in the judicially approved reparations plan and issuance of the final reparations order: the Court will retain experts to assist the Court in preparing and implementing a reparations plan; the Trust Fund for Victims (“TFV”) along with the Registry, the OPCV and the experts will initiate a five-step implementation plan; and, finally, proposals for collective reparations will be presented to the Chamber for its approval.²²

22. Thomas Lubanga’s argument that the Decision is final as to the Defence because it does not establish modalities of Defence participation is flawed both factually and legally.²³ First, the Decision does in fact set out that the Defence can bring issues regarding the work and decisions of the TFV to a Chamber for resolution,²⁴ and second, even if a Defence role were hereinafter excluded, that still does not make the Decision a final “reparations order”.

²⁰ ICC-01/04-01/06-2911, para.20.

²¹ ICC-01/04-01/06-2904, paras.180, 189, 190, 192, 195, 198-201, 207-208, 211, 213, 218, 221, 232.

²² ICC-01/04-01/06-2904, paras.263, 281-282 and 289.

²³ ICC-01/04-01/06-2917, para.9.

²⁴ ICC-01/04-01/06-2904, paras.261, 262, 286, 289.

23. Nor does the assignment of functions to the TFV convert the Decision into a final appealable order. Thomas Lubanga argues that because the TFV is a non-judicial body, it cannot issue the ‘final reparation order’ under Rule 150. Accordingly, he argues, this Decision necessarily must be the final order of the Chamber.²⁵ This argument is unfounded because it presumes that the TFV has the last word in determining reparations. To the contrary, the Decision contemplates both judicial oversight and, more importantly, a final judicial decision yet to be issued by the Chamber with respect to the proposals of the TFV.
24. Contrary to the submissions of legal representatives V01, the fact that the Trial Chamber did not order Thomas Lubanga to participate in symbolic reparations – thereby, it argues, rejecting the possibility of victims’ requests for reparations directly from Thomas Lubanga – also does not make the Decision final.²⁶ The fact that a certain principle aimed at shaping future orders has been developed by the Chamber does not turn that principle into the order itself. It will be the final reparations order, which presumably will direct reparations that do not include symbolic or other contributions from Thomas Lubanga, that will be appealable.
25. Nor does the fact that Court Management System (CMS) notified these filings as being pursuant to Rule 150 support the interpretation that the appealed Decision is final, as again suggested by legal representatives V01.²⁷ The legal representatives filed what they purported to be a direct appeal under Rule 150, which characterization – as is established by the Chamber’s order directing submissions on the admissibility of the appeal -- is not binding on the Court itself. CMS did nothing more than accept the submitted document and correctly identify the appellate route used by the legal representatives. If the parties and participants cannot bind the Chamber by their descriptions of their appeals, CMS has even less power to do so by its notification that the self-characterized appeals

²⁵ ICC-01/04-01/06-2917, para.9.

²⁶ ICC-01/04-01/06-2914, para.7.

²⁷ ICC-01/04-01/06-2914, para.9.

were filed. Nor does CMS have the authority to correct or recharacterize filings. When documents are submitted that purport to be final appeals filed under Rule 150, CMS's notification, which reflects what the party or participant submits, thus has no independent significance.

26. Finally, legal representatives V01, V02 and the OPCV argue that the Decision is final in relation to individual claims for reparations. They say that in transmitting these applications to the TFV to decide if they should be integrated in a collective reparations program without further review, the Chamber effectively rejected, with finality, the individual claims.²⁸ This argument is also unfounded. Most interlocutory orders or decisions are final resolutions of particular issues, but that element of finality does not make those decisions appealable as of right under Articles 81 (1) and (2) or 82(4). The Trial Chamber has not rejected any individual claims or issued a final order in relation to them. Rather, the Trial Chamber has delegated the function of reviewing the claims to the TFV with the express aim of including those who establish valid claims in a reparations award. The fact that the Trial Chamber favours a community-based approach in this case as having more benefit and greater utility than individual awards²⁹ cannot be construed as a final order dismissing the victims' individual claims.

(b) The Prosecution's response to the issue of standing

Thomas Lubanga's standing

27. In its response to Thomas Lubanga's appeal under Article 82(1)(d), the Prosecution advanced its submissions on the preliminary issue of Thomas Lubanga's standing to appeal.³⁰ The same arguments apply to his appeal under Article 82(4).

²⁸ ICC-01/04-01/06-2914, para.6 and ICC-01/04-01/06-2909, paras.11 and 14.

²⁹ ICC-01/04-01/06-2904, para.274.

³⁰ ICC-01/04-01/06-2924, paras.12-16.

