

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: French

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

Date: 13 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 Document

Defence application for leave to appeal against the *Decision establishing the principles and procedures to be applied to reparation issued on 7 August 2012*

Source: Defence Team for Mr Thomas Lubanga

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

Office of the Prosecutor

Ms Fatou Bensouda

Counsel for the Defence

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Mr Marc Desalliers

Ms Caroline Buteau

Legal Representatives of Victims

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Mr Paul Kabongo Tshibangu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

Ms Paolina Massidda

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

GREFFE

Registrar

Ms Silvana Arbia

Trust Fund for Victims

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

BACKGROUND

1. On 14 March 2012, Trial Chamber I handed down its judgment pursuant to article 74 of the Statute.¹
2. On 7 August 2012, the Chamber rendered its *Decision establishing the principles and procedures to be applied to reparations*² (“Impugned Decision”).
3. On 10 August 2012, Trial Chamber I informed the parties and participants that the decision was “[TRANSLATION] to be considered to have been officially notified in English” and that it “[TRANSLATION] was not a reparation order within the meaning of rule 150”.³
4. In accordance with article 82(1)(d) and rule 155, the Defence seeks leave to appeal the Chamber’s 7 August 2012 decision establishing the principles and procedures applicable at the reparations stage.

I – GROUNDS OF APPEAL

5. The Defence seeks to submit the following grounds to the Appeals Chamber:

1. THE BENEFICIARIES OF REPARATIONS

6. In light of the provisions of the Statute and the Rules of Procedure and Evidence,⁴ and in accordance with previous decisions of the Trial Chamber and the Appeals Chamber,⁵ only direct victims “whose harm is the result of the commission of a crime within the jurisdiction of the

¹ ICC-01/04-01/06-2842.

² ICC-01/04-01/06-2904.

³ E-mail from the Chamber to the parties and participants on 10 August 2012.

⁴ Rule 85.

⁵ See, *inter alia*: ICC-01/04-01/06-1432; ICC-01/04-01/06-1634.

Court”, and indirect victims “who suffer harm as a result of the harm suffered by direct victims”,⁶ are eligible to claim victim status in the instant case.

7. In its *Decision on “indirect victims”* of 20 January 2009, the Trial Chamber held that the direct victims of the crimes with which Mr Lubanga was charged are the children under the age of fifteen years who claim to have been enlisted, conscripted or used to participate in hostilities by FPLC soldiers.⁷ The indirect victims are those for whom “as a result of their relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them”,⁸ such as the parents of the direct victims or the persons who intervened to prevent the commission of a crime.⁹ The Chamber expressly excluded from this category those who suffered harm as a result of the conduct of direct victims.¹⁰
8. Since it is possible for an order on reparations to be issued against a convicted person,¹¹ it would be contrary to the rights of the convicted person to allow a construction of the concept of “victim” which oversteps the Appeals Chamber’s previous construction in the instant case.
9. Accordingly, the Defence wishes to submit the following issues to the Appeals Chamber:

⁶ *Decision on “indirect victims”*, ICC-01/04-01/06-1634, para. 44.

⁷ ICC-01/04-01/06-1634, para. 47.

⁸ ICC-01/04-01/06-1634, para. 49.

⁹ ICC-01/04-01/06-1634, paras. 50 and 51. Trial Chamber I notes that the Appeals Chamber held that the existence of a close personal relationship, such as the one between a parent and child, is a prerequisite for the participation of indirect victims.

¹⁰ ICC-01/04-01/06-1634, para. 52.

¹¹ ICC-01/04-01/06-2904, para. 250.

