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No.: ICC-01/04-01/06
Date: 15 January 2018

THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi
Judge Howard Morrison
Judge Sanji Mmasenono Monageng
Judge Christine Van den Wyngaert
Judge Piotr Hofmański

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR *v.* THOMAS LUBANGA DYILO**

Public Document

Notice of Appeal against Trial Chamber II's "*Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu*" of 15 December 2017

Source: Legal Representatives of the V01 Group of Victims

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

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I. PROCEDURAL HISTORY

1. On 7 August 2012, Trial Chamber I handed down a decision establishing the principles and procedures to be applied to reparations in the instant case.¹
2. On 3 March 2015, the Appeals Chamber delivered its judgment² on the appeals against that decision, affirming in part and amending in part Trial Chamber I's decision on reparations. It also directed the Trust Fund for Victims ("Trust Fund") to file a draft implementation plan within six months, and set the Trial Chamber the task of monitoring and overseeing the execution of the Amended Order for Reparations and determining the size of the reparations award against Mr Lubanga.
3. On 14 August 2015, the Chamber granted the Trust Fund a three-month extension of time to file the draft implementation plan ("Decision of 14 August 2015").³
4. On 3 November 2015, the Trust Fund submitted the "Filing on Reparations and Draft Implementation Plan".⁴
5. On 9 February 2016, the Chamber deferred the approval of the Draft Implementation Plan of 3 November 2015 and instructed the Trust Fund to

¹ Trial Chamber I, "Decision establishing the principles and procedures to be applied to reparations", dated 7 August 2012, ICC-01/04-01/06-2904.

² 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.

³ Decision of 14 August 2015, ICC-01/04-01/06-3161-tENG.

⁴ "Decision on the 'Request for extension of time to submit the draft implementation plan on reparations'", 14 August 2015, ICC-01/04-01/06-3161-tENG.

compile dossiers on behalf of the victims potentially eligible for reparations and submit them to the Chamber.⁵

6. An application by the Trust Fund for leave to appeal against that order was rejected by the Chamber on 4 March 2016.
7. As instructed by the Chamber, the Trust Fund then began a process of identifying the victims, assessing their eligibility for reparations according to the criteria laid down by the Appeals Chamber. In April 2016, some of the participating victims in groups V01 and V02 were interviewed accordingly by the Trust Fund and subjected to a series of expert evaluations.
8. On 31 May 2016, the Trust Fund filed an application urging the Chamber to reconsider its approach to the victim identification process as set out in the Order of 9 February 2016.
9. On 15 July 2016, the Chamber, by a majority, instructed the Registry to “provide the Legal Representatives of [group V01 and V02] victims[, the Office of Public Counsel for Victims (“OPCV”)] and the Trust Fund for Victims with all the necessary and appropriate aid and assistance for the purpose of locating and identifying [Potentially Eligible Victims]”.⁶
10. On 21 October 2016, the Chamber approved and ordered the implementation of the Trust Fund’s plan for symbolic reparations. It also instructed the

⁵ Order of 9 February 2016, ICC-01/04-01/06-3198-tENG.

⁶ “Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations”, 15 July 2016, ICC-01/04-01/06-3218-tENG, and dissenting opinion of Judge Herrera Carbuccion, ICC-01/04-01/06-3217-Anx-tENG.

Trust Fund to continue the victim identification process in order to obtain a “representative sample” of victims, with a view to determining the size of the award against Mr Lubanga. The Chamber also authorized the OPCV to identify potential victims, prepare their dossiers and submit them to the Chamber.⁷ Applications from participating victims for leave to appeal against this order were rejected by way of the order of 8 December 2016.⁸

11. The Trust Fund resumed its evaluation of the victims participating in the proceedings and submitted the dossiers that were considered complete. The OPCV submitted a series of dossiers for potential victims who had yet to make themselves known to the Court. The Defence was able to make submissions on these dossiers.

12. By its Decision of 15 December 2017, the Chamber not only determined the overall size of the reparations award against Mr Lubanga; it also determined, in an annex, which victims would be eligible for the collective reparations that the Trust Fund was to implement. It excluded a significant number of the victims who were participants in the proceedings and whom the Trust Fund had already designated as eligible.

