

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 3 May 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

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Paul Kabongo Tshibangu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following Decision on the defence request for leave to appeal:

I. Procedural background

1. On 5 April 2012, the Chamber issued its “Decision on the OPCV’s request to participate in reparations proceedings” (“impugned Decision”).¹
2. On 11 April 2012, the defence requested leave to appeal this Decision (“defence request”).²
3. On 12 April 2012, the Chamber instructed the parties and participants that any responses to the defence request were to be filed no later than 16.00 on 20 April 2012.³
4. On 13 April and the 16 April 2012 respectively, the Office of Public Counsel for Victims (“OPCV”) and the prosecution filed their separate responses.⁴

II. Relevant provisions

5. In accordance with Article 21(1) of the Rome Statute (“Statute”), the Trial Chamber has considered Article 82(l)(d) of the Statute:

Appeal against other decisions

¹ Decision on the OPCV’s request to participate in the reparations proceedings, 5 April 2012, ICC-01/04-01/06-2858.

² Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Décision on the OPCV’s request to participate in the reparations proceedings » rendue le 5 avril 2012, 11 April 2012, ICC-01/04-01/06-2859.

³ E-mail communication from a Legal Officer to the Trial Chamber to the parties and participants on 12 April 2012 at 14:50.

⁴ Réponse du Bureau du conseil public pour les victimes à la « Requete 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, 13 April 2012, ICC-01/04-01/06-2860 ; Prosecution’s Response 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’, 16 April 2012, ICC-01/04-01/06-2861.

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.

III. Submissions

A. General remarks

6. The Chamber's assessment of the merits of the proposed appeal is irrelevant when considering an application under Article 82(1)(d) of the Statute. Instead, the focus of the Chamber is on whether the relevant decision "[...] 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 Chamber, therefore, has not reviewed the defence submissions on the merits, and it has instead focused exclusively on the Article 82(1)(d) test, in accordance with the Appeals Chamber's jurisprudence.⁵
8. The Chamber has examined the application for leave to appeal against the following criteria:
 - a) Whether the matter is an "appealable issue";
 - b) Whether the issue at hand could significantly affect:

⁵ Judgement 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, paragraphs 9-14.

- 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.

B. The submissions

(i) Is this an appealable issue?

9. The defence principally seeks leave to appeal as regards paragraphs 10 and 12 of the impugned Decision.⁶
10. Although the defence does not advance any specific submission as to why these paragraphs contain appealable issues, it argues that in its Decision the Chamber has permitted the OPCV to act as the legal representative for “potential victims”, a step that is not provided for in the Statute or the Rules and it is suggested this is contrary to the provisions that regulate applications to participate and to receive reparations. The defence argues that regardless of whether reparations are granted on an individual or collective basis, Rule 85 of the Rules stipulates that it is necessary to establish personal harm in relation to clearly identified “natural persons”, or organisations or institutions. It suggests that only those recognised as victims can be represented in the proceedings and the Trial Chamber does not have the power to act *ultra petita*, granting collective reparations to individuals who have merely submitted an application. The defence argues that this suggested impermissible expansion by the Chamber of the notion of a victim so as to

⁶ ICC-01/04-01/06-2858, paragraphs 10 and 12.

include an unidentified number of individuals or organisations gravely affects the rights of Mr Lubanga.⁷

11. The OPCV contends that the defence has not identified an appealable issue. It suggests the Chamber merely indicated the possibility of granting collective reparations to individuals who have not submitted application forms and who, to date, have not been individually identified. The OPCV submits that this is consistent with the Rome Statute framework. Furthermore, the OPCV argues that the Chamber's decision to appoint the OPCV to represent "potential beneficiaries" of reparations is consistent with Article 75(3) of the Statute. The OPCV submits that this provision grants the Chamber the discretionary power to invite observations from "other interested persons".⁸

12. The prosecution submits that none of the issues identified by the defence arise from the impugned Decision. The prosecution contends that the defence application is founded on the erroneous premise that the Chamber has already decided to award collective reparations to unidentified victims, which is incorrect given the Chamber has yet to rule on the procedure and principles that are to be applied. The prosecution submits that the defence will have the opportunity to appeal following the Chamber's final decision on reparations, pursuant to Article 75 of the Statute.⁹

13. The prosecution argues that the impugned Decision has not established the principles that are to be applied or the procedures that will be followed by the Chamber with regard to reparations, and it is observed that submissions on these matters are pending. The prosecution further submits that the impugned Decision does not award reparations, but merely appoints the OPCV to represent the interests of victims who may benefit from collective

⁷ ICC-01/04-01/06-2859, paragraphs 6-8.