- a. In holding 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”,¹² the Impugned Decision contravenes the provisions of the Statute and the Rules¹³ which subordinate the granting of the status of “victim”, and, accordingly, any entitlement to reparations, to compliance with the necessary procedural requirements, adversarial proceedings during which the Defence may raise objections, and a decision of the Chamber;
- b. In holding that “victims of sexual or gender-based violence”¹⁴ could, as such, obtain reparations within the context of the trial of Mr Thomas Lubanga, the decision contravenes the principle according to which the convicted person can only be held liable for reparations for harm resulting from the crimes for which he or she was found guilty; in the present case, the Trial Chamber expressly ruled that the individual responsibility of Thomas Lubanga could not be accepted in cases of sexual violence;¹⁵
- c. In failing to clarify whether the victims must demonstrate the existence of harm that is personal, has actually come into being, is current and certain, and for which no reparations have already been issued, the decision contravenes generally recognised principles of compensation;¹⁶

¹² ICC-01/04-01/06-2904, para. 187.

¹³ Rules 94, 89(2); regulation 88. See, generally, article 68; rules 89-93 and 94-99. See also: ICC-01/04-101-tENG, para.67, footnote 62.

¹⁴ ICC-01/04-01/06-2904, para. 200.

¹⁵ ICC-01/04-01/06-2842, para. 896 and ICC-01/06-01/04-2091, paras. 74-75.

¹⁶ Article 21(1)(c). See, for example, ECCC, Case File No. 001/18-07-2007-ECCC/SC, Judgment, Doc. No. F28, para. 640; France: French Court of Cassation, Criminal Division: Cass. mixed ch, 29 May 1970, Bull. crim. 1970, No. 176; Cass. Crim. 20 October 1971, Bull. crim. 1971, No. 279.

d. In holding that the Court should apply the standard of “proximate cause” to determine whether causation exists between the crime committed and the harm suffered,¹⁷ the decision provides a vague and imprecise standard, the application of which might prejudice the rights of Mr Thomas Lubanga.

2. THE REPARATIONS PROCEDURE

10. The decision rightly emphasises that “the reparations proceedings are an integral part of the overall trial process”.¹⁸

11. It follows that the reparations proceedings, with some exceptions expressly provided for by the texts, are subject to the same procedural requirements as the other aspects of the trial, with equal regard to the functions and powers devolved to the judges in charge of the trial, the fundamental rights of the accused (article 67), and the rights and duties of the other participants.

12. The Defence wishes to submit the following points of law to the Appeals Chamber:

a. In delegating some of its judicial functions to the Trust Fund for Victims, to the expert commission and to the Registry, the Trial Chamber contravenes the provisions of the Rome Statute

13. The Impugned Decision provides that, in the instant case, reparations will be dealt with principally by the Trust Fund for Victims, under the supervision of a newly constituted Trial Chamber.¹⁹ The Chamber delegates to the TFV, together with the Registry, the OPCV and the experts appointed by the TFV,²⁰ the power to assess the harm suffered

¹⁷ ICC-01/04-01/06-2904, paras. 249-250.

¹⁸ ICC-01/04-01/06-2904, para. 260.

by the victims,²¹ assess the appropriate reparations²² and to identify the beneficiaries of those reparations.²³

14. The Defence will argue firstly that the Trial Chamber cannot defer the present case to another newly constituted Chamber without violating articles 39(2)(b)(ii) and 74(1). Secondly, the Trial Chamber cannot delegate the authority to decide on issues governed by powers which are its sole preserve to a non-judicial organ, such as, for example, the appointment of an expert under regulation 97(2), or the determination of the harm suffered by an individual.

b. The mechanism established and the principles set forth by Trial Chamber I in the Impugned Decision are violative of the fundamental rights of Mr Thomas Lubanga

15. The implementation of victims' participation at all stages of the proceedings, including at the reparations stage, should on no account jeopardise the fairness of the trial.²⁴
16. Apart from his specific rights at the reparations stage, the Accused must be able fully to exercise the fundamental rights accorded to him by article 67, in particular the right to a fair and impartial trial, the right to be tried within a reasonable time, and the right to a full and complete defence.
17. Fair trial rules require in particular that the Defence be informed of the allegations made by the victims against the convicted person, and be

¹⁹ ICC-01/04-01/06-2904, para. 261.

