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

Date: 15 January 2018

THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Christine Van den Wyngaert
Judge Howard Morrison
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 by 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
way of the Decisions of 20 and 21 December 2017**

Source: Defence 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 December 2017, Trial Chamber II (“Chamber”) held a public hearing in which it set the size of the reparations award against Mr Lubanga.
2. On the same day, the Defence received notification of the “*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*”¹ (“Decision”), accompanied by two public annexes² and one confidential redacted annex.³
3. The Chamber stated that the Decision was an integral and supporting part of the amended order for reparations issued pursuant to article 75 of the Rome Statute, and that it was therefore appealable under article 82(4) of the Statute and rule 150(1) of the Rules of Procedure and Evidence.⁴
4. On 18 December 2017, the Defence requested notification of a corrected version of the Decision and annex I thereto, insofar as these mistakenly stated the term of Mr Lubanga’s sentence of imprisonment as 15 years instead of 14.⁵
5. On 20 December 2017, the Chamber issued the “*Décision relative à la requête de la Défense de Thomas Lubanga Dyilo du 19 décembre 2017*”⁶ granting the error correction request, although it did not consider the error made to be material.
6. The Chamber also stated that it lacked jurisdiction to adjudicate the second aspect of the request, *viz.* for a ruling to have the appeal period start from the date of notification of the corrected version of the Decision.

¹ ICC-01/04-01/06-3379-Conf; ICC-01/04-01/06-3379-Red.

² ICC-01/04-01/06-3379-AnxI and ICC-01/04-01/06-3379-AnxIII.

³ ICC-01/04-01/06-3379-Conf-AnxII-Red.

⁴ ICC-01/04-01/06-T-369-FRA, p. 6, lines 7-10.

⁵ “*Requête de la Défense en rectification d’erreur matérielle de la ‘Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu’ notifiée le 15 décembre 2017*”, 18 December 2017, ICC-01/04-01/06-3380.

⁶ ICC-01/04-01/06-3382.

7. On 21 December 2017, the Chamber notified a corrected version of its Decision of 20 December 2017 on account of an error concerning the number of the paragraph to be corrected in annex I.⁷
8. On the same day, it notified a corrected version of the Decision⁸ and annex I thereto.⁹

NOTICE OF APPEAL

9. Pursuant to article 82(4) of the Rome Statute, read in conjunction with rules 150 and 153 of the Rules of Procedure and Evidence and regulation 57 of the Regulations of the Court, the Defence hereby gives notice of an appeal against the “*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*” handed down on 15 December 2017 by Trial Chamber II and amended by way of the decisions of 20 and 21 December 2017, registered as document number ICC-01/04-01/06-3379-Conf¹⁰ in the case record of *The Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), insofar as it:
 - found that 425 of the 473 potentially eligible victims in the sample had shown on a balance of probabilities that they were direct or indirect victims of the crimes of which Mr Lubanga was convicted;
 - determined, as a result, that those 425 victims should be awarded the collective reparations approved by the Chamber in the instant case;
 - found that those 425 victims constituted only a sample of the potentially eligible victims and that hundreds, if not thousands, of additional victims had suffered harm as a result of the crimes of which Mr Lubanga was convicted;

⁷ ICC-01/04-01/06-3382-Corr.

⁸ ICC-01/04-01/06-3379-Conf-Corr; ICC-01/04-01/06-3379-Conf-Corr-Anx; ICC-01/04-01/06-3379-Red-Corr; ICC-01/04-01/06-3379-Red-Corr-Anx.

⁹ ICC-01/04-01/06-3379-AnxI-Corr; ICC-01/04-01/06-3379-AnxI-Corr-Anx.

¹⁰ The corrected version is ICC-01/04-01/06-3379-Conf-Corr.

- set the size of the reparations award against Mr Lubanga at a total of USD 10,000,000, reflecting his liability in respect of both the 425 victims in the sample (USD 3,400,000) and any other victims yet to be identified (USD 6,600,000); and
 - instructed the Trust Fund to file submissions by 15 January 2018 on the possibility of continuing to seek out and identify victims with the help of the Office of Public Counsel for Victims and the Legal Representatives of V01 and V02 Victims.
10. Pursuant to regulation 58 of the Regulations of the Court, the Defence will set out in its appeal brief the legal and/or factual reasons advanced in support of the grounds of appeal below.

