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Date: **17 August 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 Defence Application for leave to Appeal the "Decision
establishing the principles and procedure to be applied to reparations"**

Source: Office of the Prosecutor

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Introduction

1. On 13 August 2012 the defence for Thomas Lubanga (hereinafter, “Defence”) sought leave to appeal Trial Chamber I’s 7 August 2012 “Decision establishing the principles and procedures for reparations” (hereinafter, “Decision”). The Defence requests that a range of issues allegedly stemming from the Decision be certified for appeal. Those issues relate to both the scope of beneficiaries of reparations under the terms of the Decision and the procedure established by the Chamber for reparations to be effected.¹
2. The Prosecution opposes the Application. By the clear terms of the Decision, the remainder of the reparations process, including the critical issuance of reparation orders, will be done through the Trust Fund, with no consequences whatsoever for Mr. Lubanga himself. Further, Mr. Lubanga will not be required even to make symbolic reparations; they will only be made if he agrees to do it. Thus, none of the issues raised in the Application are capable of adversely affecting the fair and expeditious conduct of the proceedings or the outcome of trial vis-à-vis the Defence.
3. In addition, the Prosecution notes that at this highly advanced stage of the case, where the trial has been concluded, decisions on both guilt and sentence have been entered and only the implementation of reparations remains, an interlocutory appeal is not a proper remedy for any grievance that the parties may have. Rather, the issues raised in the Application should be dealt in the context of a final appeal against a reparation order, to the extent that they arise, if and when such order adversely affects Mr. Lubanga’s rights.

¹ See ICC-01/04-01/06-2905 (hereinafter “Application”), paras. 6-31

Procedural Background

4. On 14 March 2012, Trial Chamber I issued its “Judgment pursuant to Article 74 of the Statute” (“Judgment” or “Article 74 Decision”).² On the same day, the Chamber issued a Scheduling order establishing the time table for sentencing and reparations (“Scheduling Order”).³
5. On 10 July 2012, Trial Chamber I issued its “Decision on Sentence pursuant to Article 76 of the Statute” (“Sentencing Decision”).⁴
6. On 7 August 2012, The Chamber issued its “Decision establishing the Principles and Procedures to be applied to Reparations” (“the Impugned Decision”).⁵
7. On 13 August 2012, the defence filed its “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” (“Application for Leave to Appeal”).⁶

Submissions

The Issues raised in the Application

8. The Application involves two separate categories, each of them including a number of issues submitted for certification.
9. The first category relates to the beneficiaries of reparations. Claiming that it would be against the right of the convicted person to interpret the concept of “victim” more broadly than the Appeals Chamber has already decided in its Decision of 20 January 2009, the Defence identifies four issues:

² ICC-01/04-01/06-2842.

³ ICC-01/04-01/06-2844.

⁴ ICC-01/04-01/06-2901.

⁵ ICC-01/04-01/06-2904.

⁶ ICC-01/04-01/06-2905.

- (a) By deciding that *“it would be inappropriate to limit reparations to the relatively small group of victims that participated in the trial and those who applied for reparations”* (para.187), the Decision breaches the relevant provisions in the Statute and the Rules according to which the status of victim (and hence the status of the person entitled to reparations) can only be granted in accordance with set procedures that include the possibility for the Defence to make observations.
- (b) By deciding that the *“victims of sexual or gender-based violence”* (para. 200) could receive reparations, the Decision breaches the principle according to which the convicted person shall only make reparations for damages resulting from the crimes for which he was found guilty.
- (c) By omitting to clarify that the victims must demonstrate the existence of an unrepaired personal harm, the Decision breaches the general principles for reparation.
- (d) The criteria of *“proximate cause”* (para. 249-250) is too vague.

10. The second category concerns the procedure for reparation envisioned in the Decision. Here, the Defence identifies the following four issues:

- (a) By delegating to the Trust Funds for Victims, the Expert Commission and the Registry some judicial functions, the Trial Chamber breached the Rome Statute.
- (b) The mechanisms and the principles decided by the Trial Chamber for reparations breach Mr. Lubanga’s fundamental rights (article 67).
- (c) The standard of proof at the reparation stage is detrimental to the rights of Mr. Lubanga.

(d) By asking all State Parties to identify and freeze all of Lubanga's assets, the Trial Chamber wrongly interpreted article 93(1)(k), which only refers "*proceeds, property and assets and instrumentalities of crimes*"

Three of the Issues do not arise from the Decision and should accordingly be dismissed *in limine*

11. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issue meets the criteria set out in the provision.⁷ While disputing the merits of the underlying arguments, the Prosecution concedes that the issues identified in the first category, and the first issue from the second category arise from the Decision. However, the last three issues (para. 10 (b)-(d), above) identified in the second category are based on a misinterpretation of the Decision.
12. The claim that the mechanism established by the Decision infringes the rights of Mr. Lubanga and, in particular, his right to (a) sufficient time and resources to challenge the victims' allegations and (b) access to the identity of the victims and their applications for reparations,⁸ is baseless. Nothing in the Decision deprives Mr. Lubanga of any of those rights. On the contrary, the Decision expressly states that nothing in the principles adopted by the Chamber "will prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial" (para. 255). The passages of the Decision cited in the Application (paras. 282-285) focus on the manner of implementation of the reparations plan, and in particular the roles of the TFV, OPCV, Registry and the Chamber. Nothing in those paragraphs supports the

⁷ ICC-02/04-01/05-20-US-Exp, para. 22.