²⁰ ICC-01/04-01/06-2904, para. 285.

²¹ ICC-01/04-01/06-2904, para. 285.

²² ICC-01/04-01/06-2904, para. 282.

²³ ICC-01/04-01/06-2904, paras. 283 and 284.

²⁴ Articles 67 and 68 and rule 97(3): 1. The participation of victims at the reparations stage must occur in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

afforded adequate time and facilities to respond to them (article 67); the effective exercise of these fundamental rights presupposes that the Defence will be made privy to the identity of the victims and all of the information they have provided to the Chamber in support of their claims.

18. The Defence submits to the Appeals Chamber that the mechanism provided for by the Trial Chamber in the Impugned Decision wholly prevents the Defence from exercising the rights enshrined in the Statute although it remains a party to the proceedings at the reparations stage²⁵ and orders for reparations can be made against it.²⁶
19. In particular, the Defence will argue that the procedure established by the Impugned Decision provides neither for the transmission to the Defence of the application forms for reparations submitted by the victims nor for its participation in the assessment of the harm suffered by the victim²⁷ in determining the appropriate reparations²⁸ or identifying the beneficiaries of such reparations.²⁹ Nor is provision made for informing the Defence of the TFV's reparations orders and decisions.
20. Moreover, the procedure set forth in the Impugned Decision does not specify the time limit within which the TFV must issue orders for reparations, in violation of the right granted by article 67(1)(c).

²⁵ The founding instruments of the ICC clearly provide for the participation of the convicted person in the reparations stage and there is no provision that warrants his exclusion. Hence, the convicted person is to receive the notifications provided for in rules 94(2) and 95(1) and is accordingly entitled to submit observations under article 75(3). The convicted person may also call experts to assist the Court on any matter relating to reparations. Lastly, the person may appeal against orders for reparations under articles 75 pursuant to article 82(4).

²⁶ ICC-01/04-01/06-2904, para. 250.

²⁷ ICC-01/04-01/06-2904, para. 285.

²⁸ ICC-01/04-01/06-2904, para. 282.

²⁹ ICC-01/04-01/06-2904, paras. 283 and 284.

21. It follows that the Defence, for which modalities for participation in the reparations proceedings have not been expressly envisaged, will not be in a position to exercise its rights as expressly enshrined in the Statute.³⁰
- c. The standard of proof adopted by the Trial Chamber at the reparations stage does not allow the convicted person's rights to be guaranteed**
22. The Trial Chamber considers that a “wholly flexible” approach is appropriate for the determination of factual issues where compensation is paid by the Trust Fund for Victims.³¹
23. The Chamber neglects to define exactly the standard of proof which should be applied by the TFV in determining the facts in relation to victims’ applications for reparations.
24. The Defence will argue firstly that the standard of proof adopted by the Trial Chamber will not allow the convicted person to respond to the allegations of the victims against him, and secondly that the standard of proof adopted by the Chamber is not sufficiently precise to allow a non-judicial organ, the TFV, to apply the principles established by the Trial Chamber.
25. The Defence emphasises in this regard that Mr Lubanga’s indigence cannot be relied on to justify a lightening of the burden of proof incumbent on the victims, since the Impugned Decision provides specifically for the seizure of the assets of the convicted person for the payment of any awards for reparations.³²

³⁰ For example, articles 64(2), 67 and 68 and rules 97(2), 97(3) and 150(1).

³¹ ICC-01/04-01/06-2904, para. 254.

