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TRIAL CHAMBER II

Before: Judge Marc Perrin de Brichambaut, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Péter Kovács

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

Public

**Decision on the request of the Trust Fund for Victims for leave to appeal against
the order of 9 February 2016**

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

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TRIAL CHAMBER II (“the Chamber”) of the International Criminal Court, acting pursuant to article 82(1)(d) of the Rome Statute (“the Statute”) and rule 155 of the Rules of Procedure and Evidence (“the Rules”), decides the following.

I. Procedural background

1. On 3 November 2015, the Trust Fund for Victims (“the TFV”) filed a draft implementation plan on reparations¹ (“the Proposed Plan”).
2. On 9 February 2016, the Chamber instructed the TFV to supplement the Proposed Plan² (“the Order of 9 February 2016”). To this end, it instructed the TFV to prepare a file for each potential victim, to transmit these files to the Chamber by the dates indicated,³ to continue developing the complete details of the initial group of programmes and to transmit them to the Chamber by 7 May 2016.⁴
3. On 15 February 2016, the TFV filed a request, pursuant to article 82(1)(d) of the Statute (“the Request”), for leave to appeal against the Order of 9 February 2016.⁵
4. On 18 February 2016, the Defence team for Thomas Lubanga (“the Defence”) filed a response to the Request⁶ (“the Response”), calling for it to be dismissed as inadmissible or, alternatively, to be dismissed for failing to satisfy the criteria set out in article 82(1)(d) of the Statute.⁷

II. Submissions

(a) Submissions of the TFV

5. The TFV submits that although, according to a strict interpretation of article 82(1)(d) of the Statute, it is not *a party* to the reparations proceedings, it should

¹ “Filing on Reparations and Draft Implementation Plan”, 3 November 2015, ICC-01/04-01/06-3177-Red, and its two annexes (ICC-01/04-01/06-3177-AnxA and ICC-01/04-01/06-3177-Conf-Exp-AnxI-Red).

² “Order instructing the Trust Fund for Victims to supplement the draft implementation plan”, 9 February 2016, ICC-01/04-01/06-3198-tENG.

³ *Ibid.*, paras. 17-18 and p. 12.

⁴ *Ibid.*, paras. 21-22 and p. 12.

⁵ “Request for Leave to Appeal against the ‘Ordonnance enjoignant au Fonds au profit des victimes de compléter le projet de plan de mise en œuvre’ (9 February 2016)”, 15 February 2016, ICC-01/04-01/06-3200.

⁶ “Réponse de la Défense à la Requête du Fonds au profit des victimes sollicitant l’autorisation d’interjeter appel de l’ ‘Ordonnance enjoignant au Fonds au profit des victimes de compléter le projet de plan de mise en œuvre’, datée du 15 février 2016”, 18 February 2016, ICC-01/04-01/06-3201.

⁷ *Ibid.*, paras. 20-40.

be given a standing to request leave to file an appeal against the Order of 9 February 2016.⁸

6. The TFV is conscious of the fact that it may not be considered *a party* to the reparations proceedings because, as it concedes, the expression “either party” denotes, on the one hand, the convicted person and, on the other, the victims eligible for reparations.⁹ In the view of the TFV, however, the Court should adopt a wider reading of article 82(1)(d) so as to consider the TFV to be *a party* to the reparations proceedings in the instant case.¹⁰ The TFV claims that this request is particularly appropriate, in view of the fact that the Order of 9 February 2016 is directed solely at it.¹¹

7. Accordingly, the TFV argues that such an interpretation is compatible with the spirit of article 82 of the Statute, which, in its view, allows all entities that may be adversely affected by a proceeding to lodge an appeal. In support of its interpretation, the TFV cites article 82(2) of the Statute, which provides that a State can appeal against an interlocutory decision with the leave of the Pre-Trial Chamber.¹² The TFV also cites article 82(4) of the Statute, which, in its view, underscores that in reparations proceedings the parties with *locus standi* are different from those in a criminal trial and include parties potentially adversely affected by the order for reparations, such as *bona fide* owners of property.¹³ In this regard, the TFV argues that its position is directly comparable to that of a *bona fide* owner of property because it is adversely affected by the Order of 9 February 2016. To this end, it makes reference to the financial resources out of which it would have to fund the implementation of the Order of 9 February 2016 and the complement that it may eventually decide to offer.¹⁴

⁸ Request, para. 10.

⁹ *Ibid.*, para. 4.

¹⁰ *Ibid.*, para. 5.

¹¹ *Ibid.*, para. 6.

¹² *Ibid.*, para. 11.