⁸ Application, paras. 17 et seq.

proposition that the Defence will not be entitled to participate in the process or that it will be denied the necessary time and facilities to do so.

13. Similarly, the claim that the “level of proof” is detrimental to the rights of the convicted person and in particular will not allow the latter to adequately respond to reparation claims is misconceived. The Application relies on para. 254 of the Decision. Yet, this paragraph, on its face, deals primarily with reparations that are awarded from the resources of the Trust Fund. More importantly, nothing in this paragraph can be construed as adversely affecting the rights of the convicted person, who is not even mentioned in it. The mere generic reference to a “flexible approach” for the purposes of determining factual matters cannot be presented as an issue adversely impacting on the Defence’s rights that warrants interlocutory appellate review.
14. Finally, the claim that the Trial Chamber erroneously instructed State Parties to freeze all of Mr. Lubanga’s assets⁹ is false: no such instruction exists in the Decision. The Decision merely notes, in general terms, the importance of the identification of any assets of the convicted person and of State cooperation for these purposes (para. 276). It then recommends that the Registry and the TFV establish standard operating procedures, confidentiality protocols and financial reporting obligations (para. 280). Thus, at no point does the Decision “demand” that State parties identify and freeze all assets of the convicted person, as erroneously claimed by the Defence.

The remaining Issues cannot affect the fair and expeditious conduct of trial vis-à-vis the Defence

15. By its plain terms, the Decision that the Defence seeks to challenge on appeal does not entail any adverse consequences for Mr. Lubanga. Accordingly, it

⁹ Application, paras. 26 et seq.

cannot produce any adverse impact on the fair or expeditious conduct of the proceedings vis-à-vis Mr. Lubanga, capable of giving rise to arguable appealable issues.

16. The Decision clearly establishes that, since Mr. Lubanga appears to be indigent and no assets or property have been identified for the purposes of reparations, Mr. Lubanga can only contribute to non-monetary reparations. It further provides, however, that those symbolic reparations cannot be compelled, but are available only with Mr. Lubanga's agreement. Consequently, they will not form part of any Court order,¹⁰ and Mr. Lubanga will remain unaffected by the reparations process unless he voluntarily agrees to provide the symbolic reparations. In this context, it is difficult to see how any of the principles and procedures that the Defence attacks in its Application could produce any impact on the fair and expeditious conduct of the proceedings or otherwise adversely affect Mr. Lubanga's rights.
17. The Prosecution stresses that the burden on the Defence is to demonstrate the existence of a concrete and tangible impact on the fair and expeditious conduct of the proceedings. As stated repeatedly by the Appeals Chamber and multiple Trial and Pre-Trial Chambers, an applicant cannot speculate in the abstract that a decision may cause prejudice to his or her the rights in order to demonstrate that the fairness of the proceedings are affected.¹¹ A purely general complaint does not suffice.¹² In the instant case, since none of the principles and procedures established in the Decision, in and of themselves, will necessarily impact on Mr. Lubanga's rights, it necessarily follows that, regardless of Mr. Lubanga's views as to the fairness and correctness of those principles and procedures, he cannot satisfy the requirements established in

¹⁰ Decision, para. 269.

¹¹ See ICC-01/04-168 OA3, para. 10; ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211 para. 33 and 39; ICC-01/09-02/11-88, para. 25, see also paras. 23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para. 30.

¹² ICC-01/04-01/07-2463, para. 31.

the first limb of article 82(1)(d). Indeed, authorizing a party that is not aggrieved by a decision to raise on appeal issues arising from that decision is antithetical to the Statute's basic principles of appellate review¹³ and would be detrimental to the efficient administration of justice.

18. In this sense, the Prosecution notes the significant differences between the instant situation and the one underpinning the Trial Chamber's grant of leave to appeal its ruling on victim participation at trial:¹⁴ there, the Trial Chamber had crafted a regime which allowed for a broad range of victims to participate at trial and to lead evidence pertaining to the guilt or innocence of the accused.¹⁵ The ruling which the parties sought to challenge on appeal thus had a direct impact on the rights of the Defence, since it dealt with a matter – the scope and manner of victim participation at trial - that had clear consequences for the process by which the guilt or innocence of the accused would necessarily be determined. Nothing of this applies to the present context, where, as already demonstrated, the ruling in question does not entail any consequences for Mr. Lubanga.
19. The lack of arguable prejudice to Mr. Lubanga must therefore render his efforts to appeal the Decision futile.

The Application fails to demonstrate any impact on the outcome of trial

20. The Prosecution notes that the Decision refers to reparations proceedings as “an integral part of the overall trial process”.¹⁶ While there may be differing views as to whether the concept of “trial” for the purposes of article 82(1)(d) can be meaningfully extended to reparations proceedings, the Chamber need

¹³ In the context of the Statute, only the Prosecution is entitled to bring an appeal in circumstances where the Prosecution is not the aggrieved party: the appeal filed by the Prosecution on behalf of the convicted person under Article 81 (1) (b).

