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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 document

Response of the Office of Public Counsel for Victims 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’ rendue le 5 avril 2012*”

Source: Office of Public Counsel for Victims

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

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I. BACKGROUND

1. On 14 March 2012, Trial Chamber I issued its *Scheduling order concerning timetable for sentencing and reparations*,¹ by which it invited “other individuals or interested parties” to apply in writing for leave to file submissions on issues related to reparations, by 4 p.m. on 28 March 2012.²

2. On 28 March 2012, the Office of Public Counsel for Victims (“OPCV”) submitted an application for leave to appear before the Chamber in respect of specific issues concerning reparations.³

3. On 4 April 2012, the Defence filed submissions opposing the OPCV’s application.⁴

4. On 5 April 2012, the Chamber issued its *Decision on the OPCV’s request to participate in the reparations proceedings*⁵ (“the Decision”), by which it (i) instructed the Registry to appoint the OPCV as the legal representative for the unrepresented applicants and to provide it with the applications for reparations that have been received thus far, as well as any future applications from unrepresented victims; and (ii) instructed the OPCV to file submissions on the principles to be applied by the Chamber with regard to reparations and the procedure to be followed, on behalf of those victims who have not submitted applications but who may benefit from an award for collective reparations, by 4 p.m. on 18 April 2012.⁶

¹ See *Scheduling order concerning timetable for sentencing and reparations* (Trial Chamber I), ICC-01/04-01/06-2844, 21 March 2012 (dated 14 March 2012).

² *Ibid.*, para. 10.

³ See “Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on issues related to reparations proceedings”, ICC-01/04-01/06-2848, 28 March 2012.

⁴ See “Réponse de la Défense à la « Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on issues related to reparations proceedings », datée du 28 mars 2012”, ICC-01/04-01/06-2857, 4 April 2012.

⁵ See *Decision on the OPCV’s request to participate in the reparations proceedings* (Trial Chamber I), ICC-01/04-01/06-2858, 5 April 2012 (“the Decision”).

⁶ *Idem*, para. 13.

5. On 11 April 2012, the Defence filed an application for leave to appeal the *Decision on the OPCV's request to participate in the reparations proceedings* issued on 5 April 2012⁷ ("the Defence Application").

6. In accordance with regulation 65(3) of the Regulations of the Court, Principal Counsel of the OPCV hereby submits her response to the Defence Application.

II. OBSERVATIONS OF THE OPCV

1) *Criteria of article 82(1)(d) of the Rome Statute*

7. Previous rulings of the Court have consistently established that the two criteria of article 82(1)(d) of the Rome Statute are complementary, and that each one has to be established cumulatively in order for leave to appeal to be granted.⁸

8. More specifically, article 82(1)(d) of the Rome Statute limits the possibility of appeal to "[a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

9. In this respect, the Appeals Chamber held: "Evidently, article 82(1)(d) of the Statute has two components. The first concerns the prerequisites for the definition of

⁷ See *"Requête de la Défense sollicitant l'autorisation d'interjeter appel de la « Decision on the OPCV's request to participate in the reparations proceedings » rendue le 5 avril 2012"*, ICC-01/04-01/06-2859, 11 April 2012 ("the Defence Application").

⁸ See *Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal* (Appeals Chamber), ICC-01/04-168, 13 July 2006, paras. 7-19. See also *Decision on the prosecution and defence applications for leave to appeal the "Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court"* (Trial Chamber I), ICC-01/04-01/06-2107, 3 September 2009, para. 27.

an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber.”⁹ The Appeals Chamber emphasised that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”¹⁰ and defined the term “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹¹ It further held in this respect that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.¹²

2) *Applicability of the criteria of article 82(1)(d) of the Rome Statute to the Defence Application*

10. The OPCV submits that the Defence Application does not satisfy the criteria of article 82(1)(d) of the Rome Statute, in that it does not demonstrate the existence of any appealable “issue”. The Defence merely submits disparate arguments pertaining to points of law which do not flow from the Decision and, in any event, relate to distinct stages of the proceedings. Even if the Decision were to raise an appealable “issue” pursuant to article 82(1)(d) of the Rome Statute, the Defence does not show in what way such issue could significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor does it demonstrate that an immediate resolution of the issue by the Appeals Chamber could “materially advance the proceedings”.

