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

Date: **16 April 2012**

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

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

Public

**Prosecution's Response to the "Requête de la Défense sollicitant l'autorisation
d'interjeter appel de la 'Decision on the OPCV's request to participate in the
reparations proceedings'"
(ICC-01/04-01/06-2859)**

Source: Office of the Prosecutor

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

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Introduction

1. On 14 March 2012, Trial Chamber I found Thomas Lubanga guilty of conscripting, enlisting and using children under the age of 15 to participate in hostilities. It also invited "individuals or interested parties" to apply in writing for leave to file submissions on the principles and procedure to be applied by the Chamber with regard to reparations. On 5 April the Chamber authorized the Office of Public Counsel for victims ("OPCV"), *inter alia*, to represent the interests of victims who have not submitted applications yet but may eventually benefit from collective reparations.
2. The Defence seeks leave to appeal this latter decision (the "Application")¹ and identifies three issues: (1) whether legal representation can be provided to potential and non-identified victims during the reparations proceedings; (2) whether collective reparations can be awarded to victims who have not made any request to the Chamber; and (3) whether the Chamber's expansion of the concept of victim seriously infringes the rights of the accused.
3. The Prosecution submits that none of these issues arise from the Decision, and that the Application should be accordingly dismissed. The Application is grounded on the erroneous premise that the Chamber has already decided to award collective reparations to non-identified victims. This is incorrect. The Chamber is yet to decide on the procedure and principles that will guide the forthcoming reparations proceedings and to issue a final decision pursuant to article 75. If, following those decisions, the Defence believes that Lubanga's rights are infringed; he will have the ability to appeal at that stage.

¹ ICC-01/04-01/06-2859.

Procedural Background

4. On 14 March 2012, the Chamber issued its decision under article 74(2).² On the same day, the Chamber issued an scheduling order in which it, *inter alia*, invited "other individuals or interested parties" to apply in writing for leave to file submissions on the principles to be applied and the procedure to be followed by the Chamber with regard to reparations by 28 March 2012.³ The Chamber also instructed the Registry to send the current applications for reparations to the Chamber.
5. On 28 March 2012, the Office of Public Counsel for Victims ("OPCV") requested leave to appear before the Chamber on issues relating to the reparations proceedings ("OPCV's request").⁴
6. Additionally on 28 March 2012, the Registry submitted its "First Report to the Trial Chamber on applications for reparations", in which it informed the Chamber that it has received 85 applications for reparations.⁵ The Registry recommended that "the OPCV be appointed to represent the unrepresented applicants for reparations and any new applicant that may apply for reparations following the notification under Rule 96" of the Rules.
7. On 5 April 2012, the Chamber appointed the OPCV to "act as the legal representative of unrepresented applicants for reparations until their status is determined or until the Registrar arranges a legal representative to act on their behalf" and "represent the interests of victims who have not submitted applications but who may benefit from an award for collective reparations, pursuant to Rules 97 and 98 of the Rules" (the "Decision").⁶

² ICC-01/04-01/06-2842.

³ ICC-01/04-01/06-2844, para.10.

⁴ ICC-01/04-01/06-2848.

⁵ ICC-01/04-01/06-2847.

⁶ ICC-01/04-01/06-2858, para. 12.

8. On 11 April, the Defence sought leave to appeal three issues:⁷

(1) The legal representation of "potential victims" unidentified is not foreseen by the Statute or the Rules and contravenes provisions governing applications for participation or reparations. Whatever the form of compensation (individual or collective), Rule 85 requires demonstration of a personal harm suffered by an individual clearly identified or a direct harm incurred by an organization or institution specifically identified. In order to be considered by the Chamber, the requests for participation and reparation submitted by applicants to the status of "victims" should be registered with the Registry and reviewed in accordance with rules 89 and 94, and regulations 86 and 88 of RoC. Only persons recognized as victims under this process can be duly represented in the procedure by a legal representative.⁸

(2) The Trial Chamber is not empowered to rule *ultra petita* by paying collective reparations to persons who have not presented any demand to the Court.

(3) Expanding "victim" to undifferentiated individuals or unidentified organizations seriously affects Lubanga's rights.

Submissions

9. The impugned Decision does not set out principles to be applied and procedures to be followed by the Chamber with regard to reparations; indeed, the parties and others will make submissions on principles and procedures on

⁷ ICC-01/04-01/06-2859.

⁸ The Prosecution reproduces verbatim the issue as framed by the Defence.

