DISSENTING OPINION OF JUDGE HENDERSON

1. I respectfully disagree with the reasoning in Section 2 of the decision of the Majority, and the disposition which suspends implementation of the Pre-Trial Chamber's Order. In my view, the main issue for determination is whether a Pre-Trial Chamber is authorised to request protective measures from a State for the purposes of an order of reparations prior to conviction. After careful consideration, I am of the view that while Article 57(3)(e) of the Statute and Rule 99(1) of the Rules authorise the Pre-Trial Chamber to request protective measures for the purposes of eventual forfeiture, these provisions do not provide authority to a Pre-Trial Chamber, or a Trial Chamber prior to conviction, to request a State to take protective measures under Article 93(1) of the Statute for the purposes of an order for reparations. For this reason, in my view, the Pre-Trial Chamber's Order should be revoked.

I. Analysis

2. The term 'forfeiture', referred to in Article 57(3)(e), is only provided for in the Statute under Article 77(2)(b) ('Applicable Penalties'), which refers to '[a] forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties'. These provisions, when interpreted in accordance with their ordinary meaning and in light of their object and purpose, in my view, only empower the Pre-Trial Chamber to request protective measures from the States for *the purposes of eventual forfeiture* in respect of proceeds, property and assets derived directly or indirectly from the crimes for which the accused was charged.

3. I therefore respectfully disagree with the Majority's interpretation of Article 57(3)(e) of the Statute as encompassing the Pre-Trial Chamber's authority to request protective measures for the purposes of reparations. In my view, this authority has been reserved for the Trial Chamber under Article 75(4) in Part 6 of the Statute: 'The Trial'. In addition, Article 75(4) of the Statute specifically states *when* the Court may seek measures from a State for the purposes of reparations, and that is 'after a person is convicted of a crime within the jurisdiction of the Court'. Thus, based on the plain text of these provisions, neither the Pre-Trial Chamber nor the Trial Chamber is empowered to request measures under Article 93 in respect of reparations, prior to rendering a decision on conviction.

4. Application of the literal rule of interpretation to Rule 99(1) of the Rules provides further support for a reading which limits the Pre-Trial Chamber's authority. The explanatory note for the Rules of Procedure and Evidence expressly provides that the Rules 'are an instrument for the Application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases'. Rule 99(1) repeats the statutory authority under which the Chambers may act: the Pre-Trial Chamber under Article 57(3)(e), which refers to forfeiture, and the Trial Chamber under Article 75(4), which refers to reparations (under Part 5 and Part 6 of the Statute, respectively). When read together, the Statute and the Rules create a scheme and structure of the Court that *inter alia*, sets out the progression of proceedings from the institution of the investigation, the trial and appellate stage through to enforcement. Rather than standing alone and enlarging the meaning of the term 'forfeiture' to give it a broader meaning that includes reparations, the Rule elaborates on the procedure already set forth in the Statute. In considering the effect of the Articles 57(3)(e) and 75(4) of the Statute on Rule 99(1),

recognising that the Rules are subsidiary to the Statute, I am minded that I must construe the Rule so as to give effect to the Articles to which it pertains. I am also mindful that the Statue is to be interpreted in a purposive and broad manner rather than in any narrow or pedantic way.

5. I do not read the phrase 'in particular for the ultimate benefit of victims' contained in Article 57(3)(e) of the Statute as expanding the authority of the Pre-Trial Chamber under that Article beyond that which is expressly stated. Rather, I see this phrase as an acknowledgment that in taking the significant step of prospectively freezing or seizing the property or assets of a person who is presumed innocent, the Pre-Trial Chamber shall take into consideration – in addition to the strength of the evidence and the rights of the accused person – whether such measures would in particular be for the ultimate benefit of the victims. In this regard, Article 79(2) of the Statute provides that the Court may order that money and other property collected through fines or forfeiture be transferred to the Trust Fund. The Trust Fund itself is expressly established for the benefit of victims of crimes that fall within the jurisdiction of the Court, and Article 75(2) provides that the Court may order reparations to victims out of this Fund.[1]

