

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 29 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

Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations

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

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**Victims Participation and Reparations
Section**

Other
The Trust Fund for Victims
The Appeals Chamber

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, delivers the following Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations.

I. Procedural History

1. On 14 March 2012 the Chamber delivered the Judgment pursuant to Article 74 of the Statute (“Judgment” or “Article 74 Decision”).¹
2. On 7 August 2012 the Chamber issued its “Decision establishing the principles and procedures to be applied to reparations” (“Decision”).²
3. On 10 August 2012 the Chamber informed the parties that it considered the decision to have been officially notified to the parties on 7 August 2012, when the English version was issued. The Chamber additionally set out that the Decision does not constitute a reparation order within the meaning of Rule 150.³
4. On 13 August 2012 the defence filed a request for leave to appeal the Decision (“Request”) on eight separate issues relating to the principles and procedures established therein.⁴
5. The Office of the Prosecutor (“prosecution”)⁵ and the Office of Public Counsel for Victims (“OPCV”) and legal representatives for the V02 group of victims (“victims”)⁶ filed responses on 17 August 2012.

¹ Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842.

² ICC-01/04-01/06-2904.

³ Email communication from the Legal Advisor of the Trial Division to the parties on 10 August 2012 at 16:53.

⁴ 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, 13 August 2012, ICC-01/04-01/06-2905.

⁵ Prosecution’s Response to Defence Application for leave to Appeal the “Decision establishing the principles and procedures to be applied to reparations”, ICC-01/04-01/06-2908.

II. Relevant Provisions and Jurisprudence

6. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Trial Chamber has considered the following provisions:

Article 64 of the Statute

Functions and powers of the Trial Chamber

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[...]

(f) Rule on any other relevant matters.

[...]

Article 82(1)(d) of the Statute

Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) 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.

7. The Appeals Chamber has held⁷ that the following criteria are applicable to an application for leave to appeal:

- a) Whether the matter is an "appealable issue";
- b) Whether the issue at hand could significantly affect:

⁶ Réponse conjointe à la «Requête de la Défense sollicitant l'autorisation d'interjeter appel de la "Décision establishing the principles and procedures to be applied to reparation" rendue le 7 août», 17 August 2012, ICC-01/04-01/06-2907.

⁷ Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paras 8 – 19.

- (i) The fair and expeditious conduct of the proceedings; or
 - (ii) The outcome of the trial; and
- c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.

8. The Chamber notes that the requirements of sub-parts a), b) and c) above are cumulative. Thus, failure to fulfil one or more of them is fatal to an application for leave to appeal.⁸

III. Submissions and Analysis

Defence Submissions

9. The defence identifies eight issues in two separate categories which it wishes to appeal. The first category relates to the beneficiaries of reparations. The defence submits that the rights of the accused are prejudiced by a definition of “victim” that goes beyond the limits established by the Appeals Chamber in this regard.⁹ The four issues identified in this first category are:

1(a) the Chamber’s statement 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”¹⁰ is contrary to the Rome Statute framework which provides that the status of victim can only be granted in

⁸ See for example Decision on the Prosecution’s Application for Leave to Appeal the Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06, a/0111/06 to a/0127/06, ICC-02/04-112, 19 December 2007, notified on 20 December 2007, para. 17.

⁹ ICC-01/04-01/06-2905, paras 6 – 8.

¹⁰ ICC-01/04-01/06-2904, para. 187.

accordance with set procedures which include the opportunity for the defence to make observations;¹¹

1(b) the suggestion that “victims of sexual or gender-based violence”¹² may be eligible for reparations violates the principle that the convicted person shall only be ordered to make reparations for damage resulting from crimes for which he was found guilty;¹³

1(c) the Decision contravenes general principles of reparations by failing to specify that victims must demonstrate the existence of personal harm that has not yet been redressed;¹⁴ and

1(d) the Chamber’s “proximate cause” criteria is excessively vague.¹⁵

10. The second category identified by the defence concerns the procedure for reparations established by the Decision.¹⁶ The four issues the defence seeks leave to appeal in this category are:

2(a) the Chamber has breached the Rome Statute by i) delegating certain judicial functions to the Trust Fund for Victims (“TFV”) in conjunction with the Registry and the experts appointed by the TFV, and ii) delegating supervision of the reparations proceedings to a new Chamber;¹⁷

2(b) the reparations procedure established by the Chamber violates the fundamental rights of the convicted person;¹⁸

¹¹ ICC-01/04-01/06-2905, para. 9 (a).

