

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

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

Date: **18 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

**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**

Source: Office of Public Counsel for Victims

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

Office of the Prosecutor

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of V01 Victims

Mr Luc Walley
Mr Franck Mulenda

Legal Representatives of Applicants

Legal Representatives of V02 Victims

Ms Carine Bapita Buyangandu
Mr Paul Kabongo Tshibangu
Mr Joseph Keta Orwinyo

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

Ms Paolina Massidda
Ms Sarah Pellet
Ms Caroline Walter
Ms Bibiane Bakento

**Office of Public Counsel for the
Defence**

States' Representatives

Trust Fund for Victims

Mr Pieter de Baan

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for Victims ("Legal Representative" and "OPCV", respectively), as the legal representative of 392 applicants, of whom 379 have already been found eligible for collective reparations,¹ hereby submits her consolidated response to the appeal brief of the Defence² and that of the Legal Representatives of V01 Victims ("LRVs")³ against the Trial Chamber II Decision of 15 December 2017.⁴

2. To begin with, the Legal Representative underlines that neither appellant has stated clearly, let alone proved, that the criteria applicable under article 82(4) of the Rome Statute have been met. They do not clearly identify the nature or the basis of the errors that the Trial Chamber supposedly made and do not prove how the alleged errors could have affected the Impugned Decision. Accordingly, and in line with previous Appeals Chamber rulings, their appeals must be rejected outright.

¹ 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 to correct a substantive error in the terms of the Decision, the Chamber issued a corrected version 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.

² 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 Decision*", ICC-01/04-01/06-3388-tENG, 15 January 2018; and "*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*", ICC-01/04-01/06-3394-Conf-tENG and 3394-Red-tENG, 15 March 2018 ("*Defence Appeal*").

³ 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, 16 January 2018; and "*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, 19 March 2018. A corrected version was filed on 5 April 2018, see ICC-01/04-01/06-3396-Corr-Red. ("*LRV01 Appeal*").

⁴ See "*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*", footnote 1, above.

3. In the unlikely event that the Appeals Chamber were to consider the appeals admissible, the Legal Representative submits that all of the grounds raised by the LRVs merely express disagreement with the Chamber's previous decisions and/or suggest a misunderstanding of the Decision of 15 December 2017 and that, as a result, all the grounds must be rejected. The Legal Representative also submits that the grounds of appeal raised by the Defence are without merit and must be rejected.

4. Pursuant to rule 150(1) of the Rules of Procedure and Evidence and regulation 63(4) of the Regulations of the Court applied to these proceedings, the Legal Representative hereby files a consolidated response to the appeal briefs of the Defence and of the LRVs; the latter was notified to her on 19 March 2018.

II. CLASSIFICATION

5. In accordance with regulation 23 *bis*(2) of the Regulations of the Court, the present submission is filed as confidential, consistent with the classification chosen by the Defence and the LRVs. The Legal Representative specifies, however, that this filing does not contain any confidential information and requests that it be reclassified as public.

III. PROCEDURAL HISTORY

6. On 15 December 2017, the Chamber handed down its decision setting the size of the reparations award for which Thomas Lubanga Dyilo ("Mr Lubanga") is liable ("Decision of 15 December 2017").⁵ It determined, *inter alia*, that 425 applicants for reparations have shown that they suffered harm as a result of the crimes of which Mr Lubanga was convicted and would therefore be awarded collective reparations; that this figure did not represent the sum-total of the victims and that hundreds, and possibly thousands, of others had also suffered such harm and had not yet been able

⁵ *Idem*.

to file a dossier to that end; that it was for the Trust Fund for Victims ("Trust Fund") to put in place a process to continue seeking and identifying other persons who might be eligible for reparations, with the assistance of all the Legal Representatives of Victims; and that it was for the Trust Fund to earmark or raise additional funds for the implementation of collective reparations. This decision was appealed by both the Defence⁶ and the team of Legal Representatives of V01 Victims.⁷

7. On 15 January,⁸ 21 March⁹ and 13 April 2018,¹⁰ the Trust Fund filed its observations on the process of locating and identifying additional victims as part of the reparations proceedings, as well as its reports on the implementation of the collective reparations.

8. On 15 January and 15 March 2018, the Defence filed its notice of appeal, followed by its appeal brief, against the Decision of 15 December 2017 ("Defence Appeal").¹¹

9. On 16 January and 19 March 2018, the LRVs filed their notice of appeal and their appeal brief, respectively, against the Decision of 15 December 2017.¹²

⁶ See Defence Appeal, footnote 2, above.

⁷ See LRV01 Appeal, footnote 3, above.

⁸ See "Observations in relation to locating and identifying additional victims pursuant to the Trial Chamber's decision of 15 December 2017", ICC-01/04-01/06-3386, 15 January 2018.

⁹ See "Trust Fund's Observations in relation to the victim identification and screening process pursuant to the Trial Chamber's order of 25 January 2018", ICC-01/04-01/06-3398, 21 March 2018. See also "Order Directing Further Information from the Trust Fund for Victims on the Procedure for Determining Victim Status at the Implementation Stage of Reparations" (Trial Chamber II), ICC-01/04-01/06-3391-tENG, 25 January 2018.

¹⁰ See "Fourth progress report on the implementation of collective reparations as per Trial Chamber II's orders of 21 October 2016 and 6 April 2017", ICC-01/04-01/06-3400 + Conf-Exp-AnxA and Conf-Exp-AnxB, 13 April 2018. See also "Further information on the reparations proceedings in compliance with the Trial Chamber's order of 16 March 2018", ICC-01/04-01/06-3399-Conf, 13 April 2018. See also "Order Instructing the Trust Fund for Victims to File the Documents Requested by the Chamber on the Process of Screening New Victims, the Progress of Discussions with the Stakeholders Involved in Locating and Identifying New Victims, the Possibility of Earmarking an Additional Amount for Reparations and the Progress of the Implementation of Reparations" (Trial Chamber II), ICC-01/04-01/06-3395-tENG, 16 March 2018.

