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No.: **ICC-01/04-01/06**
Date: **16 August 2018**

THE APPEALS CHAMBER

Before: **Judge Piotr Hofmánski, Presiding Judge**
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Chile Eboe-Osuji
Judge Howard Morrison

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Document

Defence Consolidated Reply to the Responses of the Legal Representatives of the V01 Group of Victims and the Office of Public Counsel for Victims Respectively Filed on 15 and 18 May 2018

Source: **Defence team for Mr Thomas Lubanga Dyilo**

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

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PROCEDURAL HISTORY

1. On 15 March 2018, the Defence filed its appeal[1] against the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable"[2] handed down by Trial Chamber II on 15 December 2017 ("Chamber").

2. On 15 May 2018, the Legal Representatives of the V01 group of victims ("V01 Legal Representatives") filed their response[3] to the appeal brief of the Defence for Mr Lubanga.

3. On 18 May 2018, the Office of Public Counsel for Victims ("OPCV") provided its consolidated response[4] to the appeal briefs from the Defence and the V01 Legal Representatives.

4. By decision of 26 July 2018,[5] the Appeals Chamber granted the Defence[6] leave to file a consolidated reply to the Responses.

[1] "Appeal Brief of the Defence for Mr Thomas Lubanga Dyilo against the '*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*' handed down by Trial Chamber II on 15 December 2017 and Amended by the Decisions of 20 and 21 December", 15 March 2018, ICC-01/04-01/06-3394-Conf-tENG; Public redacted version: ICC-01/04-01/06-3394-Red-tENG.

[2] "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", 15 December 2017, ICC-01/04-01/06-3379-Conf-tENG.

[3] "Response of the Legal Representatives of the V01 Group of Victims to the Appeal Brief of the Defence for Mr Thomas Lubanga Dyilo against the '*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*' handed down by Trial Chamber II on 15 December 2017 and Amended by the Decisions of 20 and 21 December 2017", 15 May 2018, ICC-01/04-01/06-3405-tENG..

[4] "Consolidated Response to the Appeal Briefs of the Defence and the Legal Representatives of V01 Victims against the Trial Chamber II Decision of 15 December 2017", 18 May 2018, ICC-01/04-01/06-3407-Conf-tENG.

[5] "Decision on requests for leave to reply", 26 July 2018, ICC-01/04-01/06-3412.

[6] "Defence Application for Leave to File a Consolidated Reply to the Responses of the Legal Representatives of the V01 Group of Victims and the Office of Public Counsel for Victims Respectively Filed on 15 and 18 May 2018", 24 May 2018, ICC-01/04-01/06-3410-Conf-tENG.

SUBMISSIONS

(1) **Reply to the Response of the V01 Legal Representatives**

- *The response to the first ground of appeal (paras. 9-17)*

5. The V01 Legal Representatives incorrectly submit that Trial Chamber I, by its decision of 7 August 2012, affirmed by the Appeals Chamber on 3 March 2015, decided to "proceed with reparations *proprio motu*".[7]

6. Article 75 of the Rome Statute provides that the International Criminal Court ("Court") may only "in exceptional circumstances" determine "on its own motion", or "*propriu motu*", "the scope and extent of any damage, loss and injury to" victims who have not applied to the Court for reparations".

7. In such an eventuality, the Court must, in the first place, adhere to the procedure laid down by rule 95 of the Rules of Procedure and Evidence and ask "the Registrar to provide notification of its intention to the person or persons against whom the Court is considering making a determination, and, to the extent possible, to victims, interested persons and interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3".

8. And yet, in its decision of 7 August 2012, Trial Chamber I did not in any way rely on the provisions of article 75 and rule 95. Nor did it decide to rule "*propriu motu*" on the size of the reparations award.

9. Therefore, in its Decision of 3 March 2015, the Appeals Chamber did not decide "to proceed with reparations *proprio motu*", that is, "on its own motion" within the meaning of article 75 of Statute, but simply upheld Trial Chamber I's choice of collective reparations over individual reparations.

[7] ICC-01/04-01/06-3405-tENG, para. 12.