¹² ICC-01/04-01/06-2904, para. 200.

¹³ ICC-01/04-01/06-2905, para. 9(b).

¹⁴ ICC-01/04-01/06-2905, para. 9 (c).

¹⁵ ICC-01/04-01/06-2905, para. 9 (d).

¹⁶ ICC-01/04-01/06-2905, paras 10 – 31.

¹⁷ ICC-01/04-01/06-2905, paras 10 – 14.

¹⁸ ICC-01/04-01/06-2905, paras 15 – 21.

2(c) the standard of proof for establishing the facts relevant to reparations awarded from the TFV, or any source apart from the funds of the convicted person, is too vague to be applied by a non-judicial organ, and it does not enable the defence to respond to the victims' allegations;¹⁹ and

2(d) the Chamber erred in its interpretation of Article 93(1)(k) when requesting States Parties to identify and freeze "any assets of the convicted person" as this provision only refers to "proceeds, property and assets and instrumentalities of crimes".²⁰

11. The defence suggests that all of the above issues affect the fairness and expeditiousness of the proceedings, given the principles as set out in the Decision affect the fundamental rights of the accused and have the result of delaying any orders for reparations. It is additionally submitted that the lack of clarity as to the procedural mechanisms will lead to challenges and significant delays.²¹ The defence also suggests that the issues affect the outcome of the trial, as reparations proceedings are the final stage of the trial.²² Lastly, the defence notes the Chamber's statement that it "will not otherwise issue, in this case, any order or instruction to the TFV on the implementation of reparations"²³ and argues that the immediate resolution of the issues by the Appeals Chamber will materially advance the proceedings by ensuring that reparations orders are not issued on an erroneous basis.²⁴

¹⁹ ICC-01/04-01/06-2905, paras 22 – 25.

²⁰ ICC-01/04-01/06-2905, paras 26 – 30, referring to ICC-01/04-01/06-2904, para. 277.

²¹ ICC-01/04-01/06-2905, paras 32 – 34.

²² ICC-01/04-01/06-2905, para. 35.

²³ ICC-01/04-01/06-2905, para. 39, referring to ICC-01/04-01/06-2904, para. 287.

²⁴ ICC-01/04-01/06-2905, paras 36 – 40.

Prosecution submissions

12. The prosecution submits that issues 2(b), 2(c) and 2(d), relating to the reparations procedure established by the Chamber, do not arise from the Decision and therefore should be dismissed *in limine*.²⁵ It is contended as regards issue 2(b) that the defence claim that the mechanism established by the Chamber infringes the rights of the convicted person has no basis, as the Decision does not exclude the defence from participating in the reparations process, and it does not deny him the necessary time and facilities to do so.²⁶ With respect to issue 2(c) the prosecution similarly argues that the claim that the level of proof required will not permit the defence adequately to respond to the claims for reparations is misconceived.²⁷ The prosecution notes that the defence application refers to a paragraph of the Decision which deals primarily with reparations awarded from the resources of the TFV, and it argues that nothing in this paragraph can be construed as adversely affecting the rights of the convicted person.²⁸ Finally, addressing issue 2(d) – the Chamber’s interpretation of Article 93(1)(k) – the prosecution submits that the Decision does not instruct States Parties to freeze all the assets of the convicted person but rather it notes the importance of identifying his assets, and the need for States to cooperate for these purposes.²⁹

13. As to the remaining five issues – 1(a), (b), (c) and (d) and 2(a) – the prosecution suggests that while they arise from the Decision, these issues do not affect the fair and expeditious conduct of the trial vis-à-vis the defence.³⁰ It is contended that since no assets or property of the convicted person have been identified for the purposes of reparations, and as Mr Lubanga will not be compelled to make

²⁵ ICC-01/04-01/06-2908, paras 11 – 14.

²⁶ ICC-01/04-01/06-2908, paras 11 – 12.

²⁷ ICC-01/04-01/06-2908, para. 13.

²⁸ ICC-01/04-01/06-2908, para. 13.

²⁹ ICC-01/04-01/06-2905, para. 14, referring to ICC-01/04-01/06-2904, paras 276 and 280.