FIRST GROUND OF APPEAL – BREACH OF ARTICLE 75 OF THE STATUTE AND RULE 95 OF THE RULES OF PROCEDURE AND EVIDENCE

11. Article 75 of the Statute states that the International Criminal Court (“Court”) may not “on its own motion” determine “the scope and extent of any damage, loss and injury” to victims who have not applied to the Court for reparations, except “in exceptional circumstances”.
12. Rule 95 of the Rules of Procedure and Evidence provides that the Court in such cases:
- shall 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.
13. These provisions make no distinction according to the individual or collective nature of the reparations envisaged.
14. In its determination of the “scope and extent of any damage, loss and injury to victims” in the instant case, the Chamber factored in not only the victims

who had applied to the Court for reparations but also “[TRANSLATION] hundreds, if not thousands” of unidentified additional victims who had not made any application to the Chamber.¹¹

15. The Chamber, in so doing – without a demonstration of “exceptional circumstances” and without the notification provided for in rule 95 of the Rules of Procedure and Evidence – erred in law by exceeding its jurisdiction.
16. As a result of this error of law, the Chamber wrongly ordered Mr Lubanga to pay USD 6,600,000 in reparations for harm suffered by unidentified victims “[TRANSLATION] who may be identified during the implementation of reparations”.¹²
17. The Appeals Chamber is accordingly asked to hold that the Trial Chamber erred in law and to vacate the Decision insofar as it orders Mr Lubanga to pay USD 6,600,000 in reparations for harm to victims who made no application for reparations to the Court.

SECOND GROUND OF APPEAL – FAILURE TO APPLY THE STANDARD OF PROOF

18. The standard of proof as to whether a victim qualifies for reparations is a balance of probabilities.¹³
19. The criteria used by the Chamber in the instant case to assess the number of qualifying victims – including those who submitted applications for reparations to the Chamber and the unidentified victims who “[TRANSLATION] may be identified during the implementation of reparations” – do not reflect that standard.

¹¹ Decision, paras. 244 and 280.

¹² Decision, para. 280.

¹³ ICC-01/04-01/06-3129-AnxA, para. 65.

- *Potential victims identified in the proceedings*

20. The Chamber determined that “[TRANSLATION] in most cases, the Potentially Eligible Victims were not in a position to submit supporting documentation to prove their allegations”.¹⁴ In finding them eligible, the Chamber was largely content to rely on its characterization of their uncorroborated statements as “[TRANSLATION] consistent and credible”.¹⁵
21. In finding that the uncorroborated statements of the applicants for reparations were sufficient in themselves to clear the relevant evidentiary hurdle, provided they were “[TRANSLATION] consistent and credible”, the Chamber erred in law.
22. The Chamber also failed to draw the obvious conclusions from the factual inconsistencies and evidentiary lacunae that it found, or should have found.¹⁶ In deciding that the inconsistencies and gaps in the evidence did not mar the credibility of the applications before it, the Chamber committed a further error of law, or at the very least a clear error in the exercise of its discretion, with regard to the applicable standard of proof.
23. As a result of this error of law, the Chamber accorded the *locus standi* of victim for reparations purposes to 425 of the 473 participating applicants without being sufficiently precise as to which of them had established their standing as victims to the requisite standard of proof. On this faulty basis, it wrongly ordered Mr Lubanga to pay USD 3,400,000 in reparations for the harm suffered by victims identified in the proceedings.
24. The Appeals Chamber is accordingly asked to hold that the Trial Chamber erred in law and to vacate the Decision insofar as it orders Mr Lubanga to pay

¹⁴ Decision, para. 61.

¹⁵ See, in particular, Decision, paras. 94, 109 and 142.

¹⁶ Decision, paras. 65-189; see also ICC-01/04-01/06-3379-Conf-AnxII-Red.

USD 3,400,000 in reparations for harm suffered by victims identified in the proceedings.

