

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: French

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

Date: 28 May 2018

**THE APPEALS CHAMBER**

**Before:**

**Judge Piotr Hofmański, Presiding Judge  
Judge Chile Eboe-Osuji  
Judge Howard Morrison  
Judge Luz del Carmen Ibáñez Carranza  
Judge Solomy Balungi Bossas**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
THE PROSECUTOR *v.* THOMAS LUBANGA DYILO**

**Confidential**

**Response to the “*Requête de la Défense afin de solliciter l’autorisation de déposer une réplique consolidée aux Réponses des Représentants légaux du groupe des victimes V01 et du Bureau du Conseil public pour les victimes déposées respectivement le 15 et 18 mai 2018*”  
(ICC-01/04-01/06-3410-Conf)**

**Source: Office of Public Counsel for Victims**

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

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**Counsel Support Section**

**Victims and Witnesses Section**

**Detention Section**

**Victims Participation and Reparations  
Section**

## I. INTRODUCTION

1. Principal Counsel (“Legal Representative”) of the Office of Public Counsel for Victims (“OPCV”), as legal representative of 392 applicants – 379 of whom, the Court has decided, are to receive collective reparations as victims,<sup>1</sup> submits her response to the 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 (“Defence Application”).<sup>2</sup>

2. It is the Legal Representative’s submission that (i) the Defence does not identify any new issue which could not reasonably have been anticipated; (ii) the Defence does not show “good cause” for the filing of a reply; and (iii) a reply is, in any event, unnecessary to dispose of the matter initially raised by the Defence. The application for leave to reply repeats the Defence’s previous arguments, which do nothing more than show a mere difference of opinion between the Defence and the Legal Representative.

## II. CLASSIFICATION

2. Per regulation 23 *bis*(2) of the Regulations of the Court, the present response is marked as confidential to accord with the classification of the previous filings put before the Appeals Chamber. The Legal Representative would, however, point out

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<sup>1</sup> See “*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*” (Trial Chamber II), ICC-01/04-01/06-3379-Conf-Corr + Anxs, 15 December 2017. Further to a request for correction of a substantive error in its decision, the Chamber issued a corrected version of the decision on 21 December 2017. See “*Defence Request to correct a substantive error in the ‘Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu’ notified on 15 December 2017*”, ICC-01/04-01/06-3380-tENG, 19 December 2017 and “*Décision relative à la requête de la défense de Thomas Lubanga Dyilo du 19 décembre 2017*” (Trial Chamber II), ICC-01/04-01/06-3382, 20 December 2017.

<sup>2</sup> See “*Requête de la Défense afin de solliciter l’autorisation de déposer une réplique consolidée aux Réponses des Représentants légaux du groupe des victimes V01 et du Bureau du Conseil public pour les victimes déposées respectivement le 15 et 18 mai 2018*”, ICC-01/04-01/06-3410-Conf A7 A8, 24 May 2018 (“Defence Application”)

that the response does not contain confidential information and she requests its reclassification as public.

### III. PROCEDURAL HISTORY

3. On 15 January 2018, the Defence filed its notice of appeal,<sup>3</sup> followed, on 15 March 2018, by its appeal brief<sup>4</sup> against Trial Chamber II's decision of 15 December 2017 setting the size of the reparations award for which Thomas Lubanga Dyilo is liable ("Decision of 15 December 2017").<sup>5</sup>

4. The Legal Representatives of the V01 team ("LRV") filed their notice of appeal<sup>6</sup> and their appeal brief<sup>7</sup> against the Decision of 15 December 2017 on 16 January and 19 March 2018, respectively.

5. On 18 May 2018, the Legal Representative filed her consolidated response to the respective appeal briefs from the Defence and the Legal Representatives of V01 Victims against Trial Chamber II's Decision of 15 December 2017 ("Legal Representative's Response").<sup>8</sup>

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<sup>3</sup> See "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", ICC-01/04-01/06-3388-tENG A7 A8, 15 January 2018.

<sup>4</sup> See "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", ICC-01/04-01/06-3394-Conf A7 A8 and 3394-Red A7 A8, 15 March 2018.

<sup>5</sup> See Decision of 15 December 2017, above, footnote 1.

<sup>6</sup> See "Notice of Appeal against Trial Chamber II's '*Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu*' of 15 December 2017", ICC-01/04-01/06-3387-tENG A7 A8, 16 January 2018.

<sup>7</sup> See "*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 A7 A8, 19 March 2018. A corrected version was filed on 5 April 2018, see ICC-01/04-01/06-3396-Corr-Red A7 A8.

<sup>8</sup> See "*Réponse consolidée aux Mémoires d'Appel de la Défense et des Représentants légaux des victimes V01 contre la Décision de la Chambre de première instance II du 15 décembre 2017*", ICC-01/04-01/06-3407-Conf A7 A8, 18 May 2018.

6. On 21 May 2018, the LRVs filed a *“Demande d’autorisation de répliquer à la ‘Réponse consolidée aux Mémoires d’Appel de la Défense et des Représentants légaux des victimes V01 contre la Décision de la Chambre de première instance II du 15 décembre’ déposée par le Bureau du conseil public pour les victimes en date du 18 mai 2018”* (“LRVs’ Application”).<sup>9</sup>

7. On 24 May 2018, the Legal Representative moved the Chamber to deny the LRVs’ Application.<sup>10</sup>

8. That day, the Defence filed an 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 (“Defence Application”).<sup>11</sup>

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<sup>9</sup> See *“Demande d’autorisation de répliquer à la ‘Réponse consolidée aux Mémoires d’Appel de la Défense et des Représentants légaux des victimes V01 contre la Décision de la Chambre de première instance II du 15 décembre’ déposée par le Bureau du conseil public pour les victimes en date du 18 mai 2018”*, ICC-01/04-01/06-3408-Conf A7 A8, 21 May 2018.