³⁰ ICC-01/04-01/06-2905, paras 11 and 15

symbolic reparations, he is unaffected by the reparations process unless he voluntarily agrees to provide symbolic reparations. In this regard, the prosecution submits that the defence has failed to demonstrate that the remaining five issues have a material impact on the fair and expeditious conduct of the proceedings.³¹

14. The prosecution also submits that the defence has not demonstrated that these five issues will have any effect on the outcome of trial.³² Even assuming that the concept of “trial” can be extended to reparations proceedings for the purposes of Article 81(2)(d), the prosecution argues that the Request fails to demonstrate the impact of these issues but instead it is merely suggested that since the reparations process results in reparations orders, it necessarily follows that all questions related to the principles applicable to such orders directly affect the outcome of trial.³³ The prosecution emphasises that the jurisprudence of the Court establishes that it does not suffice to show that an issue has a hypothetical impact on the outcome of the trial, but instead the party seeking leave must demonstrate how *that party* will be adversely affected by the outcome.³⁴ On this basis, the prosecution argues that the defence Request should be rejected, as nothing in the Decision is capable of producing adverse consequences for Mr Lubanga and there is thus no impact on the conduct of trial.³⁵

15. Finally, the prosecution submits that even accepting that Article 82(1)(d) is applicable, interlocutory intervention by the Appeals Chamber at this stage would not materially advance the proceedings.³⁶ On the contrary, the prosecution suggests that an appeal at this stage would cause unnecessary delay and it would

³¹ ICC-01/04-01/06-2908, paras 15 – 19.

³² ICC-01/04-01/06-2908, paras 20 – 23.

³³ ICC-01/04-01/06-2908, paras 20 – 22.

³⁴ ICC-01/04-01/06-2908, paras 21 – 22.

³⁵ ICC-01/04-01/06-2908, paras 21 – 23.

³⁶ ICC-01/04-01/06-2908, paras 24 – 26.

concern wholly hypothetical and abstract issues. It is submitted that if and when a reparations order is issued that adversely affects the rights of the convicted person, he has a right of appeal at that stage under Article 82(4) of the Statute.³⁷

The submissions of the victims

16. The victims argue that the defence request is erroneously based on Article 82(1)(d) of the Statute and should be rejected *in limine*.³⁸ It is suggested that the Chamber in its Decision not only established the principles applicable to reparations, but it also approved a community-based approach to reparations, delegated responsibilities to the TFW and decided not to examine individual reparations applications. It is further submitted that no decision by a future Chamber concerning reparations could be considered an “order for reparations” in the sense envisaged by Article 82(4).³⁹ It is argued, therefore, that the Decision constituted an “order for reparations” issued pursuant to Article 75 of the Statute and a right of appeal exists under Article 82(4).⁴⁰

17. The victims submit that if the Chamber concludes the defence request has been correctly brought pursuant to Article 82(1)(d) of the Statute, one of the issues (which is treated as two issues by the victims) identified by the defence is properly the subject of an interlocutory appeal, while the remainder should be dismissed. The victims submit that defence issue 2(a) is an appealable issue, and they support the arguments of the defence in this regard.⁴¹ The victims submit the Chamber’s decision to delegate the oversight of the reparations proceedings to a

³⁷ ICC-01/04-01/06-2908, paras 24 – 26.

³⁸ ICC-01/04-01/06-2907, paras 11 – 13.

³⁹ ICC-01/04-01/06-2907, paras 13 – 14.

⁴⁰ ICC-01/04-01/06-2907, paras 12 – 15.

⁴¹ ICC-01/04-01/06-2907, paras 21 – 30.

new Chamber contravenes the Rome Statute framework.⁴² The victims refer to the Decision, which provides that “reparations proceedings are an integral part of the overall trial process”,⁴³ and they quote the Chamber’s 22 May 2008 decision in which it was established that the same three judges must sit until the end of deliberations.⁴⁴ The victims support the defence argument that the Chamber’s delegation of authority to the TFV (a non-judicial organ) to determine a number of reparations-related issues violates the Rome Statute framework.⁴⁵

18. It is suggested that the Chamber’s delegation of these responsibilities affects the fair and expeditious conduct of the proceedings because it denies the victims their right to participate in efficient and expeditious reparations proceedings, in accordance with Article 75.⁴⁶ The immediate resolution of this issue, it is submitted, will materially advance the proceedings.⁴⁷

19. As to the beneficiaries of reparations – defence issues 1(a), 1(b), 1(c) and 1(d) – the victims submit that the defence has failed to demonstrate that these are appealable issues.⁴⁸ It is further argued that even if the Chamber concludes they are potentially appealable, they do not affect the fair and expeditious conduct of the trial, because the reparations orders will not be made directly against the accused.⁴⁹ It is submitted that the defence has not established how the Chamber’s decision as to the individuals or groups that may benefit from a reparations order

⁴² ICC-01/04-01/06-2907, paras 21 – 24.