⁸ ICC-01/04-01/06-2860, paragraphs 11-17.

⁹ ICC-01/04-01/06-2861, paragraph 3.

reparations. The prosecution thus suggests that the defence application advances “purely hypothetical concerns”.¹⁰

14. The prosecution submits that the impugned Decision does not confer any rights on the individuals who will be represented by the OPCV, and they will not qualify automatically as victims who are entitled to apply for reparations, and the Decision does not affect the likelihood, or the nature, of any award of collective reparations.¹¹ Furthermore, the prosecution submits that the Chamber has not ordered the payment of collective reparations, nor has it expanded the class of victims who may benefit from collective reparations.¹²

(ii) Does the issue significantly affect the “fair and expeditious conduct of the proceedings”?

15. The defence submits that the rights of the accused under Article 67 of the Statute apply throughout the trial process, including the Article 74 decisions and the decisions on sentencing and reparations. The defence submits that the issues decided by the Trial Chamber affect the fairness and expeditiousness of the trial since Mr Lubanga could be held responsible for unspecified events about which he has not had the opportunity to present observations.¹³
16. The OPCV observes that the Chamber has found Mr Lubanga guilty of the crimes charged, and it submits that the gravity of his criminal responsibility will be determined in the sentencing hearing. It is suggested that this determination will be unaffected by the number of victims who may eventually benefit from reparations. Furthermore, the OPCV contends that to date there is no evidence that Mr Lubanga has the means to pay any award of

¹⁰ ICC-01/04-01/06-2861, paragraphs 9-10.

¹¹ ICC-01/04-01/06-2861, paragraph 12.

¹² ICC-01/04-01/06-2861, paragraph 13.

¹³ ICC-01/04-01/06-2859, paragraphs 10-12.

reparations to victims, including to those who have submitted individual application forms. Moreover, the OPCV submits that the victims in relation to whom it has been authorised to make submissions could only benefit from collective reparations. The OPCV argues that collective reparations should not be ordered directly against the convicted person but instead they are to be implemented by the Trust Fund for Victims. The OPCV contends finally that the defence has not demonstrated how the impugned Decision allowing the OPCV to represent “victims who have not submitted applications but who may benefit from an award for collective reparations” could affect the rights of Mr Lubanga or the guarantees of a fair trial, the latter having concluded.¹⁴

17. The prosecution submits that collective reparations have not been ordered in the impugned Decision and Mr Lubanga has not been denied the opportunity to be heard in advance of any order that the Chamber may make as regards reparations to groups, including unidentified victims. The prosecution additionally submits that the defence request fails to demonstrate any potential adverse impact on the expeditious conduct of the proceedings. The prosecution suggests that these issues can in any event be raised as part of an appeal against any order that the Chamber may issue on reparations, and it is contended that a premature appeal that essentially concerns hypothetical issues would only delay rather than expedite the process.¹⁵

(iii) Does the issue significantly affect the outcome of the trial?

18. The defence submits that the impugned Decision affects the outcome of the proceedings, since the Chamber may issue an order under Article 75 of the Statute that requires Mr Lubanga to compensate individuals who have not been authorised to participate as victims.¹⁶

¹⁴ ICC-01/04-01/06-2860, paragraphs 18-21.

¹⁵ ICC-01/04-01/06-2861, paragraphs 15-17.

¹⁶ ICC-01/04-01/06-2859, paragraph 13.

19. The prosecution submits that the defence argument in this regard is speculative and premature in the absence of any order from the Chamber as regards reparations, and it is suggested that it is unclear whether Mr Lubanga has the means to fund any award of reparations.¹⁷

(iv) Will the immediate resolution of the issue materially advance the proceedings?