- *Unidentified victims*

25. The Chamber's findings as to the existence of "[TRANSLATION] hundreds, if not thousands" of unidentified additional victims are essentially based on reports by various organizations that provide no specific assessments of the number of children under the age of 15 in the UPC/FPLC during the time frame of the charges.¹⁷
26. Moreover, the Chamber admits to having undertaken no detailed analysis of those reports with regard to their reliability.¹⁸
27. Lastly, the "[TRANSLATION] methods of reasoning"¹⁹ applied by the Chamber to these irrelevant and unreliable data yield conclusions that can only be regarded as unresolved speculation.
28. By proceeding in this manner to assess the number of victims "[TRANSLATION] who may be identified during the implementation of reparations", the Chamber misapplied the requisite standard of proof and thus erred in law. As a result of this error of law, the Chamber wrongly ordered Mr Lubanga to pay USD 6,600,000 in reparations for harm suffered by "[TRANSLATION] hundreds, if not thousands" of unidentified additional victims "who may be identified during the implementation of reparations".²⁰
29. The Appeals Chamber is accordingly asked to hold that the Trial Chamber erred in law and to vacate the Decision insofar as it orders Mr Lubanga to pay USD 6,600,000 in reparations for harm suffered by "[TRANSLATION] hundreds, if not thousands" of unidentified additional victims.

¹⁷ Decision, paras. 213-231; see also ICC-01/04-01/06-3379-AnxIII.

¹⁸ Decision, para. 216.

¹⁹ Decision, para. 223; ICC-01/04-01/06-3379-AnxIII.

²⁰ Decision, para. 280.

THIRD GROUND OF APPEAL – BREACH OF THE RULES OF A FAIR TRIAL

30. The order against Mr Lubanga to pay USD 10,000,000 is part of a judicial process, itself an integral part of the trial and governed by the rules of a fair trial – foremost among which is the obligation to hold adversarial proceedings giving the defendant the opportunity to become acquainted with and to challenge any and all submissions and evidence put before the Bench.
31. At the reparations stage, this fundamental fair trial principle is implemented pursuant to article 75(3) and rules 94(2) and 97(3), which enshrine the right of a convicted person to challenge the submissions and evidence brought before the Bench.
32. In the instant case, the submissions and evidence disclosed to the Defence were affected by redactions that gravely violated the rights of the Defence and precluded any genuine adversarial debate.
33. In concluding that the redactions in the submissions and evidence relied on for its decision were not inimical to a fair hearing,²¹ the Chamber erred in law.
34. The Appeals Chamber is accordingly asked to hold that the Trial Chamber erred in law and to vacate the Decision insofar as it orders Mr Lubanga to pay USD 10,000,000.

²¹ Decision, paras. 44-59.

**FOURTH GROUND OF APPEAL – BREACH OF RULES 97 AND 98 OF THE
RULES OF PROCEDURE AND EVIDENCE**

35. It follows from rules 97 and 98, taken together in the light of a principle of basic fairness, that the amount of an award against a convicted person is limited to all or part of the actual cost of the reparations ordered.
36. In an award for collective reparations, the size of the award against the convicted person can only be determined on the basis of the actual cost of the collective reparations ordered.
37. In its determination of the size of the award against Mr Lubanga in the instant case, the Chamber, working by approximation, found that the amount of the award should be equal to the sum of individual harm, without regard for the actual cost of the collective reparations envisaged.²²
38. In so deciding, the Chamber committed a clear error of law.
39. The Appeals Chamber is accordingly asked to hold that the Trial Chamber erred in law and to vacate the Decision insofar as it orders Mr Lubanga to pay USD 10,000,000.

²² Decision, paras. 279-280.

FIFTH GROUND OF APPEAL – BREACH OF THE PRINCIPLES APPLICABLE TO A CONVICTED PERSON’S LIABILITY FOR REPARATIONS

40. The Appeals Chamber held that a convicted person’s liability for reparations “must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case”.²³
41. The scope of a convicted person’s liability for reparations depends on the mode of individual criminal responsibility established and on the specific elements of that responsibility.²⁴
42. In finding Mr Lubanga liable for the full amount of reparations in the instant case – without regard for the plurality of co-perpetrators, his degree of participation in the commission of the crimes, his actions in favour of the demobilization of minors or the specific circumstances of the case²⁵ – the Chamber committed an error of law or, at the very least, a clear error in the exercise of its discretion.
43. The Appeals Chamber is accordingly asked to hold that the Trial Chamber erred in law and to vacate the Decision insofar as it orders Mr Lubanga to pay USD 10,000,000.