28. The Prosecution reiterates arguments previously made against Thomas Lubanga's standing in the response to his application for leave to appeal. As argued therein, because reparations will come solely from resources of the TFV, and not from Thomas Lubanga's assets, he is neither prejudiced nor even directly affected by the Decision.³¹
29. In granting leave to appeal, the Trial Chamber dismissed the Prosecution's argument on standing.³² It held that Thomas Lubanga is "affected by the reparations process" even if awards are funded entirely from the TFV because any reparations award "will be an expression of the Court's disapproval and condemnation of the wrongdoing of the convicted person".³³ The Chamber, however, did not cite any authority in support of this statement. Moreover, the sources cited in the Decision for the assertion that reparations "go beyond the notion of punitive justice in order to provide effective remedies to the victims"³⁴ do not support the proposition that a reparations award *not coming from the perpetrator* imposes an additional form of reproach directed at him sufficient to confer standing. One source states that various forms of reparations may emphasize different purposes (i.e., an apology serves broader aims of reconciliation/restoration while ordering the perpetrator to build a memorial could serve both as a punishment and reconciliation).³⁵ Even on a broad reading, this point is distinguishable from the instant case as Thomas Lubanga is not ordered to build a memorial or provide any form of reparations to victims now or in the future.³⁶
30. Further, even if the Trial Chamber's position is accepted as a correct proposition of the law, it should still be determined whether the general and abstract effect –

³¹ ICC-01/04-01/06-2908, 17 August 2012, paras.15-16 and 22.

³² ICC-01/04-01/06-2911, paras.21-26.

³³ ICC-01/04-01/06-2911, para.23.

³⁴ ICC-01/04-01/06-2911, para.23.

³⁵ Dwertmann, *The Reparation System of the International Criminal Court* (2010), p.43.

³⁶ ICC-01/04-01/06-2904, para.269.

that a reparations award constitutes independent judicial disapproval and condemnation over and above the conviction itself -- identified by the Trial Chamber suffices for the purposes of granting Thomas Lubanga standing to appeal, or whether the latter requires a more specific and concrete form of prejudice.

The standing of claimants

31. Turning to the issue of standing for victim/claimants, the Statute confers upon victims the right to appeal only one decision: a reparations order under Article 75.³⁷ As the Decision at issue is not a reparations order but an interlocutory decision establishing the principles and procedures to be applied to the reparations phase, the victims do not have standing to appeal. They are equally unable to appeal under Article 82(1), which confers this right only to “either party”. The Appeals Chamber has defined “parties” as the Prosecution and the Defence only.³⁸
32. Instead of the right to appeal at this stage, the Decision gives victims the opportunity to raise issues arising out of the work and decisions of the TFV to the Chamber for resolution. Ultimately they can appeal the final reparations order.
33. If the Chamber considers that the Decision could be appealed by victims, then the Prosecution considers that the answer to the question of standing varies, depending on the relevant group of victims or claimants. The Prosecution has identified four potential classes of claimants: (i) victims who were granted status to participate in the proceedings, whether or not they have yet applied for

³⁷ The Prosecution notes that Trial Chamber I has held that the OPCV is not entitled to appeal the Article 74 Judgment under Article 81(1) of the Rome Statute: *Prosecutor v. Lubanga*, “Order refusing a request for reconsideration”, ICC-01/04-01/06-2846, 27 March 2012, para.3.

³⁸ ICC-01/04-01/06-1432 OA9 OA10, para.93. See also ICC-01/04-01/06-2799OA19, paras.7-8, where the Appeals Chamber found that Trial Chamber’s I decision granting the Netherlands and the DRC right to appeal fell “outside of the context of articles 81 and 82 of the Statute” and was accordingly “*ultra vires*”.

reparations; (ii) those whose previous status as victims was withdrawn by order of Trial Chamber I; (iii) victims who applied for reparations but have not been granted status to participate in the proceedings; and (iv) potential beneficiaries of reparations who have not yet applied for reparations. In the Prosecution's estimation, given that the reparations procedures have yet to commence, only those persons falling into the first category have standing in the present appeal.

34. Standing refers to the interest a person must have in order to obtain the right to participate in a particular step in a proceeding. The interest must be sufficient and it must be real rather than hypothetical. It also requires a recognized procedural status in the case. Persons who are not parties or participants in a case before the Court cannot claim standing to appeal decisions rendered in that case on the basis that such decision may also adversely affect their interest in other cases or proceedings. There are strong, practical reasons for limiting the scope of participation, as without restrictions on who can participate in a given procedure, Courts would be flooded with submissions by persons who have only a passing or general interest in the issue but no clear status and cognizable personal interest at stake.