10. The V01 Legal Representatives cannot, therefore, construe the decision of Trial Chamber I to award collective reparations as a decision to rule "on its own motion" on the ground that the decision exclusively in favour of collective reparations was implicitly considered by the Appeals Chamber as an exceptional circumstance within the meaning of article 75(1) of the Statute.[8]

11. It is precisely because the Decision appealed fails to adhere to the procedure and the conditions applicable to the award of reparations made "*proprio motu*", that is to say, "on [the Chamber's] own motion", laid down in article 75 of the Rome Statute and rule 95 of the Rules of Procedure and Evidence, that the Decision is affected by an error of law.

12. Furthermore, the V01 Legal Representatives misconstrue the decision of the Appeals Chamber of 3 March 2015 by taking the view that that Chamber expressly held that the award of collective reparations precluded the submission of applications for reparations from victims.[9]

13. In fact, the Appeals Chamber simply held, and rightly so, that the award of exclusively collective reparations ruled out individual awards.

- *The response to the second ground of appeal (paras. 19-22)*

14. The V01 Legal Representatives claim that the Defence acknowledged in its Appeal Brief that "the balance of probabilities" "is also the standard generally applied in international law in the context of asylum".[10]

15. To the contrary: at paragraphs 53 to 70 of its Appeal Brief, it is the Defence's submission that the Chamber made an error of law in that it was content to describe the uncorroborated statements of the applicants as "coherent and credible" in finding that they were eligible as victims.

[8] ICC-01/04-01/06-3405-tENG, para. 15.
[9] ICC-01/04-01/06-3405-tENG, para. 15.
[10] ICC-01/04-01/06-3405-tENG, para. 21.

16. The standard of proof based on the "coherent and credible" nature of statements is applied in international law only to the assessment of eligibility for refugee status under the 28 July 1951 Geneva Convention, whose protective aim justifies a particularly low standard of proof.

17. Hence jurisdictions relying on the "coherent and credible" nature of the statements in granting an applicant refugee status have held that that standard of proof cannot be considered to be a balance of probabilities.[11]

18. The Defence has shown in its Appeal Brief that "the standard of proof based on the 'coherent and credible' nature of the applicants' statements is lower than the standard of a balance of probabilities".[12]

19. The V01 Legal Representatives therefore misrepresent the Defence position.

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[11] "Note on Burden and Standard of Proof in Refugee Claims", UNHCR, 16 December 1998, para. 17; See also:
Supreme Court of the United States: *INS v. Stevic*: with regard to the standard applicable in asylum proceedings, it pointed out that a moderate interpretation of the "well-founded fear" standard would indicate "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility"; *INS v. Cardoza-Fonseca*: to show a "well-founded fear of persecution" an alien "need not prove that it is more likely than not that he or she will be persecuted in his or home country", the Court reaffirmed the standard stipulated in the Stevic case, that of "a reasonable possibility".
The House of Lords of the United Kingdom: *Fernandez v. Government of Singapore*: The House of Lords concluded that it was not necessary to show that it was more likely than not that the individual would be detained or restricted if returned, a lesser degree of likelihood sufficed, such as a "reasonable chance", "substantial grounds for thinking" or "a serious possibility"; *R. v Secretary of State for the Home Department ex parte Sivakumaran*: the House of Lords called for a test less stringent than the "more likely than not" standard, such as "reasonable degree of likelihood".
The Australia High Court: *Chan Yee Kin v. The Minister for Immigration and Ethnic Affairs*: the High Court used the term "real chance". Mason C.J. said, "the Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns." Dawson C.J. preferred a test which "requires there to be a real chance of persecution before fear of persecution can be well-founded". He explained there need not be "*certainty*" or "*even probability that (a fear) will be realised*". McHugh J. said, "Obviously, a far-fetched possibility of persecution must be excluded. But if there is a real chance that the applicant will be persecuted, his or her fear should be characterised as 'well-founded' for the purpose of the Convention and Protocol".
Canada: *Joseph Adjei v. Minister of Employment and Immigration*: the Court of Appeal rejected the "more likely than not" test stating "It was common ground that the objective test is not so stringent as to require a probability of persecution." MacGuigan J. adopted a "reasonable chance" standard which was equated with "good grounds for fearing persecution" and "a reasonable possibility" of persecution. See also, *Federal Court of Appeal, Salibian v. Canada*
[12] ICC-01/04-01/06-3394-Red-tENG, para. 58.

