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

Date: **18 May 2018**

THE APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
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

Response of the Defence for Mr Thomas Lubanga Dyilo to the “*Mémoire dans l’appel contre la ‘Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu’ du 15 décembre 2017 de la Chambre de première instance II*” submitted on 19 March 2018 by the Legal Representatives of the V01 Group of Victims

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 December 2017, Trial Chamber II (“Chamber”) handed down the “*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*” (“Decision”).¹
2. On 21 December 2017, the Chamber notified a corrigendum of the Decision² and Annex I thereto.³
3. On 16 January 2018, the Legal Representatives of the V01 Group of Victims (“V01 Legal Representatives”)⁴ and the Defence⁵ filed notices of appeal against the Decision.
4. On 15 March 2018, the Defence filed its “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”.⁶
5. On 19 March 2018, the V01 Legal Representatives submitted their “*Mémoire dans l’appel contre la ‘Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu’ du 15 décembre 2017 de la Chambre de première instance II, ICC-01/04-01/06-3396-Conf*” (“Appeal Brief”).⁷

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

² 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.

³ ICC-01/04-01/06-3379-AnxI-Corr; ICC-01/04-01/06-3379-AnxI-Corr-Anx.

⁴ “Notice of Appeal against Trial Chamber II’s ‘*Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu*’ of 15 December 2017”, 16 January 2018, ICC-01/04-01/06-3387-tENG.

⁵ “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”, 16 January 2018, ICC-01/04-01/06-3388-tENG.

⁶ ICC-01/04-01/06-3394-Conf-tENG; ICC-01/04-01/06-3394-Red-tENG.

⁷ ICC-01/04-01/06-3396-Conf; ICC-01/04-01/06-3396-Corr-Red.

6. The Defence for Mr Lubanga is filing this submission in response to the Appeal Brief of the V01 Legal Representatives.

FIRST GROUND OF APPEAL

1) First and second sub-grounds

7. The V01 Legal Representatives contest the individual assessment of the victims' dossiers performed by the Chamber in the Decision of 15 December 2017, maintaining that, in doing so, the Chamber wrongly equated the reparations forms with applications for reparations, violated rules 97(1) and 98(3) of the Rules of Procedure and Evidence and exceeded the mandate entrusted to it by the Appeals Chamber.⁸
8. They conclude that it was not for the Chamber to determine the victim status of the applicants who had filed a reparations dossier, since that task devolves to the Trust Fund for Victims ("Trust Fund") where only collective reparations have been ordered.
9. That analysis, however, contradicts the provisions of both the Rome Statute and the Rules of Procedure and Evidence, along with the principles applicable in the reparations phase and the Regulations of the Trust Fund for Victims.
10. Article 75 of the Rome Statute provides:
1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
11. The Court may rule on reparations only within the limits of the requests submitted to it. It may not determine "on its own motion", *proprio motu*, "the scope and extent of any damage, loss and injury" suffered by other

⁸ ICC-01/04-01/06-3396-Corr-Red, paras. 14-22.

possible victims who have not applied for reparations in the proceedings, unless it establishes “exceptional circumstances” and adheres to the provisions of rule 95 of the Rules of Procedure and Evidence.

12. Where the Court is not ruling on its own motion because of “exceptional circumstances”, its jurisdiction in reparations matters is circumscribed by the requests submitted to it, which must have been filed in accordance with rule 94(1) of the Rules of Procedure and Evidence.
13. In this regard, it should be stressed that:
 - the “requests” within the meaning of article 75 of the Statute must be filed in accordance with the criteria laid down in rule 94(1) of the Rules of Procedure and Evidence, which necessarily implies full and accurate identification of the persons concerned;
 - neither the Legal Representatives nor the Office of Public Counsel for Victims in its capacity as legal representative can claim to represent unidentified victims or prepare requests within the meaning of article 75 for persons other than those who have expressly instructed them to do so and who have filed a dossier in accordance with rule 94;
 - consequently, in the instant case, by ruling on the harm suffered by “[TRANSLATION] hundreds and possibly thousands more victims”, as yet unidentified and unrepresented, the Chamber ruled “on its own motion”, exceeding the parameters of the matter before it in violation of article 75 and rule 95.
14. The decision to opt for collective reparations does not render that principle inapplicable.
15. The collective nature of the reparations has the sole consequence of relieving the Chamber of having to rule on the quantum of the individual harm to the victims who have applied for reparations in the proceedings. Conversely, the