35. In relation to the issue of interest, the United States Supreme Court identifies three requirements that collectively establish sufficient personal interest to confer standing:

- (i) the plaintiff must have suffered an "injury in fact," or, an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent", not "conjectural" or "hypothetical";
- (ii) there must be a causal connection between the injury and the conduct complained of; and
- (iii) it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision".³⁹

³⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

36. At this stage, the Trial Chamber has merely identified the framework for the reparations process and the principles applicable to it. Standing at this preliminary phase of the reparations process must only extend to those persons who were granted victim status during the trial proceedings, whether or not they have yet submitted claims for reparations. That is because the Trial Chamber has assessed and determined that they are natural persons who have suffered concrete, particularized harm as a result of the commission of Thomas Lubanga's crimes under Rule 85. Those victims are at least "likely" to be awarded reparations. This is the only group of persons who – even if only for the time being on a *prima facie* basis – has a concrete claim to reparations at this juncture and, therefore, an existing interest in the outcome of the Decision.
37. The claimants whose right to participate in the proceedings as victims was withdrawn – the second category - are no longer participants in the case. Their very status of victims (including the necessary determination under Rule 85) has been removed by the Trial Chamber. Without any recognizable status and/or any tangible interest in the outcome, they do not have standing to appeal a decision on the principles and processes to be followed during the reparations process, nor to the final reparations order. This is without prejudice to the possibility of those individuals requesting to be admitted as claimants in the reparations process in the future, if and when a proper showing under Rule 85 can be made.
38. Finally, the last two categories capture victim/claimants who have not been granted participant status or yet applied for reparations. In an appeal already marked by largely speculative or insubstantial claims of actual injury, their interest is even less concrete. Only once it is clear who they are, their claims are processed and it is decided whether they will receive reparations or not

(following the final reparations order) will they have standing to present views on appeal.⁴⁰

The Prosecution's Response to Thomas Lubanga's Request for Suspensive Effect

39. The Prosecution opposes the Appellant's request for suspension of proceedings pursuant to Article 82(3).⁴¹ The implementation of the Decision will not have irreparable consequences⁴² warranting suspension.⁴³

40. The Appellant has not demonstrated irreparable prejudice should the Appeals Chamber reverse the Decision below on any of the grounds that are the subject of the appeal. In the short period prior to a determination by the Appeals Chamber, it is not likely that the final reparations order will be rendered. In any event, the Appellant retains the right to appeal and, if successful, reverse any such reparations order or interim decisions. Nor, contrary to the statement of the Appellant, does the finding that reparations impact him (in the decision granting leave to appeal) justify suspension.⁴⁴

⁴⁰ Nor will the Appeals Chamber make determinations on the status of victims at this stage. It has held that "the Appeals Chamber will not embark on determining the status of these victims as ordinarily, for interlocutory appeals it would not itself make first hand determinations with respect to the status of victims." (*The Prosecutor v. Thomas Lubanga Dyilo*, "Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled 'Decision on Victims' Participation'", 16 May 2008, ICC-01/04-01/06 OA09 and OA10, para.40.)

⁴¹ Appeal Brief, para.29.

⁴² Appeal Brief, para.73.

⁴³ The continuation of the proceedings under the terms of the impugned decision will not create an irreversible situation or render the object of the appeal moot. The Appeals Chamber has ruled that "when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances." In that case, the Appeals Chamber considered "whether the implementation of the Impugned Decision would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant" (*Prosecutor v. Lubanga*, ICC-01/04-01/06-1290 OA11, Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008, 22 April 2008, paras.7-8).

⁴⁴ Appeal Brief, para.73.

Relief Sought

41. For the reasons set out above, the Prosecution respectfully requests that the Appeals Chamber:

- (i) determine that the appeals filed pursuant to Article 82(4) are not admissible;
- (ii) determine that neither Thomas Lubanga nor any of the claimants have standing to appeal. In the alternative, should the Appeals Chamber determine that victims do have standing, to determine that only those claimants who still have victim status in the case have standing to appeal the Decision; and if the Appeals Chamber considers that Lubanga has standing in the context of his Article 82 (1) (d) appeal, to consider the substantive response filed by the Prosecution on 21 September 2012; and
- (iii) reject Thomas Lubanga's request for suspensive effect of the Decision, either pending the Appeals Chamber decision on admissibility and standing, or in the event the Appeals Chamber decides that submissions on the merits of his appeal are required.



Fatou Bensouda
Prosecutor

Dated this 1st day of October 2012
At The Hague, The Netherlands