- *The response to the fourth ground of appeal (paras. 51-55)*

20. The V01 Legal Representatives claim that the Defence has "always contended that, in order to determine the size of the award for reparations, the Chamber had to assess the harm of each individual victim and not the […] cost of implementing a programme of collective reparations, some of which are symbolic reparations".[13]

21. To so assert is incorrect and misrepresents the Defence position.

22. The Defence has never argued that the quantum of the individual harm should be assessed. It has, however, consistently underscored that the existence and the nature of the individual harm must be evaluated in order to devise appropriate collective reparations.

23. Thus, in its Appeal Brief, the Defence submitted that it could be inferred from the provisions of rules 97 and 98 of the Rules of Procedure and Evidence, read together, "that the amount held against the convicted person can only be all or a part of the actual cost of the reparations ordered, not the value of the aggregate individual harm assessed independently of the cost of the reparations actually awarded by the Court".[14]

24. The Appeal Brief also pointed out that "[i]n the case of collective reparations, the award against a convicted person can be assessed only on the basis of the actual cost of the collective award".[15]

25. Furthermore, the V01 Legal Representatives misquote the Defence.

26. They claim that the Defence stated that the size of the collective award "cannot evidently be lower than the aggregate individual harm".[16]

[13] ICC-01/04-01/06-3405-tENG, para. 51.
[14] ICC-01/04-01/06-3394-Red-tENG, para. 210.
[15] ICC-01/04-01/06-3394-Red-tENG, para. 211.
[16] ICC-01/04-01/06-3405-tENG, para. 51.

27. Yet the paragraph of the Defence appeal brief referenced and purportedly cited verbatim in the Response of the V01 Legal Representatives makes entirely the opposite point:

> "Moreover, the size of the collective award envisaged, as yet unknown, can evidently **only** be lower than the aggregate individual harm." (Emphasis added).[17]

28. That being so, the V01 Legal Representatives have misrepresented the Defence's position and misquoted the Defence.

(2) **Reply to the OPCV Response**

- *The motion for inadmissibility (paras. 10-12)*

29. The OPCV contends that the Defence appeal brief is inadmissible for failure to clearly identify the nature or the basis of the errors allegedly committed by the Trial Chamber or to show how the impugned decision was affected by the alleged errors.[18]

30. The Appeals Chamber will deny the motion as unfounded.

31. For each of the six grounds, the Appeal Brief sets out its legal basis, its arguments − legal and/or factual − the error (error of law or clear misappreciation of the facts), how the error affected the impugned decision and the relief sought.

32. Moreover, clear misappreciation of the facts and error in the exercise of discretion fall within the jurisdiction of the Appeals Chamber.

- *The response to the first ground of appeal (paras. 30-34)*

33. In its first ground of appeal, the Defence submits that the Chamber made an error of law in its assessment of "the scope and extent of any damage, loss and injury to victims" by giving consideration not only to the victims who had applied to the

[17] ICC-01/04-01/06-3394-Conf-tENG, para. 222.
[18] ICC-01/04-01/06-3407-Conf-tENG, para. 12.

Court for reparations but also to "hundreds and possibly thousands more victims" who were unidentified and had not made any application to the Chamber.

34. The OPCV disputes the position on the ground that the Chamber was informed by the Legal Representatives and the Trust Fund of the existence of hundreds more victims identified for reparations in the case and so "the victims' applications were therefore put before" the Chamber.[19]

35. Yet, the OPCV cannot legitimately maintain that applications for reparations were put before the Chamber by potential victims who did not submit any application form.

36. Specifically, an application for reparations is properly before the Court only if it is in the form of a filed dossier which is duly completed and provides all the particulars necessary for consideration of an applicant's standing as victim, in compliance with the criteria of rule 94 of the Rules of Procedure and Evidence.