⁴³ ICC-01/04-01/06-2904, paras 260 and 267.

⁴⁴ ICC-01/04-01/06-2907, para. 22, referring to paras 12, 14 and 15 of Decision on whether two judges alone may hold a hearing – and – Recommendations to the Presidency on whether an alternate judge should be assigned for the trial, 22 May 2008, notified on 23 May 2008, ICC-01/04-01/06-1349.

⁴⁵ ICC-01/04-01/06-2907, paras 25 – 30.

⁴⁶ ICC-01/04-01/06-2907, paras 24 and 29 – 30.

⁴⁷ ICC-01/04-01/06-2907, paras 24 and 30.

⁴⁸ ICC-01/04-01/06-2907, paras 31 – 36.

⁴⁹ ICC-01/04-01/06-2907, paras 36 – 38.

may affect the rights of the convicted person or the fairness of the trial, which has already concluded.⁵⁰

Analysis

Preliminary considerations

20. The Chamber repeats and emphasises that the Decision of 7 August 2012 does not constitute an “order for 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.
21. The Chamber will first deal with two arguments advanced by the prosecution which are relevant to the various “issues” raised by the defence.
22. First, the Chamber notes the prosecution suggestion that issues 1(a), (b), (c) and (d) and 2(a), as advanced by the defence, cannot affect the fair and expeditious conduct of the trial vis-à-vis the defence because no assets or property of the convicted person have been identified for the purposes of reparations, and, furthermore, Mr Lubanga will not be compelled to participate in symbolic reparations.⁵¹ The prosecution submits that Mr Lubanga is unaffected by the reparations process unless he voluntarily provides symbolic reparations.
23. It is misconceived for the prosecution to submit that because assets belonging to Mr Lubanga have not been identified he is unaffected by the reparations process, because this misrepresents the overall aim of the reparations system. Indeed, the Chamber highlighted that the system of reparations introduced by the Statute and the Rules of Procedure and Evidence (“Rules”) is one that reflects the

⁵⁰ ICC-01/04-01/06-2907, para. 38.

⁵¹ ICC-01/04-01/06-2905, paras 15 – 16.

growing recognition in international criminal law of the need to go beyond the notion of punitive justice in order to provide effective remedies to the victims.⁵² The Chamber has stressed the defence is a party to the reparations proceedings,⁵³ and it is critical that the principles established by the Chamber do not prejudice, or operate inconsistently, with the rights of the convicted person to a fair and impartial trial.⁵⁴ Moreover, the Chamber highlighted that during the implementation process it will be able to resolve any contested issues arising out of the work and the decisions of the TFV.⁵⁵ These safeguards would be unnecessary if the Chamber had concluded that the convicted person was unaffected by the reparations process. Although the reparations approved by the Chamber, once the five-step implementation plan⁵⁶ has been implemented, are likely to be by way of collective awards,⁵⁷ they will also have an important symbolic function. Not least, they will be an expression of the Court's disapproval and condemnation of the wrongdoing of the convicted person. Thus, Mr Lubanga is affected by the reparations awards even though they will not be funded using his assets or property.

24. Second, the prosecution emphasises that the jurisprudence of the Court establishes that it does not suffice to show that an issue has a hypothetical impact on the outcome of the trial, but instead the party seeking leave on this basis must demonstrate how *that party* will be adversely affected by the outcome.⁵⁸ On this basis, the prosecution argues that the defence Request should be rejected, as

⁵² ICC-01/04-01/06-2904, para. 177.

⁵³ ICC-01/04-01/06-2904, para. 267.

⁵⁴ ICC-01/04-01/06-2904, para. 255.

⁵⁵ ICC-01/04-01/06-2904, paras 262 and 286.

⁵⁶ ICC-01/04-01/06-2904, para. 282.

⁵⁷ ICC-01/04-01/06-2904, paras 269 – 275.