¹³ *Idem.*

¹⁴ *Idem.*

(b) Submissions of the Defence

8. The Defence submits that the TFV does not have the *locus standi* required under article 82(1)(d) of the Statute to file a request for leave to appeal the Order of 9 February 2016.¹⁵ The Defence argues that, as the TFV itself has acknowledged, the TFV is not a party to the reparations proceedings and therefore does not have *locus standi* under article 82(1)(d) of the Statute.¹⁶ In support of its assertion, the Defence argues that, in the instant case, the expression “either” refers specifically to the two parties in the reparations stage, i.e., the sentenced person and the victims.¹⁷

9. Furthermore, it is the Defence’s view that, contrary to the TFV’s claim, a wider reading of article 82(1)(d) of the Statute is not warranted.¹⁸ The Defence asserts that the Court has “[TRANSLATION] always maintained a strict interpretation of the terms of the Statute so as to limit the right to appeal to the parties and participants expressly mentioned in the texts” of the Court.¹⁹ Referring to paragraphs 2 and 4 of article 82 of the Statute, cited by the TFV, the Defence argues that “[TRANSLATION] where the drafters of the Statute wished to grant the right of appeal to a person or entity, they expressly stated as much”.²⁰

III. Analysis

10. Article 82(1)(d) of the Statute provides that:

Either party may appeal [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.

11. The Chamber notes that it has not yet been determined whether article 82(1)(d) of the Statute, which refers, *inter alia*, to “the fair and expeditious

¹⁵ Response, paras. 3-19.

¹⁶ *Ibid.*, para. 5.

¹⁷ *Idem.*

¹⁸ *Ibid.*, paras. 7-10.

¹⁹ *Ibid.*, paras. 12 and 14.

²⁰ *Ibid.*, para. 17.

conduct of the proceedings or the outcome of the trial”, is applicable to reparations proceedings.²¹ However, the Chamber also notes that neither the TFV nor the Defence has raised this question.

12. In any event, the Chamber notes that a request for leave to appeal may be submitted only by “either party”. In this regard, the Chamber notes that these terms generally denote the Prosecution and the accused.²² The Chamber also notes that neither the TFV nor the Defence disputes the fact that, during the reparations stage, which is a distinct stage of the proceedings,²³ the parties to the proceedings are the sentenced person and the victims²⁴ and that none of the parties recognised as such has deemed it appropriate to request leave to appeal.

13. The Chamber notes that “the Statute defines exhaustively the right to appeal”²⁵ and that:

[T]he limitation of the right to bring interlocutory appeals to those subjects listed in article 82 of the Statute was fully consistent with internationally recognised human rights, which require that only the convicted person has a right to appeal final decisions on conviction or sentence.²⁶

14. In this regard, the Chamber notes the jurisprudence of the Pre-Trial and Trial Chambers, which have adopted a narrow interpretation of the term “parties” with respect to article 82(1)(d) of the Statute. By way of example, when

²¹ With regard to this question, the Chamber notes paragraphs 12 and 17 of the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, by which Pre-Trial Chamber I dismissed a request for leave to appeal (13 July 2006, ICC-01/04-168) (“the DRC OA3 Judgment”).

²² See, for example, “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, para. 93.

²³ Appeals Chamber, “Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings”, 14 December 2012, ICC-01/04-01/06-2953 (“the Decision on Admissibility”), para. 70. See also, Appeals Chamber, “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2”, 3 March 2015, ICC-01/04-01/06-3129, (“the Judgment of the Appeals Chamber”), para. 234.

²⁴ Response, para. 5. Request, para. 4. See also article 82(4) of the Statute; Decision on Admissibility, paras. 66-67.

²⁵ *The Prosecutor v. Germain Katanga*, “Decision on the admissibility of the appeal against the ‘Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350’”, 20 January 2014, ICC-01/04-01/07-3424 (“the Decision of 20 January 2014”), para. 28, citing DRC OA3 Judgment, para. 39.

²⁶ *Idem.*, making reference to the DRC OA3 Judgment, para. 38.

the Netherlands and the Democratic Republic of the Congo submitted requests for leave to appeal, under article 82(1)(d) of the Statute, a decision on protective measures relating to an asylum application, Trial Chamber I ruled that “the term ‘party to the proceedings’ does not encompass a State Party”.²⁷ Similarly, Pre-Trial Chamber II reminded the Egyptian authorities, in connection with a request under regulation 46(3) of the Regulations of the Court, that they could not “be considered as a party to the present proceedings within the meaning of article 82(1)(d) of the Statute” as they lacked *locus standi*.²⁸ Lastly, it was the view of Pre-Trial Chamber II that:

a person, against whom a summons to appear has been requested, [does not have] *locus standi*, [and is not recognized] [...] as a “party” to the proceedings, within the meaning of article 82(1)(d) of the Statute, until [the Chamber] has taken a decision on the Prosecutor's applications. It follows that [he or she] is not entitled to request a leave to appeal [...].²⁹

15. In the view of the Chamber the arguments set out by the TFV, which refer, *inter alia*, to paragraphs 2 and 4 of article 82 of the Statute in order to demonstrate that entities other than parties may lodge an appeal under article 82 of the Statute, are not convincing. The Chamber notes that paragraphs 2 and 4 of article 82 of the

²⁷ Trial Chamber I, “Decision on two requests for leave to appeal the ‘Decision on the request by DRC-DO1-WWWW-0019 for special protective measures relating to his asylum application’”, 4 August 2011, reclassified as public on 25 October 2011, ICC-01/04-01/06-2779, para. 11.