Chamber is still required to rule on the admissibility and the merits of the requests for reparations.

16. In its Decision of 3 March 2015, the Appeals Chamber rightly held that, where only collective reparations are awarded, the Chamber is not required to rule on the merits of each individual request for reparations;⁹ it recalled, however, the necessity of identifying each of the victims individually.¹⁰
17. That position is consistent with the provisions of both the Statute and the Rules of Procedure and Evidence and with the principles applicable to the civil phase of criminal proceedings.
18. Obviously, the Chamber adjudicating reparations proceedings must be able to identify each victim individually so as to adjust the size of the collective reparations award to the number of victims concerned and to the type of harm they have suffered.
19. That identification requires that the Chamber adjudicating requests for reparations undertake a detailed examination of the dossier compiled by the applicant since it contains all the information and supporting documentation required to determine victim status.
20. The assessment of a victim's eligibility as a beneficiary of reparations is, moreover, a judicial function since it comes under the rules that govern the taking and evaluation of evidence and fair trial principles.
21. In the instant case, since the Chamber did not raise "exceptional circumstances", its jurisdiction was accordingly circumscribed by the dossiers submitted to it.
22. Those requests were filed on the basis of rule 94(1) since the applicants were in

⁹ "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012", 3 March 2015, ICC-01/04-01/06-3129, paras. 7 and 152.

¹⁰ "Order for Reparations (amended)", 3 March 2015, ICC-01/04-01/06-3129-AnxA, para. 57.

effect seeking to be recognized as victims of the crimes of which Mr Lubanga was convicted so they could be eligible for the reparations programmes implemented by the Trust Fund.

23. Contrary to the V01 Legal Representatives' interpretation, the Chamber was right to consider the reparations forms to be requests for reparations, since any submission to the Chamber by an applicant with a view to seeking reparations within the framework of a case constitutes a request for reparations under rule 94(1).
24. Furthermore, the Chamber did not exceed the mandate entrusted to it by the Appeals Chamber, since, under the identification process expressly mandated by the Decision of 3 March 2015, it was required to determine whether the applicants who had filed requests for reparations were indeed victims.¹¹
25. The V01 Legal Representatives therefore cannot contend that, when only collective reparations are ordered, the Trust Fund has sole competence to identify the beneficiaries.
26. Such an interpretation is contrary to the provisions and principles expounded above.
27. Moreover, there is no provision in the Regulations of the Trust Fund for Victims that confers responsibility for identifying the victims on the Trust Fund where collective reparations are ordered. Paragraphs 62 to 64, cited by the V01 Legal Representatives in support of their argument,¹² concern reparations awarded to victims on an individual basis, not collective reparations procedures.
28. In the light of the above, the V01 Legal Representatives' first and second sub-grounds of appeal are without merit and should be rejected.

¹¹ See para. 16, above.

¹² ICC-01/04-01/06-3396-Corr-Red, para. 13.