[1] Article 75 (2) of the Statute. It was on this basis that Triffterer suggested that protective measures could be requested 'for the ultimate benefit of victims'; *see* OttoTriffterer, Commentary on the Rome Statute of the international Criminal Court, 2008, pages 1130-31: 'The purpose of this provision, which was inserted into the text of article 57 towards the end of the conference, is to ensure the right to reparation of the victims of a crime within the jurisdiction of the Court (article 75), and the applicability of a penalty of forfeiture foreseen in article 77 para. 2. (b) [footnote], by means of protective measures directed at the property of a person prosecuted by the Court'. He explains in the footnote that '[i] indirectly, the sanction of forfeiture is also related to the victims' right to reparation, since the ICC may order money and other property, collected through fines or forfeiture to be transferred to the Trust Fund for the benefit of victims (article 79 paras. 1 and 2).'

6. In my view, this reading, as explained above, is also supported by commentators to the *travaux préparatoires*.[2]

7. I acknowledge that victims, pursuant to the Court's jurisdiction *ratione materiae*, have a central role in these proceedings and in the fight against impunity. I also acknowledge that at the appropriate stage of proceedings and in appropriate circumstances, the Court may grant reparations to alleviate, as much as possible, the negative consequences of their victimization, and in so doing, that this will be in their benefit. On this basis, in *The Prosecutor v. Thomas Lubanga Dyilo*, Pre -Trial Chamber I reasoned that it had authority to take protective measures for the purpose of securing the enforcement of a future reparation award, as to do otherwise would not be in the ultimate benefit of the victims.[3] In my view, this objective can be effectively achieved by the Pre-Trial Chamber requesting protective measures for the purposes of eventual forfeiture, which in appropriate circumstances can be transferred to the Trust Fund and thereafter used for the benefit of the victims in an award for reparations, as provided in the plain text of Article 57(3)(e) of the Statute.

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[2] *See, e.g.* Otto Triffterer, Ed., Commentary on the Rome Statute of the International Criminal Court, 2008, page 1578: 'According to article 57(3)(e) the issuance of a warrant of arrest or a summons to appear under article 58 constitute the earliest moments in the proceedings as from which on a request under *littera* k may be made. A request under *littera* k may also be made in conjunction with article 75(4) to secure enforcement of a reparation order to be made under article 75(2). A request under *littera* k in conjunction with article 75(4) can only be made, though after the conviction of the person concerned'; Antonio Cassese, Paola Gaeta and John R.W.D Jones., The Rome Statute of the International Criminal Court, 2006, page 1834, 'One interesting French proposal [concerning reparations and enforcement thereof] was to give the Presidency the power to order the provisional attachment of any property, asset or money once an order under Article 75 was made in order to prevent the sentenced person from organising the 'disappearance' of his or her property at this stage. The proposal was meant to add to the powers of the ICC contained Article 57(3)(e) and Article 75(4). This proposal did not gain much support and in the course of the debate it emerged that many delegations denied the existence of an obligation for States Parties to cooperate with the ICC for the purpose of adopting protective measures in the field of reparation'; William Schabas, International Criminal Court: A Commentary on the Rome Statute, 2010, page 1021, in explaining Article 57(3)(e), referring only to Article 77(2)(b).

[3] Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo ('Lubanga Decision'), 24 February 2006, ICC-01/04-01/06-8-Corr, para. 136, *et. seq*.

II. Conclusion

8. While I agree with the Majority that unless the Pre-Trial Chamber has the statutory authority to request at the earliest opportunity protective measures for the purposes of an eventual order for reparations, the possibility to seize such assets may be lost, I differ in how that objective is to be achieved. I cannot agree with an interpretation that, in my view, effectively overreaches the plain text of the provisions of the Rome Statute and the Rules of Procedure and Evidence and is unnecessary to achieve the desired result. In my respectful view, if it is the desire that the Pre-Trial Chamber has authority to make such an order, then it is a matter to be addressed by the Assembly of States Parties under Article 121 of the Statute.

9. For these reasons, I respectfully dissent.

Done in both English and French, the English version being authoritative.

G Henderson

Judge Geoffrey Henderson

Dated 08 July 2014

At The Hague, the Netherlands