⁷ “Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016”, 21 October 2016, ICC-01/04-01/06-3252-tENG, and dissenting opinion of Judge Herrera Carbuccion, ICC-01/04-01/06-3252-Anx-tENG.

⁸ ICC-01/04-01/06-3263-tENG, 8 December 2016.

II. LEGAL BASIS FOR THE APPEAL

13. This appeal is filed pursuant to article 82(4) of the Statute and rule 153 of the Rules of Procedure and Evidence.

III. GROUNDS OF APPEAL

First ground

The Trial Chamber failed to heed the Appeals Chamber's instructions and exceeded the mandate it had received from it by engaging in an individual assessment of the eligibility of the potential victims already identified, contrary to rules 97(1) and 98(3), which apply to exclusively collective reparations. It also treated the reparations forms compiled by the Trust Fund as applications for reparations filed under rule 98, whereas a final determination had been reached that collective reparations would not be based on individual applications.

14. The decision specifies that the 425 victims who attracted a finding of eligibility must be awarded reparations under the programme, from which it seems to follow that those who did not are ineligible to participate.
15. This decision runs counter to the instructions of the Appeals Chamber, whose ruling was that – given the collective nature of the reparations – the assessment of each victim's eligibility for the programme should be made not by the Chamber at the conclusion of an adversarial judicial process, but by the Trust Fund at the implementation stage.

16. By the Appeals Chamber's definition, the Trial Chamber's role was to:

monitor and oversee the implementation stage of the present order, including having the authority to approve the draft implementation plan submitted by the Trust Fund. The Chamber may be seized of any contested issues arising out of the work and the decisions of the Trust Fund.⁹

In its judgment, the Appeals Chamber noted that "the duties assigned to the newly constituted Trial Chamber, namely the approval of the draft implementation plan and the hearing of any contested issues, are limited".¹⁰

17. According to the (amended) order for reparations, the Trust Fund for Victims was put in charge of implementing the collective reparations and was instructed to prepare a draft reparations plan that included a statement of the anticipated monetary amount necessary to remedy the harm "based on information gathered during the consultation period leading up to the submission of the draft implementation plan".¹¹ Once its plan was approved, the Trust Fund was to contact the victims to verify their eligibility and request their consent to participate in the programme.¹²

18. Before approving its proposed plan, the Chamber invited the Trust Fund to compile dossiers on potential victims.¹³ For this task, the Trust Fund sought the cooperation of the participating victims, who submitted to an assessment procedure consisting of an interview with the Trust Fund followed by specialized examinations at the hands of medical and socioeconomic experts.

19. During these interviews, Trust Fund staff filled out a "reparations form" stating the identities of the victims and their answers to a questionnaire about

⁹ Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 76.

¹⁰ "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012", para. 234.

¹¹ Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 78.

¹² *Ibid.*, para. 73.

¹³ Order of 9 February 2016, ICC-01/04-01/06-3198-tENG.

the events and harm they had experienced. The eligibility of the victims to participate in the collective reparations programme was assessed by the Trust Fund team on the basis of their interviews, the experts' reports, their participation and/or reparations applications filed early in the proceedings, and documents tendered by the victims at the Trust Fund's request.

20. In the Decision of 15 December 2017, the Chamber treats the dossiers compiled by the Trust Fund as though they were individual applications for reparations. Having allowed for a cross-check by the Defence, it rules on the eligibility of each victim identified, whereas the dossiers were intended to provide the Chamber with a "representative sample of victims". It also ignores the findings of the Trust Fund, whose assessments were conducted at its request.

21. In so doing the Chamber misapprehends the fundamental distinction between a process based on individual applications for reparations as provided for in rule 94 and a collective reparations process as provided for in rule 98.

Second ground

The Trial Chamber erred in law by assessing the victims' eligibility for collective reparations on the basis of different processes depending on the category they belonged to and the entity entrusted with compiling their dossiers, which in practice discriminated against the participating victims.