2) Third sub-ground

29. The V01 Legal Representatives contend that the Chamber erred in law in its assessment of the value of Mr Lubanga's liability by making an *ex æquo et bono* estimation instead of evaluating the cost of the collective reparations.¹³
30. It can be inferred from the provisions of rules 97 and 98 of the Rules of Procedure and Evidence, read together and interpreted in the light of the principle of fundamental fairness, 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.
31. In collective reparations proceedings, the amount held against the convicted person can be assessed only on the basis of the actual cost of the collective reparations ordered.
32. As the V01 Legal Representatives maintain in their Appeal Brief, that was the position taken by the Appeals Chamber in *The Prosecutor v. Germain Katanga*.¹⁴
33. This is also the Defence's fourth ground of appeal, to which we refer here.¹⁵
34. However, such an interpretation does not in any way imply "that the whole process of assessing the individual dossiers mattered little for the determination of the amount awarded against Mr Lubanga."¹⁶
35. The collective nature of the reparations does not preclude the Chamber from identifying victims but only relieves it of having to rule on the quantum of the

¹³ ICC-01/04-01/06-3396-Corr-Red, paras. 23-32.

¹⁴ "Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute'", 8 March 2018, ICC-01/04/01/07-3778-Red, para.72.

¹⁵ ICC-01/04-01/06-3394-Red-tENG, paras. 208-225.

¹⁶ ICC-01/04-01/06-3396-Corr-Red, para. 30.

individual harm to the victims who have applied for reparations.

36. The Appeals Chamber is therefore asked to hold that the Chamber erred in law and to vacate the Decision insofar as it orders Mr Lubanga to pay USD 10,000,000.

SECOND GROUND OF APPEAL

37. The V01 Legal Representatives consider that the Chamber committed an error of law by assessing the admissibility of the victims for collective reparations on the basis of different procedures, depending on the group to which they belonged and on the section mandated to prepare their dossiers, which *de facto* discriminated against the participating victims.¹⁷
38. In the Decision of 15 December 2017, the Chamber ruled on the eligibility for victim status of the applicants who had filed requests for reparations¹⁸ and held that “[TRANSLATION] persons who had not been in a position to submit a dossier by 31 March 2017 would, at the implementation stage of reparations, be screened by the TFV for eligibility for an award.”¹⁹
39. In so ruling, the Chamber created differential treatment prejudicial to Mr Lubanga, since his right to a fair trial will no longer be guaranteed when the requests for reparations are assessed by the Trust Fund.
40. Mr Lubanga is excluded from the Trust Fund’s assessment process at the implementation stage of the programmes, since the dossiers filed by the applicants will no longer be transmitted to him, even in redacted form, and he will no longer be given the opportunity to submit representations.
41. Moreover, Mr Lubanga will no longer have the guarantee of judicial oversight over the assessment of victim eligibility since the Chamber has delegated that

¹⁷ ICC-01/04-01/06-3396-Corr-Red, paras. 33-43.

¹⁸ ICC-01/04-01/06-3379-Red, para. 190.

¹⁹ ICC-01/04-01/06-3379-Red, para. 293.

power to an administrative body – the Trust Fund – and no procedure for challenge is available to the convicted person.

42. The Chamber thus created a distinct procedure – one that is discriminatory and prejudicial – which no longer affords Mr Lubanga the fundamental guarantees of a fair trial and the right to notice and the opportunity to be heard.
43. The Appeals Chamber is asked to hold that Trial Chamber II committed an error of law and that the procedure for assessing the eligibility of the applicants is a judicial function only and cannot be delegated to an administrative body after the reparations order.

THIRD GROUND OF APPEAL

44. The V01 Legal Representatives maintain that the Chamber
 did not apply the principles that it laid down in its decision to the individual dossiers and committed an error of law by failing to provide adequate reasons for rejecting dossiers and disregarding the assessment made by the Trust Fund and its experts.²⁰
45. The Defence refers to its third ground of appeal on the violation of the rules of a fair trial by the Chamber in its Decision of 15 December 2017.²¹
46. The reparations proceedings are part of the judicial process, an integral part of the trial proceedings and are governed by the rules of a fair trial, foremost among which is the requirement to be afforded notice and the opportunity to be heard, giving the person prosecuted the opportunity to acquaint him- or herself with and to canvass the entirety of the submissions and evidence put before the Bench.
47. In the reparations phase, effect is given to this fundamental principle of a fair trial by article 75(3) and rules 94(2) and 97(3), which confer on the convicted

²⁰ ICC-01/04-01/06-3396-Corr-Red, paras. 44-70.