³² ICC-01/04-01/06-2904, paras. 276-280. See also, in particular, regulation 117 of the Regulations of the Court.

d. By requesting States Parties to identify and freeze “any assets of the convicted person”, the Trial Chamber misconstrues article 93(1)(k)

26. The Trial Chamber relies on article 93(1)(k) to request States Parties to provide the Court with the necessary assistance for the purposes of identifying and freezing “any assets of the convicted person”.³³
27. The Defence will challenge the Chamber’s construction of article 93(1)(k).
28. The request for assistance provided for in article 93(1)(k) refers exclusively to property and assets and instrumentalities “of crimes” [emphasis added].
29. The Trial Chamber’s request for assistance is therefore inconsistent with the provisions of article 93 in that it concerns all of Mr Lubanga’s assets, without the requirement to demonstrate whether or not they are linked to the crimes.
30. Accordingly, the Chamber’s construction of article 93(1)(k) is violative of the rights of the convicted person.
31. These are the grounds on which the Defence intends to pray the Appeals Chamber to set aside the Trial Chamber’s decision of 7 August 2012.

³³ ICC-01/04-01/06-2904, para. 277.

II- APPLICATION OF ARTICLE 82(1)(d) CRITERIA

A- The Impugned Decision raises issues which may significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

1- Fair and expeditious conduct of the proceedings

32. As previously argued, the Trial Chamber's decision affects the fundamental rights of the Accused and is antithetical to fair and impartial trial requirements.

33. the Impugned Decision further significantly affects the expeditiousness of the proceedings, *inter alia* in that:

- The principles set out by the Trial Chamber will have the effect, amongst others, of indefinitely delaying the issuance of any orders for reparations;
- The lack of detail as to the body of procedural mechanisms which are to be applied in the event of the issuance of orders for reparations will cause a multiplication of challenges,³⁴ thereby causing significant delays.

34. It follows that all the issues raised are such as to affect directly the fair and expeditious conduct of the proceedings.

2- Outcome of the trial

35. Since the reparations stage concludes with the issuance of orders for reparations,³⁵ it is self-evident that all matters pertaining to the

³⁴ ICC-01/04-01/06-2904, para. 262.

³⁵ ICC-01/04-01/06-2800, para. 45; ICC-01/04-01/06-2904, para. 267.

principles governing such reparations directly affect the outcome of the trial.

B- The immediate resolution by the Appeals Chamber of the issues raised may materially advance the proceedings

36. The Appeals Chamber has held that to meet this criterion, the issue raised “must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”.³⁶
37. The Appeals Chamber went on to hold that the word “advance” (which appears in article 82(1)(d)) cannot be associated with the expeditiousness of the proceedings, but instead means “move forward”, “by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings”.³⁷
38. The Appeals Chamber added that a decision in the “context of article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances the proceedings will not be advanced but on the contrary they will be set back”.³⁸
39. As Trial Chamber I itself emphasised, the Impugned Decision is of particular significance in that it is the very first on reparations to be

³⁶ ICC-01/04-168, para. 14.

³⁷ *Idem*, para. 15.

³⁸ *Idem*, para. 16.

issued by a chamber of this Court.³⁹ The significance of this decision is all the greater as the Chamber specifically stated that it would not issue any other decision on reparations.⁴⁰

40. The immediate resolution of these issues by the Appeals Chamber will obviate the issuance of erroneously founded orders for reparations. An authoritative decision by the Appeals Chamber setting out the appropriate procedure for this stage would provide undeniable legal certainty and advance the proceedings.

III- SUSPENSION OF THE EFFECTS OF THE DECISION

41. Should the Trial Chamber grant the Defence authorisation to appeal the Impugned Decision, the Defence would seek suspension of the effects of the decision during appellate proceedings in accordance with article 82(3) and rule 156(5).

³⁹ ICC-01/04-01/06-2904, para. 20.

⁴⁰ ICC-01/04-01/06-2904, para. 287.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I:

TO AUTHORISE the Defence to appeal against the Trial Chamber's
decision of 7 August 2012.

[signed]

Ms Catherine Mabile, Counsel

Done this 13 August 2012

At The Hague, The Netherlands