⁹ See *Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal*, *supra*, footnote 8, para. 8.

¹⁰ *Ibid.*, para. 9.

¹¹ *Ibid.*

¹² *Ibid.*, para. 10.

a. The Decision does not raise any “issues”

11. Firstly, the Defence contends that the Chamber has no power to award reparations to persons who have not submitted applications for reparations and who have no standing as a “victim” pursuant to rule 85 of the Rules of Procedure and Evidence.¹³

12. Hence, the Defence appears to argue that only victims who have filed applications for reparations may enjoy the right to obtain reparations. In this regard, the OPCV submits that the Court’s legal texts clearly state the Chamber’s power to award not only individual reparations, i.e. for specific identified victims, but also collective reparations,¹⁴ as well as the Chamber’s *proprio motu* authority to award reparations to victims.¹⁵ Collective reparations are, by their very nature, intended to involve a potentially high number of victims. International case law merely confirms that “collective” reparations do not require that the victims who are beneficiaries are precisely identified at the time a decision on reparations is issued, or that they must submit an application for reparations.

13. In the traditional definition, “collective reparations” are intended for a particular group of persons, not private individuals.¹⁶ Furthermore, in the practice of the Inter-American Court of Human Rights, “collective reparations” are defined as being intended for a specific group of individuals.¹⁷ Courts seized with class-action lawsuits have, in turn, relied on simple presumptions for the purposes of identifying

¹³ See the Defence Application, *supra*, footnote 7, para. 8.

¹⁴ See rule 97(1) of the Rules of Procedure and Evidence.

¹⁵ See article 75(1) of the Rome Statute and rule 95 of the Rules of Procedure and Evidence.

¹⁶ See in this connection, McCarthy, C., “Reparations and Victim Support in the International Criminal Court” (Cambridge: CUP, 2012), Chapter V. See also Rosenfeld, F., “Collective Reparation for Victims of Armed Conflict”, *International Review of the Red Cross* (2010), p. 732.

¹⁷ See, for example, IACHR, ‘*Juvenile Reeducation Institute v. Paraguay*, Preliminary Objections, Merits, Reparations and Costs, Series C No. 112, 2 September 2004; *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Series C No. 150, 5 July 2006.

victims and determining the circumstances of the case.¹⁸ Lastly, the types of collective reparations such as “satisfaction” are intended to commemorate all victims who have suffered, yet without identifying them by name.¹⁹

14. Consequently, by making reference in its Decision to “victims who have not submitted applications but who may benefit from an award for collective reparations”,²⁰ the Chamber merely contemplated the possibility of awarding collective reparations to those who have not submitted applications for reparations and who have thus far not been specifically identified – an option which is entirely consonant with the Court’s legal texts.

15. Secondly, the Defence questions the Chamber’s decision to authorise the OPCV to participate in the reparations proceedings as legal representative of the “potential beneficiaries”, arguing that said beneficiaries have never petitioned the Court with such an application and have never demonstrated any personal harm suffered.²¹

16. Hence, the Defence appears to argue that only the legal representatives of victims who have been recognised as victims pursuant to rule 85 of the Rules of Procedure and Evidence may be authorised to participate in the reparations proceedings. The OPCV submits in this regard that article 75(3) of the Rome Statute provides that, before making an order on reparations, the Chamber may invite

¹⁸ See the *Governing Rules of the Claims Resolution Tribunal for Dormant Accounts*, article 17, para. 1; available at: http://www.crt-ii.org/governing_rules.phtml. See also the *Common guidelines for the partner organisations concerning the compensation of other personal injuries, decided by the Board of Trustees of the Foundation “Remembrance, Responsibility and Future” on 21 June 2001*, para. 6; available at: www.stiftung-evz.de. See also, International Organization for Migration, *Property Claims Commission, Supplementary Principles and Rules of Procedure*, 29 January 2002, section 22.1; available at: www.compensation-for-forced-labour.org.