²¹ ICC-01/04-01/06-3394-Red-tENG, paras. 147-207.

person the right to canvass the submissions and the evidence brought before the Bench.

48. The dossiers containing requests for reparations transmitted to the Defence were extensively redacted – although this was unjustified by safety concerns – which concealed factual information essential to the Defence’s ability to analyse and discuss the evidence put before the Bench.
49. Contrary to what the Legal Representatives repeatedly claim in their submissions, the observations filed by the Defence on those dossiers do not seek to demonstrate that the requests are unlawful or that the accounts contained therein are inaccurate or mendacious, since such a demonstration would require the conduct of detailed investigations, which has been rendered impossible for the Defence.
50. The extensive redactions ordered by the Chamber precluded a process in which the Defence would have been given notice and an opportunity to be heard [*débat contradictoire*] on the eligibility of the applicants, deprived of effect the right conferred on Mr Lubanga by article 75(3) and rules 94(2) and 97(3), and seriously undermined the fairness of the trial.
51. Those redactions even now prevent Mr Lubanga from making any meaningful observations on the third ground of appeal raised by the V01 Legal Representatives.
52. Moreover, contrary to the V01 Legal Representatives’ assertions, the decision that applicants recognized as participating victims were not eligible for reparations in no way contradicts the earlier decisions handed down by Trial Chamber I and by the Pre-Trial Chamber.
53. The applicable standard of proof is not the same in the various phases of the proceedings: admission as a participating victim is assessed *prima facie*,²²

²² “Decision on victims’ participation”, January 2007, ICC-01/04-01/06-1119, para. 99.

whereas recognition of the status of victim beneficiary of reparations requires a higher standard of proof.²³

54. Moreover, the Trust Fund's assessment of the applicants' eligibility when the dossiers were compiled cannot be regarded as a decision binding on the Chamber, because the assessment of eligibility as a victim beneficiary of reparations is a judicial function.
55. It is therefore untrue that the Chamber "*de facto* overturned a series of independent decisions taken by the Trust Fund"²⁴ by denying victim status to applicants whose dossiers had been prepared and transmitted by the Trust Fund to the Chamber.
56. Consequently, the Appeals Chamber is asked to hold that the Chamber committed an error of law and to vacate the Decision in that it orders Mr Lubanga to pay USD 10,000,000.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER:

TO RULE this response to be admissible and with merit;

TO REJECT the first and second sub-grounds of the Legal Representatives of the V01 Group of Victims' first ground of appeal as they are without merit;

TO GRANT the third sub-ground of the Legal Representatives of the V01 Group of Victims' first ground of appeal in that Trial Chamber II committed an error of law and violated the provisions of rules 97 and 98 of the Rules of Procedure and Evidence by determining that the amount to be awarded

²³ ICC-01/04-01/06-3129-AnxA, para. 65.

²⁴ ICC-01/04-01/06-3396-Corr-Red, para. 53.

against Mr Lubanga should be equal to the aggregate individual harm without regard for the cost of the collective reparations;

TO GRANT the second ground of appeal of the Legal Representatives of the V01 Group of Victims, but only to the extent that Trial Chamber II committed an error of law by delegating to the Trust Fund for Victims the procedure for assessing the eligibility of applicants who have not filed requests for reparations with the Chamber;

TO REJECT the third ground of appeal of the Legal Representatives of the V01 Group of Victims in that the extensive redactions to the requests for reparations prevent Mr Lubanga from making any meaningful observations.

[signed]

Ms Catherine Mabile, Lead Counsel

Dated this 18 May 2018

At The Hague