20. The defence submits that the impugned Decision violates the rights of the accused under Article 67 of the Statute. The defence argues that at the commencement of the reparations procedure it ought to be provided with all the necessary information relating to the individual requests to participate in the reparations proceedings. The defence suggests that the immediate resolution of this issue is necessary given the impugned Decision could irreparably affect the fairness of the proceedings.¹⁸

21. The prosecution contends that the defence will be able to appeal the Chamber's final decision on reparations. However, it is submitted that delaying this process by way of an interlocutory appeal on hypothetical issues will only cause unnecessary delay.¹⁹

C. Analysis and conclusions

22. The defence seeks leave to appeal paragraphs 10 and 12 of the impugned decision, which provide as follows:²⁰

¹⁷ ICC-01/04-01/06-2861, paragraph 18.

¹⁸ ICC-01/04-01/06-2859, paragraphs 14-18.

¹⁹ ICC-01/04-01/06-2861, paragraphs 19-21.

²⁰ ICC-01/04-01/06-2858, paragraphs 10 and 12.

10. Pursuant to Rule 97(1) of the Rules, the Court may award reparations on an individual or collective basis. Furthermore, in accordance with Rule 98 (3) of the Rules, the Court may order that a collective award for reparations is made through the Trust Fund for Victims. Consequently, victims who may benefit from an award for collective reparations will not necessarily participate in the proceedings, either in person or through their legal representatives. [...]

12. In all the circumstances, the OPCV may:

[...]

b. represent the interests of victims who have not submitted applications but who may benefit from an award for collective reparations, pursuant to Rules 97 and 98 of the Rules.

23. The first consideration is whether the issues identified by the defence are appealable issues. The Appeals Chamber has indicated that “an issue” in this context is something the resolution of which is essential for the determination of matters arising in the judicial cause under examination.²¹

24. The Chamber has identified the following two relevant issues in the defence request:

- a. The Chamber may award collective reparations to victims who have not submitted an individual application form and who are thus unidentified; and
- b. The OPCV may be appointed to represent victims who have not submitted an individual application form and who may benefit from collective reparations

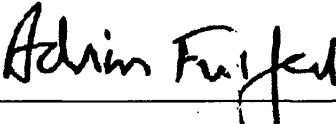
25. In its application the defence has failed to provide any foundation for its suggestion that these are appealable issues, in the sense that their resolution is essential for the determination of matters arising at this particular stage of the proceedings.

²¹ Appeals Chamber Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paragraph 9.

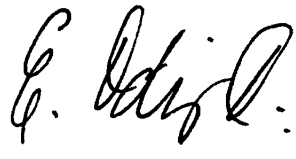
26. The mere fact that an issue is of general interest or, given its overall importance, it may be raised during, or it may affect, the future proceedings (here the Chamber's consideration of reparations) is insufficient to warrant granting leave to appeal.²²
27. The Chamber accepts the prosecution's submission that none of the issues identified by the defence arise from the Chamber's decision and that the current request is based on the erroneous premise that the Chamber has decided to award collective reparations to unidentified victims. It is to be stressed that the Chamber's decision is not a final determination on the principles to be applied to reparations or their form (*e.g.* whether they are to be individual or collective). Submissions in this regard are still pending.
28. The Chamber appointed the OPCV solely to represent the interests of victims who may eventually benefit from collective reparations. Consequently, the defence application is premature and it is founded on hypothetical concerns.
29. Once the Chamber has issued its decision on reparations pursuant to Article 75 of the Statute, the defence will have the opportunity to appeal pursuant to Article 82(4) of the Statute.
30. The requirements set out in Article 82(1)(d) are cumulative and therefore failure to fulfil one or more is fatal to an application for leave to appeal. Given the conclusions set out above, it is unnecessary for the Chamber to consider whether the other requirements within Article 82(1)(d) of the Statute are met.
31. In all the circumstances, the application for leave to appeal is refused.

²² 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, paragraph 11.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 3 May 2012

At The Hague, The Netherlands