18 April 2012.⁹ Nor does the Decision award reparations to anyone, much less collectively to groups including non-identified victims. The Decision merely appoints OPCV “to represent the interests of victims who have not submitted applications but who *may* benefit from an award for collective reparations”.¹⁰

10. Thus, the Application advances purely hypothetical concerns, none of which constitute issues arising from the Decision. On these grounds, the Application should be dismissed. Nor do any of the issues identified in the Application otherwise meet the criteria for leave to appeal.

None of the Issues arise from the Decision

11. The Appeals Chamber has held that “[a]n issue [justifying appeal] is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.”¹¹
12. With respect to the First Issue, the Defence argues that the Chamber afforded legal representation to potential and unidentified victims who do not meet the requirements under rules 85, 89, 94 and regulations 86 and 88 of the Regulations of the Court (“RoC”). The Court authorized OPCV to generally represent the interests of unrepresented persons, who have not submitted applications but who might benefit from collective reparations. That appointment, however, does not confer any rights on the persons or qualify them automatically to be considered victims entitled to request reparations. Nor does the Decision, on its face, affect the likelihood of collective reparations or the amount that might be rewarded.
13. The Second and Third Issues also do not arise from the Decision. The Trial Chamber did not order the payment of collective reparations to persons who

⁹ ICC-01/04-01/06-2844.

¹⁰ Decision, para. 12 (b), emphasis added.

¹¹ ICC-01/04-01/06-168 OA3, paras.9-10; ICC-02/04-01/05-367, para.22.

have not submitted any application to the Court. Similarly, it did not expand the class of victims who might benefit from collective reparations.

14. If the Trial Chamber considers that, despite the arguments advanced above, one or more of the issues do arise from the Decision, the Prosecution submits that the criteria of article 82(1)(d) justifying leave to appeal are not met in relation to any of them.

The Issues do not affect the fairness and expeditiousness of the proceedings

15. The Defence argues that if the Decision stands, Lubanga could be held liable for undetermined collective reparations about which he would have not been able to provide observations. This, it is argued, would affect the fairness and expeditiousness of the proceedings and the fundamental rights of the accused.¹²
16. These arguments are incorrect. Nothing in the Decision orders collective reparations or denies Lubanga the opportunity to be heard before he is ordered to pay reparations to groups that include unidentified potential victims. Should the final reparations order do so, Lubanga will be able to appeal that order, including – if the facts bear out his argument -- on the ground that the Chamber unfairly denied him the right to provide observations on the status of unidentified collective victims.
17. Alternatively, the Application fails to demonstrate any adverse impact of the Decision on the expeditious conduct of the proceedings. The issues raised by the Defence will undoubtedly be addressed in the process of determining reparations and, if resolved to Lubanga's prejudice, can be raised in an appeal to the Chamber's reparations order. Interjecting a premature appeal related to hypothetical issues that will be fully addressed by the Trial Chamber and subject to appeal as of right will only delay, not expedite, the process.

¹² Application, para.12

The issues do not affect the outcome of the trial

18. The Defence further submits that the issues will affect the outcome of the Chamber's article 75 reparations decision. It argues that the Chamber could order Lubanga to provide collective reparations to persons who, had they requested to participate in the proceedings, would have not been awarded victim status.¹³ This argument is speculative and premature. The Trial Chamber has yet to order Lubanga to pay reparations to anyone, and it is unclear whether Lubanga has the wherewithal to personally make reparation payments. Once the Chamber orders him to make collective reparations, the Defence may appeal against the final decision.

Intervention by the Appeals Chamber will not materially advance the proceedings

19. The Defence also argues that it must have, at the start of the reparations phase, all necessary material to respond to requests for participation. Otherwise, it would not be able to adequately respond to individual claims to benefit from collective reparations that Lubanga might be ordered to pay.¹⁴

20. As noted above, the Chamber has yet to determine the principles and procedures governing reparations, including disclosure and the Defence right to respond to requests. If the Chamber bases collective reparation orders on principles or processes that prejudice the Defence, it can raise those issues in a final appeal against the Chamber's decision. Delaying the reparations process to permit interlocutory appeal on hypothetical issues will only cause unnecessary delay.

¹³ Application, para.13.

¹⁴ Ibid., para.16.

Relief Sought

21. For the reasons set out above, the Prosecution requests that the Trial Chamber reject the Defence's Application.



Luis Moreno-Ocampo
Prosecutor

Dated this 16th day of April 2012
At The Hague, The Netherlands