¹⁹ In this regards, see Schonsteiner, J., “Dissuasive Measures and the Society as a Whole: A Working Theory of Reparations in the Inter-American Court of Human Rights”, 2007, *Am. U. Int’l L. Rev.* No 23, p. 127. See also IACHR, *Trujillo-Oroza v. Bolivia*, Reparations and Costs, Series C No. 92, 27 February 2002, para. 110.

²⁰ See the Decision, *supra*, footnote 5, para. 12.

²¹ See the Defence Application, *supra*, footnote 7, para. 8.

observations from, *inter alia*, “other interested persons”. Neither this provision, nor indeed any other provision in the Court’s legal texts, establishes any criteria to determine the participation of “other interested persons” in the reparations proceedings, leaving the matter entirely to the Chamber’s discretion.

17. Consequently, by authorising the OPCV to participate in the reparations proceedings, the Chamber is merely exercising its authority under article 75(3) of the Rome Statute, considering in particular that “the expertise of the OPCV will be useful, particularly in order to safeguard the rights of these potential beneficiaries of an award for collective reparations”.²²

b. The issues raised by the Defence in no way affect the fair and expeditious conduct of the proceedings or the outcome of the trial

18. Should the Chamber find that the Defence Application does indeed raise “issues”, the OPCV submits that those issues in no way affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

19. The Defence contends that “[TRANSLATION] [Mr Lubanga] could, if the Decision were to stand, be held liable for indeterminate damages, in relation to which he would not have been able to make any pertinent observations” and that “[TRANSLATION] the Chamber could issue an order under article 75 for Mr Lubanga to compensate persons whose victim status may, in some cases, have been denied by the Chamber”.²³

20. The OPCV submits in this regard that the Chamber has already found Mr Lubanga guilty of the crimes with which he was charged. The gravity of Mr Lubanga’s criminal responsibility will be determined within the sentencing procedure, but it will not under any circumstances be contingent on the number of

²² See the Decision, *supra*, footnote 5, para. 11.

²³ See the Defence Application, *supra*, footnote 7, paras. 12 and 13.

victims due to receive reparations. Furthermore, it would appear that, to date, Mr Lubanga does not possess any property or assets which could be used for reparations.²⁴ It therefore follows that Mr Lubanga does not seem able to contribute to the actual reparations for victims who have submitted reparations applications to the Chamber, which might move the Chamber to order that the award for reparations be made through the Trust Fund for Victims pursuant to article 75(2) of the Rome Statute. Furthermore, the victims on whose behalf the OPCV has been authorised to make submissions as to the reparations procedure could receive only collective reparations.²⁵ However, orders awarding collective reparations may only be made directly against the convicted person and executed only through the Trust Fund for Victims.²⁶

21. In light of the foregoing, it is unclear – and the Defence provides no explanations in this regard – whether and how the fact that the “victims who have not submitted applications but who may benefit from an award for collective reparations” have been authorised to make submissions via the OPCV on the reparations proceedings may have any effect whatsoever on the rights of the convicted person and/or the guarantees of a fair trial – a trial which has, moreover, already been concluded.

²⁴ See “Second Report of the Registry on Reparations”, ICC-01/04-01/06-2806, 1 September 2011, para. 10.

²⁵ See the Decision, *supra*, footnote 5, para. 12(b).

²⁶ See rule 98 of the Rules of Procedure and Evidence.

Consequently, Principal Counsel respectfully requests the Trial Chamber:

- to deny the Defence Application.

[signed]

**Paolina Massidda,
Principal Counsel**

Dated this 13 April 2012

At The Hague, The Netherlands