37. That being so, a mere statement that there might be further unidentified eligible victims does not suffice to constitute the filing of an application for reparations for the consideration of the Chamber overseeing the proceedings.

38. Moreover, the Legal Representatives and OPCV have authorization to represent only those persons who have expressly appointed them to do so, and, therefore they cannot make applications for reparations on behalf of unidentified persons.

39. Further still, since the Trust Fund has no power of representation, any information it might convey to the Chamber on the existence of further potential victims cannot be regarded as an application for reparations.

40. That being the case, the Chamber made an error of law by wrongfully ordering Mr Lubanga to pay USD 6,600,000 in reparations for the harm suffered by

[19] ICC-01/04-01/06-3407-Conf-tENG, para. 31.

unidentified victims "who may be identified during the implementation of reparations."

- *The response to the fourth ground of appeal (paras. 41-42)*

41. OPCV contests the argument made in the Defence's fourth ground of appeal and "contrary to the Defence's claim, […] submits that the Chamber did take the actual cost of the intended collective reparations into account in its Decision of 15 December 2017".[20]

42. To so assert is incorrect and misrepresents the Decision handed down by the Chamber on 15 December 2017.

43. In determining the size of Mr Lubanga's financial liability, the Chamber did not at all rely "[on] the estimated cost of many types of programmes and services that could be implemented in Ituri"[21] but had regard solely to an assessment of the individual harm calculated on the basis of a fixed rate.

44. Thus, at paragraphs 245 to 259 of the Decision of 15 December 2017, the Chamber made a monetary assessment of the harm suffered by the victims by applying a presumption of "average harm to each direct and indirect victim" encompassing "material, physical and psychological components, which reflect the types of harm defined by the Appeals Chamber and the fact that each victim suffered them in different combinations".[22]

45. In setting the size of the award for which Mr Lubanga is liable at USD 10,000,000, the Chamber based its reasoning solely on the assessment of the harm suffered by each victim; no regard was had to the cost of the implementation of the reparations.

[20] ICC-01/04-01/06-3407-Conf-tENG, para. 42.
[21] ICC-01/04-01/06-3407-Conf-tENG, para. 42.
[22] ICC-01/04-01/06-3379-Red-Corr-tENG, paras. 245 and 247.

46. In any case, the Chamber noted that the Trust Fund was not able to put forward an estimate of its cost.[23]

47. It is therefore incorrect of OPCV to maintain that, in setting the size of the reparations award for which Mr Lubanga is liable, the Chamber took into account the actual cost of the collective reparations.

- *The response to the sixth ground of appeal (paras. 48-50)*

48. OPCV notes that it had asked the Chamber to set the amount of Mr Lubanga's liability at USD 6,000,000 for the victims already known, and had further stated that it was aware of at least the same number of potential beneficiaries, which could bring the figure to USD 12,000,000.[24]

49. To so assert is incorrect since the figure of USD 6,000,000, at which OPCV arrives in its submissions of 8 September 2017, is the sum-total of fixed sums for a possible 3,000 persons.

50. As OPCV put it,

> on the basis of the current costs mentioned above and after adding said costs and multiplying them by the number of potential beneficiaries – estimated at approximate[ly] 1,500 (…) notes that the aggregate amount of the lump sums is approximately USD 3,000.000. Taking into account the figure of 3,000 potential beneficiaries estimated by the Trust Fund, the said amount would rise to USD 6,000,000. (Emphasis added)

51. OPCV thus concluded "that the overall amount of at least USD 6,000,000 to implement the collective reparations programmes for the potential beneficiaries seems reasonable",[25] but did not confine that estimate to those who were already known.

52. It is therefore incorrect of OPCV to state that "[it] might well have arrived at a sum-total of USD 12,000,000".

[23] ICC-01/04-01/06-3379-Red-Corr-tENG, para. 260.
[24] ICC-01/04-01/06-3407-Conf-tENG, para. 50.
[25] ICC-01/04-01/06-3360-tENG, para. 50.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO

TAKE NOTE of the present submissions.

[signed]

Ms Catherine Mabille, Lead Counsel

Dated this 16 August 2018, at The Hague