⁵⁸ ICC-01/04-01/06-2908, paras 21 – 22.

nothing in the Decision is capable of producing adverse consequences for Mr Lubanga and there is thus no impact on the conduct of trial.⁵⁹

25. The Chamber does not accept this submission. The Chamber has already determined that certain aspects of a decision may require immediate resolution by the Appeals Chamber, particularly if it provides general guidelines for the implementation of certain rights.⁶⁰ In the context of the appeal against the principles developed by the Chamber as regards victims' participation at trial it was said that:

As the participation of victims involves important principles of criminal law that have yet to be resolved finally, the general subject matter is one of importance for the determination of the case. [...] This approach has been applied in this decision.⁶¹

26. This Chamber has previously certified an appeal setting out the principles of victims' participation at trial and the Appeals Chamber ruled on its substance.⁶² The Chamber has applied this approach to the present request for leave to appeal.

The issues

27. Turning to the substance of the defence request, it is necessary for the Chamber to decide whether the issues identified by the defence arise in reality from the Decision. Addressing first the four points identified by the defence under the heading "beneficiaries of reparations", the Chamber considers that only two of

⁵⁹ ICC-01/04-01/06-2908, paras 21 – 23.

⁶⁰ Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, para. 16.

⁶¹ ICC-01/04-01/06-1191, para. 16.

⁶² Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432.

the four points identified by the defence constitute “appealable issues” for purposes of Article 82(1)(d).

28. Defence issue 1(a) concerns the Chamber’s statement 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”,⁶³ which the defence suggests is in breach of the relevant provisions in the Statute and the Rules, under which the status of victim may only be granted in accordance with set procedures that include the opportunity for the defence to make observations.⁶⁴ In this regard, although the Decision envisages that new victims may be identified, it is made clear that the Rome Statute framework applies to all victims and the Chamber has emphasised that “[n]othing in these principles will prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial,”⁶⁵ thus ensuring that the defence will be granted the opportunity to make observations whenever necessary.

29. Furthermore, the paragraph quoted by the defence does not focus on the identification of the victims who may benefit from reparations but rather on the need for the selection process to be guided by the principles of “[d]ignity, non-discrimination and non-stigmatisation”.⁶⁶ The Decision sets out that reparations may be granted to direct and indirect victims and legal entities,⁶⁷ and that proposals for collective reparations should be approved by the Chamber.⁶⁸ The Chamber has drawn a distinction between the *victims*, (including direct and indirect victims and legal entities) and the *beneficiaries* of the collective

⁶³ ICC-01/04-01/06-2904, para. 187.

⁶⁴ ICC-01/04-01/06-2905, para. 9(a).

⁶⁵ ICC-01/04-01/06-2904, para. 255.

⁶⁶ ICC-01/04-01/06-2904, para. 187.

⁶⁷ ICC-01/04-01/06-2904, paras 194 – 201.

⁶⁸ ICC-01/04-01/06-2904, para. 282.

reparations programmes, as identified by the TFFV.⁶⁹ Indeed, reparations will not be limited to those who participated in the trial and those who have applied for reparations, but they may benefit other individuals residing in the communities where the collective reparation programmes will be developed. However, these latter beneficiaries will not be granted victim status. For these reasons, the possibility that victim status may be granted in breach of the Rome Statute framework is not an issue that arises from the Decision. It follows that the application to certify a ground of appeal on this basis is refused. The Chamber does not need, therefore, to consider the other elements of the test under 81(2)(d).

30. Defence issue 1(b) is whether the Chamber has violated the rights of the convicted person by enabling the victims of sexual violence to receive reparations. The Chamber will deal with this issue below along with the issue of “causality” under 1(d).

31. Defence issue 1(c) concerns the Chamber’s alleged failure to specify that victims must demonstrate the existence of unrepaired personal harm. However, paragraph 217 of the Decision sets out that “in accordance with Article 21(3) of the Statute and Rule 85 of the Rules, reparations may be awarded to: (a) individual victims or (b) groups of victims, if in either case they suffered *personal harm*”.⁷⁰ Although the Decision does not specifically address the extent to which the harm suffered by certain victims has already have been addressed in other ways it stresses that the Court is able to take into account any awards or benefits received by victims from other bodies in order to guarantee that reparations are not applied unfairly or in a discriminatory manner.⁷¹ In addition, the Chamber decided that reparations awards shall take into account all of the “circumstances

⁶⁹ ICC-01/04-01/06-2904, paras 283 and 288.