<sup>10</sup> See *“Response to the ‘Demande des Représentants légaux de l’équipe V01 de répliquer à la “Réponse consolidée aux Mémoires d’Appel de la Défense et des Représentants légaux des victimes V01 contre la Décision de la Chambre de première instance II du 15 décembre 2017””* (ICC-01/04-01/06-3408-Conf)”, ICC-01/04-01/06-3409-Conf-tENG, 24 May 2018.

<sup>11</sup> See Defence Application, above, footnote 2.

#### IV. ARGUMENTS IN RESPONSE TO THE APPLICATION FOR LEAVE TO REPLY

9. The Legal Representative recalls that, according to regulation 24(5) of the Regulations of the Court, “[u]nless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated”. The Court’s previous decisions have made clear that an application for leave to reply may be granted only where the applicant shows good cause.<sup>12</sup> Moreover, as regards the criterion of a “new issue raised”<sup>13</sup> which the applicant could not reasonably have anticipated,<sup>14</sup> the Court has held that leave to reply may be granted only where a reply is necessary to dispose of the initial matter.<sup>15</sup>

10. Regarding the application for leave to reply to its consolidated response,<sup>16</sup> the Legal Representative submits that the Defence Application does not identify any new issue which could not reasonably have been anticipated and does not show good cause for a reply. In the Application, the Defence seeks to elaborate on the points which were raised in response to matters already raised in its appeal brief, which do nothing more than show a difference of opinion between the Defence and the Legal Representative.

11. The Legal Representative sees that, apart from the clear difference of opinion, and regarding the motion for inadmissibility, her response makes plain that the

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<sup>12</sup> See, *inter alia*, “Decision on the Defence’s Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008” (Pre-Trial Chamber III), ICC-01/05-01/08-294, 27 November 2008, para. 3. See also “Decision on the “Prosecution application under regulation 24(5) for leave to reply” (Pre-trial Chamber II), ICC-02/04-01/15-252, 17 June 2015, p. 3.

<sup>13</sup> See “Public redacted version of ‘Decision on “Defence Request for Leave to Reply to the Prosecution’s Response to ‘Defence Urgent Motion for disclosure of materials relating to P-169 and remedies for non-disclosure’”” (Trial Chamber III), ICC-01/05-01/08-3165-Red, 11 December 2014, para. 5. See also “Decision on ‘Request concerning the review of seized material’ and related matters” (Trial Chamber VII), ICC-01/05-01/13-893-Red, 9 April 2015, para. 10.

<sup>14</sup> See “Decision on Mr Laurent Gbagbo’s request for leave to reply” (Appeals Chamber), ICC-02/11-01/15-284 OA7, 9 October 2015, para. 11.

<sup>15</sup> See “Decision on the ‘Prosecution application under regulation 24(5) for leave to reply’”, above, footnote 12, p. 3.

<sup>16</sup> See Defence Application, above, footnote 2, paras. 19-29.

Court's decisions on the interpretation of article 82(4) of the Rome Statute have clearly laid down criteria for the admissibility of appeals. There is, therefore, no need for the Defence to reply to those arguments. In any event, the fact that the Legal Representative looked at whether the criteria applicable according to article 82(4) of the Rome Statute have been met in the matter at hand does not constitute a "new issue which could not reasonably have been anticipated", which, by definition, could not have been raised before. Accordingly, there is no justification for the Defence's submission that "[TRANSLATION] [i]t is in the interests of justice that [it] be allowed to reply to that argument, which the OPCV Response sets out for the first time".<sup>17</sup>

12. What is more, before it has even been granted the leave of the Appeals Chamber, the Defence addresses the points on which it seeks leave to reply.<sup>18</sup> In that connection, the Legal Representative recalls that the Court has consistently deprecated that practice and it does not allow an applicant to make substantive submissions before leave is granted. Its decisions in that regard specify that such an application must be confined to explaining why the Chamber concerned should allow it.<sup>19</sup>

13. Accordingly, the Legal Representative submits that the filing of a reply cannot be regarded as necessary to dispose of the grounds of appeal initially raised by the Defence and [the Application] should, therefore, be denied.

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<sup>17</sup> *Idem.*, para. 20.

<sup>18</sup> *Ibid.*, paras. 22, 25, 27 and 29.

<sup>19</sup> See, *inter alia*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled '*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*'" (Appeals Chamber), ICC-01/04-01/06-824 OA7, 13 February 2007, para. 68; "Order on the application on behalf of victims a/1646/10 and a/1647/10 for leave to reply" (Trial Chamber IV), ICC-02/05-03/09-242, 31 October 2011, para. 3; "Decision on the '*Requête aux fins d'être autorisés à soumettre un Addendum*'" (Trial Chamber IV), ICC-02/05-03/09-304, 6 March 2012, para. 6; and "Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga" (Appeals Chamber), ICC-01/09-96 OA2, 6 September 2012, para. 21.

## V. CONCLUSION

14. The Legal Representative respectfully requests the Appeals Chamber to deny the 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.

[signed]

**Paolina Massidda**  
**Principal Counsel**

Dated this 28 May 2018

At The Hague, Netherlands