²³ ICC-01/04-01/06-3129-AnxA, para. 21.

²⁴ ICC-01/04-01/06-3129, para. 118.

²⁵ Decision, paras. 268-281.

SIXTH GROUND OF APPEAL – BREACH OF THE *NON ULTRA PETITA* RULE

44. The prohibition against *ultra petita* rulings is an established rule of international law, derived from the principle that a court's disposition of a civil matter before it must remain within the bounds of the parties' pleadings.²⁶
45. In the case at hand, the Legal Representatives of V01 and V02 Victims and the Office of Public Counsel for Victims, in their respective submissions, prayed for an award of USD 6,000,000.²⁷
46. By setting the total size of the award for reparations against Mr Lubanga at USD 10,000,000, an amount far greater than that unanimously called for by the Legal Representatives of the victims in their submissions, the Chamber ruled *ultra petita*.
47. The Appeals Chamber is accordingly asked to hold that the Trial Chamber erred in law and to vacate the Decision insofar as it orders Mr Lubanga to pay USD 10,000,000.

²⁶ Asylum Case (1950), International Court of Justice, 299; D.W. Prager, 2002, "Procedural Developments at the International Court of Justice", *The Law and Practice of International Courts and Tribunals*, vol. 1, p. 414; Stanislas Kabalira, *The Right to Reparations under the Rome Statute of the International Criminal Court*, Wolf Legal Publishers, 2016, p. 247.

²⁷ ICC-01/04-01/06-3363, para. 29; ICC-01/04-01/06-3360-tENG, para. 60; ICC-01/04-01/06-3359, para. 76.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

TAKE FORMAL NOTE of the present notice of appeal;

HOLD that Trial Chamber II:

- Erred in law and breached article 75 of the Statute and rule 95 of the Rules of Procedure and Evidence by including hundreds, if not thousands, of unidentified additional victims, who had not applied to the Chamber for reparations, in its assessment of the scope and extent of any damage, loss and injury to victims;
- Erred in law or, at the very least, committed a clear error in the exercise of its discretion, and failed to apply the requisite standard of proof, in its assessment of the number of qualifying victims;
- Erred in law and breached the rules of a fair trial in concluding that the redactions in the submissions and evidence relied on were not inconsistent with a fair hearing;
- Erred in law and breached rules 97 and 98 of the Rules of Procedure and Evidence in determining that the amount of the award against Mr Lubanga should be equal to the sum of the individual harm, without regard for the cost of collective reparations;
- Erred in law or, at the very least, committed a clear error in the exercise of its discretion, and violated the principles applicable to a convicted person's liability for reparations;
- Erred in law and ruled *ultra petita* by setting the size of the award against Mr Lubanga at USD 10,000,000;

And accordingly,

REVERSE Trial Chamber II's Decision of 15 December 2017 insofar as it:

- Found that 425 of the 473 potentially eligible victims in the sample had shown on a balance of probabilities that they were direct or indirect victims of the crimes of which Mr Lubanga was convicted;
- Determined that those 425 victims should be awarded the collective reparations approved by the Chamber in the instant case;
- Found that those 425 victims constituted only a sample of the potentially eligible victims and that hundreds, if not thousands, of additional victims had suffered harm as a result of the crimes of which Mr Lubanga was convicted;
- Set the size of the reparations award against Mr Lubanga at a total of USD 10,000,000;
- Instructed the Trust Fund to file submissions on the possibility of continuing to seek out and identify victims with the help of the OPCV and the Legal Representatives of V01 and V02 Victims;

And accordingly,

ADJUDGE AND DECLARE that, as matters stand, Mr Thomas Lubanga Dyilo cannot be held liable for any amount in respect of reparations.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 15 January 2018

At The Hague