⁷⁰ ICC-01/04-01/06-2904, para. 217 (*Italics added*).

⁷¹ ICC-01/04-01/06-2904, para. 201.

of the victims”.⁷² Accordingly, the principles do not inhibit or prevent consideration of the fact that the harm may have been addressed outside the context of ICC reparations. Therefore, the issue does not arise from the appealed decision and the Chamber does not need to consider the other elements of the test. Issue 1(c) does not satisfy the requirements of 81(2)(d).

32. Defence issue 1(d) is the “proximate cause” criteria adopted by the Chamber (at paragraphs 249 and 250 of the Decision) as regards reparations. The Chamber considers that this issue does arise from the Decision, as it relates to the standard that will be applied to any findings as to the alleged damage arising from the claims for reparations. The same conclusion applies to defence issue 1(b): whether the Chamber has violated the rights of the convicted person by enabling the victims of sexual violence to receive reparations. These two issues are interrelated, in the sense that the Decision permits reparations awards to victims of sexual and gender-based violence, provided the facts have been established to the relevant standard and the crimes of enlisting and conscripting children under the age of 15 or using them to participate actively in the hostilities are the proximate cause of the sexual violence.
33. Further, these issues may significantly affect the fair and expeditious conduct of the proceedings, since the application of the correct criteria for identifying the link between the harm suffered and the crime committed, and the scope of the harm that can be considered in this connection, is essential to a fair reparations award. If the wrong criteria are applied, this could well lead to delay because all of the decisions that are made applying this standard will need to be re-examined. Since the Chamber has decided that these issues may affect the fairness and expeditiousness of the proceedings, it is unnecessary to consider

⁷² ICC-01/04-01/06-2904, para. 243.

whether they may affect the outcome of the trial. Addressing the last element, the Chamber is satisfied that immediate resolution by the Appeals Chamber will materially advance the proceedings by removing any doubts as to whether the correct criteria is being applied. Accordingly, the Chamber concludes that issues 1(b) and 1(d) fulfil the requirements of Article 82(1)(d).

34. As to the second four points identified by the defence under the heading “reparations procedure”, the Chamber considers that only two of these points constitute “appealable issues” for purposes of Article 82(1)(d).

35. Issue 2(a) comprises two points: the Chamber’s delegation to the TFV in conjunction with the Registry and OPCV of various responsibilities in connection with the determination and implementation of reparations⁷³ and the transfer of oversight of the reparations proceedings to a differently composed Chamber.⁷⁴ The Chamber considers that both aspects of this issue arise from the Decision.

36. In the view of the Chamber, the question of whether the responsibility for the implementation and oversight of the reparations proceedings can be delegated in this manner may affect the fairness and expeditiousness of the proceedings. The reparations proceedings are an important stage of the trial⁷⁵ which must be conducted fairly and with due regard for the rights of the convicted person. If the latter has a right according to Article 74(1) of the Statute for reparations to be conducted by the present composition of Trial Chamber I, then this issue self-evidently may affect the fairness of the proceedings. If the Chamber erred in (i) delegating the determination of these issues to the TFV,⁷⁶ and (ii) concluding that “[I]t is unnecessary for the present judges of Trial Chamber I to remain seized

⁷³ ICC-01/04-01/06-2905, paras 12 – 14, referring to ICC-01/04-01/06-2904, para. 282.

⁷⁴ ICC-01/04-01/06-2905, paras 10 – 14, referring to ICC-01/04-01/06-2904, para. 261.

⁷⁵ ICC-01/04-01/06-2904, para. 260.

⁷⁶ ICC-01/04-01/06-2904, paras 265, 266, 281 and 288.

throughout the reparations proceedings”,⁷⁷ the entirety of the decisions made in accordance with this procedure would need to be re-considered, thereby creating considerable delay. In this regard, an immediate determination by the Appeals Chamber as to whether the Trial Chamber was entitled to delegate i) certain functions to the TFV and ii) oversight to a newly-constituted Chamber will ensure the proper course of the proceedings. Thus, the Chamber finds that issue 2(a) satisfies the requirements of Article 82(1)(d).