²⁸ Regulation 46(3) of the Regulations of the Court; Pre-Trial Chamber II, “Decision on a Request for Reconsideration or Leave to Appeal the ‘Decision on the “Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014””, 22 September 2014, ICC-RoC46(3)-01/14-5, para. 8.

²⁹ Situation in the Republic of Kenya, Pre-Trial Chamber II, “Decision on a Request for Leave to Appeal”, 11 February 2011, ICC-01/09-43, para. 9. See also “Separate Opinion of Judge Daniel David Ntanda Nsereko”, Appeals Chamber, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on the admissibility of the ‘Appeal Against Decision on Application Under Rule 103’ of Ms Mishana Hosseinioun of 7 February 2012”, 9 March 2011, ICC-01/11-01/11-74, para. 2. The Chamber notes that, on some occasions, the chambers of the Court have not ruled on the question of *locus standi*. See, for example, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Appeals Chamber, “Decision on the ‘Demande d'autorisation aux fins d'appel contre la décision de la Chambre du 11 juin 2014, du refus de participation au stade préliminaire’”, 7 August 2014, ICC-02/11-02/11-113, para. 6; Situation in the Republic of Kenya, Pre-Trial Chamber II, “Decision on the Government of Kenya's Application for Leave to Appeal Pursuant to Article 82(1)(d) of the Rome Statute”, 29 May 2012, ICC-01/09-86, para. 12, in which the Appeals Chamber deemed it unnecessary to examine the issue of whether the Government of Kenya might be considered as a party within the meaning of article 82(1)(d) of the Statute.

Statute expressly provide that, with the leave of the Pre-Trial Chamber, a State and the *bona fide* owner of property may appeal against (a) a decision of the Pre-Trial Chamber under article 57 and (b) an order issued under article 75, respectively. Similarly, the Chamber notes that the right of a State to lodge an appeal, under article 82(1)(a), against a decision on the jurisdiction of the Court or the admissibility of a case, is based on articles 18(4) and 19(6) of the Statute. Accordingly, the Chamber notes that the Statute expressly provides for those situations in which a person or an entity other than the parties has standing to appeal a decision.

16. The Chamber notes that the Statute does not provide for the TFV to have standing in reparations proceedings and that relevant jurisprudence supports this conclusion. In this respect, the Appeals Chamber, relying on the Regulations of the Trust Fund,³⁰ has noted that the role of the TFV, aside from its assistance mandate, consists in implementing Court-ordered reparations.³¹ Furthermore, the Chamber notes that the TFV was *invited*, in advance, by Trial Chamber I and by the Appeals Chamber, to file observations in these proceedings.³² In contrast to the Defence and the victims represented by their counsel, the TFV was granted leave to participate in the reparations proceedings only on the basis of these invitations.³³

17. In the light of the above, it is the Chamber's view that the TFV does not have *locus standi* to request leave to appeal, under article 82(1)(d) of the Statute, against the Order of 9 February 2016. Consequently, the Chamber considers that it is not necessary to examine the other arguments put forward by the TFV.

³⁰ Regulations of the Trust Fund, Resolution ICC-ASP/4/Res.3, adopted by consensus at the fourth plenary meeting on 3 December 2005, regulation 50.

³¹ Judgment of the Appeals Chamber, para. 107. See also, Judgment of the Appeals Chamber, para. 240.

³² "*Ordonnance portant calendrier concernant la fixation de la peine et des réparations*", 21 March 2012, ICC-01/04-01/06-2799, para. 9; Decision on Admissibility, p. 4 and para. 75.

³³ The Chamber also notes that, in *The Prosecutor v. Germain Katanga*, the TFV was not considered to be a party by Trial Chamber II (*The Prosecutor v. Germain Katanga*, "Order instructing the parties and participants to file observations in respect of the reparations proceedings", 1 April 2015, ICC-01/04-01/07-3532-tENG, paras. 10, 12, 15 and p. 7).

FOR THESE REASONS, the Chamber

DISMISSES the Request *in limine*.

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

[signed]

Judge Marc Perrin de Brichambaut
Presiding Judge

[signed]

Judge Olga Herrera Carbuccion

[signed]

Judge Péter Kovács

Dated this 4 March 2016

At The Hague, the Netherlands