¹⁴ ICC-01/04-01/06-1191

¹⁵ ICC-01/04-01/06-1119. See especially paras 87- 138

¹⁶ Decision, para. 260.

not reach that question in deciding this application, since the Defence in any event has failed to establish that resolution of the issues will have an impact on the outcome of this final stage of the trial process.

21. Indeed, the Application does not even make an effort to demonstrate any impact on the outcome of trial of the issues involved in the Application. It merely states that since the reparation process finishes with the issuance of reparation orders, it necessarily follows that all questions related to the principles applicable to such orders directly affect the outcome of trial.¹⁷ This sweeping statement, whereby everything in the Decision becomes *ipso facto* appealable, is clearly insufficient for the purposes of demonstrating the need for appellate review under article 82(1)(d). The Prosecution recalls that under the jurisprudence of this Court, it does not suffice for an issue to have a hypothetical impact on the outcome of the trial.¹⁸
22. The Prosecution further notes that the “outcome of trial” requirement should not be divorced from the issue of standing. A party seeking leave to appeal an issue on the basis of the “outcome of trial” requirement should be in a position to demonstrate how *that party* will be adversely affected by the outcome. Conversely, a party who will suffer no conceivable consequences from the complained-of “outcome of trial” – who, accordingly, cannot claim any prejudice – should not be in a position to obtain certification to appeal a ruling on this basis, just as the person could not raise an issue on final appeal if the issue does not affect his interests. For instance, an accused in relation to whom certain charges have been dropped – charges that remain alive in relation to a co-accused – cannot demonstrate that the outcome of his trial is adversely affected by the refusal of the Chamber to similarly dismiss the charges against the other person, nor could he argue on appeal from a final conviction that his co-accused was wrongly convicted on those counts.

¹⁷ Application, para. 35.

¹⁸ ICC-01/04-01/07-1958, para. 20; ICC-01/09-02/11-406, paras. 42-43.

23. Since, as demonstrated above, nothing in the Decision is capable of producing adverse consequences for Mr. Lubanga, there is no arguable impact on the conduct of his trial that can properly form the basis for an appeal and the Application must accordingly be rejected.

An immediate resolution of the Issues will not materially advance the proceedings¹⁹

24. The Prosecution finally submits that even if accepting that article 82(1)(d) remains applicable, interlocutory intervention by the Appeals Chamber at this highly advanced stage of the case - where trial proceedings have been completed, decisions under Articles 74 and 76 have been entered, principles pertaining to reparations have been formulated and what remains in the implementation of these latter principles through reparation orders - would not materially advance the proceedings.
25. On the contrary, the Prosecution submits that barring exceptional circumstances, when a case has reached such an advanced stage, any issues concerning the proceedings raised by the parties can and should be dealt with in the context of a final appeal. It would indeed be detrimental to the efficient conduct of the proceedings to cause unnecessary delay by allowing an interlocutory appeal at this stage, when an adequate remedy will become available as soon as the reparations proceedings are completed, i.e. in the near future.²⁰

¹⁹ This requirement means that “prompt reference of the issue to the court of appeal” and its “authoritative determination” will help the proceedings “‘move forward’ by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.” See ICC-01/04-168, paras. 14-15,18.

²⁰ In the ICTY *Strugar* case, for instance, the Trial Chamber denied certification under Rule 73 (B) to appeal a decision finding the accused fit to stand trial, noting that, should the accused be found guilty at the end of the trial, he was entitled to raise the issue as part of his final appeal (*Prosecutor v. Strugar*, IT-02-54-T, Decision on Defence Motion for Certification, 17 June 2004, para. 6); in *Halilovic*, certification to appeal a decision denying the Prosecution leave to amend charges was rejected due to, inter alia, considerations as to the further delay that an interlocutory appeal could cause to the proceedings; it was simultaneously noted that if the accused were

26. Further, since, as already demonstrated, Mr. Lubanga cannot demonstrate any concrete prejudice arising out of the Decision, any appeal brought by him at this stage will necessarily deal with abstract or hypothetical issues. If and when, however, an order is issued in a manner that adversely affects Mr. Lubanga's rights, he will have the opportunity to bring a direct appeal under article 82(4), which in turn will allow for a focused review by the Appeals Chamber of the specific principles and procedures involved in the order.

Relief sought

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



Fatou Bensouda,
Prosecutor

Dated this 17th day of August 2012

At The Hague, The Netherlands

acquitted of the charges, the Prosecution could appeal the judgement (see *Prosecutor v. Halilovic*, IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of 'Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment,' 12 January 2005, and also *Prosecutor v. Halilovic*, IT-01-48-PT, Separate and Concurring Opinion of Judge O-Gon Kwon Appended to Trial Chamber Decision Dated 12 January 2005 on Prosecution Request for Certification for Interlocutory Appeal of 'Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment,' 14 January 2005, para. 6.).