37. Issue 2(b) is a challenge to the mechanisms and principles decided by the Trial Chamber for reparations, on the basis that they breach Mr Lubanga’s fundamental rights, in particular by failing to establish the specific mechanisms by which defence participation in the reparations proceedings will occur. The suggestion that the Decision will prevent the defence from accessing the identities of victims and their applications for reparations, or that it deprives the defence of the ability and resources to challenge the applications⁷⁸ is without merit. Indeed, as set out above, the Decision made clear that the defence is a party to these proceedings⁷⁹ and that nothing in the principles should prejudice, or be inconsistent with, the rights of the convicted person to a fair and impartial trial.⁸⁰ Moreover, the Chamber highlighted that during the implementation process it will resolve any contested issues arising out of the work and the decisions of the TFV.⁸¹ The defence has not identified any element of the Decision that prejudices its rights in the principles and procedures that are set out therein. On this basis, defence issue 2(b) does not arise out of the impugned Decision. Accordingly, it is

⁷⁷ ICC-01/04-01/06-2904, para. 261.

⁷⁸ ICC-01/04-01/06-2905, paras 15 – 21.

⁷⁹ ICC-01/04-01/06-2904, para. 267.

⁸⁰ ICC-01/04-01/06-2904, para. 255.

⁸¹ ICC-01/04-01/06-2904, paras 262 and 286.

unnecessary to consider this issue further and leave to appeal is refused on issue 2(b).

38. Defence issue 2(c) relates to the “wholly flexible” standard of proof at the reparations stage, when the reparations awarded are not directed against the convicted person.⁸² The defence argues that this standard is impermissibly vague and it does not permit the convicted person to respond to the allegations made by victims in this regard, and it is suggested the standard is too vague to be applied by a non-judicial organ.⁸³ The Chamber considers that this issue does arise from the Decision, as this standard will be used in determining the factual issues for purposes of reparations. As discussed in the “Preliminary considerations” section above, awards from the TFV will be ordered with the aim of redressing the harm relating to the crimes for which Mr Lubanga has been convicted, even if his assets are not directly at stake, and on this basis the defence has a clear interest in the standard of proof that is applied to the determination of the facts relating to these crimes. Further, the application of the correct standard of proof is essential to a fair reparations award. The standard for resolving factual questions for the purposes of reparations orders will necessarily affect the equitable determination of these awards, and thus they may have consequences for the fairness of the proceedings. If the wrong standard is applied, this will create the real possibility of delay, as all the determinations made in accordance with the “wholly flexible” standard would have to be re-considered. It follows that the issue may significantly affect the expeditious conduct of the proceedings. On this basis it is unnecessary to consider additionally whether the issue may affect the outcome of the trial. Addressing the final element, the Chamber is satisfied that immediate resolution by the Appeals Chamber will materially advance the proceedings by

⁸² See ICC-01/04-01/06-2905, paras 22 – 25, referring to ICC-01/04-01/06-2904, para. 254.

⁸³ ICC-01/04-01/06-2905, paras 22 – 25.

removing doubts about the correctness of the standard and ensuring the proper course of the proceedings. Accordingly, the Chamber concludes that issue 2(c) satisfies the requirements of Article 82(1)(d).

39. Finally, defence issue 2(d) involves an alleged order by the Chamber to the States Parties to identify and freeze all of Mr Lubanga's assets. However, the Decision states simply that States Parties should provide the Court with timely and effective assistance pursuant to Article 93(1)(k) and notes that "the ICC requires the cooperation of States Parties and non-states parties"⁸⁴ before recommending that the Registry and TFV establish standard operating procedures, confidentiality protocols and financial reporting obligations.⁸⁵ Therefore, the issue identified by the defence is based on an erroneous reading of the Decision and does not constitute an appealable issue.

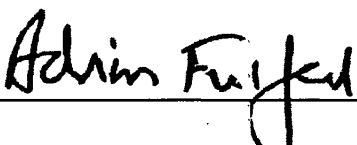
IV. Conclusion


40. For the above reasons, the Chamber grants leave to appeal as regards issues 1(b), 1(d), 2(a) and 2(c) and refuses leave to appeal on issues 1(a), 1(c), 2(b) and 2(d).

⁸⁴ ICC-01/04-01/06-2904, paras 277 – 278.

⁸⁵ ICC-01/04-01/06-2904, para. 280.

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


Judge Adrian Fulford


Judge Elizabeth Odio Benito


Judge René Blattmann

Dated this 29 August 2012

At The Hague, The Netherlands