22. As a result of the Chamber's successive orders, three groups of potential victims will have had their eligibility determined in three different ways: the participating victims, whose dossiers were compiled by the Trust Fund; the new potential victims, whose dossiers were compiled by the OPCV; and any potential victims who come forward later, who will be subjected only to screening by the Trust Fund during the reparations implementation phase.

a. Victims whose dossiers were compiled by the Trust Fund

23. The eligibility for reparations of victims who were already participants in the proceedings was made out on the basis of:

- summaries by Trust Fund staff of responses from questionnaire-based interviews that lasted several hours;
- a comparison of the Trust Fund's notes and the statements contained in the applications for participation; and
- documents requested by the Trust Fund and documents enclosed with the applications for reparations.

24. It follows from the table in annex II, however, that the Chamber gave no consideration to the reports of the doctors, psychologists and social workers who assisted the Trust Fund staff, or to the results of their assessments.

b) Potential victims whose dossiers were compiled by the OPCV

25. The eligibility of the potential victims who had not submitted applications for participation was determined on the basis of dossiers compiled by an OPCV counsel who acted as their “legal representative” and documents produced on that occasion.

c) Victims whose eligibility will be determined during the implementation phase

26. The Trust Fund and its partners will decide whether future potential victims are eligible for reparations, but their assessments will not be subject to review by either the Defence or the Chamber.

27. This difference in processes has resulted in discrimination against the participating victims:

- The applications for participation were generally submitted between 2006 and 2009 via intermediaries relying on information provided by relatives of the direct victims, who were still minors at the time. Many of the relatives were illiterate. These applications were subject to errors or misunderstandings that were occasionally corrected by the victims in their interviews with the Trust Fund and which the Trust Fund took into account in its assessments but did not note on the forms. The new potential victims, on the other hand, were interviewed for the first time when they were adults. The absence of any prior applications necessarily precluded any inconsistencies due to the passage of time.
- The forms for participating victims were filled out by Trust Fund staff on the basis of the questions posed, depending on what the staff member

considered significant or sufficient, whereas the forms for new victims were prepared by the OPCV counsel acting as their legal representative.

- Some of the victims already identified have been excluded from reparations by the Chamber at the conclusion of an adversarial judicial process and against the opinion of the Trust Fund, whereas those who make themselves known in the future may be accepted by the Trust Fund through a purely administrative process.

Third ground

The Trial Chamber did not apply the principles enunciated in its decision to the individual dossiers and erred in law by failing to provide adequate reasons in its grounds for rejection, which did not take into account the assessments conducted by the Trust Fund and its experts.

28. In its Decision of 15 December 2017, the Chamber applied a balance of probability test as its standard of eligibility, taking the view that minor contradictions were not incompatible with a victim's eligibility; nor were mistaken dates of birth on documents, provided that none of those dates suggested a victim was more than 15 years old at the time of the events.

29. In ruling on the individual dossiers, however, the Chamber decided that a significant number of victims did not qualify as victims for reparations, relying on boilerplate reasoning at odds with the aforementioned standard.

30. As the table in annex II shows, several victims were rejected on the grounds of "[TRANSLATION] insufficient detail", but the fields in the table do not reflect the questions asked in the form used by the Trust Fund. The questionnaire

provides only nine lines for the summary of a victim's account; it asks for the place of recruitment or service but not the location of training or demobilization (except where there was a formal demobilization process), the instances of fighting in which the victim took part or the names of commanding officers. Yet the Chamber seems to have based its rejections on the absence of such particulars.

31. The Chamber had asked the Trust Fund to perform an assessment of each victim – an energy-intensive and costly process – but went on to take no account of the outcome of those assessments, relying solely on the information included on the forms. The Trust Fund staff, however, necessarily had access to far more detailed accounts than those provided in the summaries and based their decisions not only on those documents, but also on what they had heard over the course of hours of interviews, and on the reports prepared by the experts.

32. Conclusion

33. The decision is materially affected by a series of errors of law; the proceedings appealed against were unfair in a way that affects the reliability of that decision.

Consequently, the Legal Representatives respectfully call upon the Appeals Chamber to:

Amend the order insofar as it determines the eligibility for collective reparations of potential victims in the sample group of dossiers submitted to the Chamber.

Set aside annex II to the decision.

Vest the Trust Fund for Victims with responsibility for determining the eligibility of potential victims who wish to participate in one of its programmes.

For the V01 victims team, the Legal Representatives

[signed]

Luc Walley

[signed]

Franck Mulenda

Dated this 15 January 2018

at Brussels, Belgium

and Bunia, DRC