¹¹ Defence Appeal, footnote 2, above.

¹² LRV01 Appeal, footnote 3, above.

IV. CONSOLIDATED RESPONSE

10. To begin with, the Legal Representative underlines that neither appellant has stated clearly, let alone proved, that the criteria applicable under article 82(4) of the Rome Statute have been met. Accordingly, the Legal Representative submits that neither appeal is admissible and they must be rejected outright.

11. The Legal Representative refers to the Judgment of 3 March 2015, in which the Appeals Chamber affirmed that the “standard of review is the same for all appeals raised before the Appeals Chamber”.¹³ In so doing, the Chamber defined the ambit of what is to be established by an appellant alleging an error of law, a procedural error or an error in the exercise of discretion by the Trial Chamber:

41. Accordingly, the standard of review for alleged legal errors is:

[T]he Appeals Chamber will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision. [An Impugned Decision] is “materially affected by an error of law” if the Trial Chamber “would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error”. [Footnotes omitted.]

42. With respect to alleged procedural errors, the Appeals Chamber held that such errors may occur in the proceedings leading up to an impugned decision. [...] However, as with errors of law, the Appeals Chamber will only reverse [the Impugned Decision] if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the [Impugned Decision] would have substantially differed from the one rendered.

43. Regarding alleged errors in discretionary decisions, the Appeals Chamber held:

79. The Appeals Chamber will not interfere with the [first-instance] Chamber's exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the [first-instance] Chamber.

¹³ See “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” (Appeals Chamber), ICC-01/04-01/06-3129, 3 March 2015, paras. 17 and 40.

80. [...]The Appeals Chamber's functions extend to reviewing the exercise of discretion by the [first-instance] Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the [first-instance] Chamber's exercise of discretion [...], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion. [Footnotes omitted].¹⁴

12. In the appeal at hand, the Legal Representative submits that the appellants do not clearly identify the nature or the basis of the errors allegedly committed by the Trial Chamber or show how the impugned decision was affected by the alleged errors. Moreover, the Legal Representative notes that, as "the clear misappreciation of the facts" does not fall within the purview of the Appeals Chamber, in conformity with its previous decisions,¹⁵ these appeals must be rejected outright by the Appeals Chamber.

13. In the unlikely event that the Appeals Chamber were to entertain the appeals, the Legal Representative has explained below, for each ground of appeal, the reasons why she objects to those grounds in their entirety, as well as the reasons why she objects to the prayers therein, in accordance with regulation 59 of the Regulations of the Court.

A. Submissions in response to the appeal of the Legal Representatives of V01 Victims

1. First ground of appeal

14. In their first ground of appeal, the LRVs contend that the Trial Chamber exceeded the Appeals Chamber's instructions by individually assessing the

¹⁴ *Idem*, paras. 41-43.

¹⁵ *Ibid.*, paras. 29-30.

applications of victims who may be eligible for reparations in the context of collective reparations, and thus erred by considering the Trust Fund's reparations *forms* to be *applications* for reparations.¹⁶

15. The Legal Representative contests the argument of the LRVs in its entirety. The Legal Representative would have, in principle and akin to the LRVs, understood the framework of the collective reparations set by the Appeals Chamber as entailing the implementation of a procedure which does not necessarily require an individual judicial assessment of the applicants' dossiers.¹⁷ She submits, however, that the phrasing used by the Appeals Chamber does not seem to exclude the possibility for the Trial Chamber to undertake that assessment.¹⁸ This is especially true given that the Trial Chamber made a ruling on the basis of a sample that allowed it to make an informed decision in the interest of the victims on the reparations programmes proposed by the Trust Fund and to have enough information to determine the scope of Mr Lubanga's financial liability.¹⁹

16. In addition, it is apparent that the Trial Chamber never intended to replace a collective procedure with a procedure involving a systematic individual examination of the dossiers submitted by the applicants. It is patent, however, that the sole purpose of the procedure implemented in the case was to collect the information

¹⁶ See LRV01 Appeal, footnote 3, above, paras. 14-32.

¹⁷ *Ibid.*, para. 22.

¹⁸ See "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", Appeals Chamber, ICC-01/04-01/06-3129, 3 March 2015, para. 152: "The Appeals Chamber therefore holds that, when only collective reparations are awarded pursuant to rule 98 (3) of the Rules of Procedure and Evidence, a Trial Chamber is not required to rule on the merits of the individual requests for reparations. Rather, the determination that it is more appropriate to award collective reparations operates as a decision denying, as a category, individual reparation awards." [Emphasis added]. Thus, while the Trial Chamber was not *bound* to make individual assessments, it was *not precluded* from doing so either.

¹⁹ See LRV01 Appeal, footnote 3, above, paras. 23 *et seq.* It would therefore seem difficult to maintain, under the circumstances, that the Chamber had acted illegally and abusively.

necessary for the Trial Chamber to perform its task²⁰ in accordance with the rights of the parties, and to provide the Trust Fund with indications for its task of assessing all the other dossiers of potential victims.

17. Moreover, the Legal Representative notes that the Trust Fund currently has neither the experience nor the expertise required for assessing and screening hundreds of dossiers of potential victims, and that this is why the Chamber saw fit, in conformity with the instructions of the Appeals Chamber, to provide the Trust Fund with all the guidelines it needs to perform its role, while safeguarding the rights of the victims and the Defence throughout the proceedings.

18. In this respect, the Appeals Chamber had already underscored in *Al Mahdi* that a Trial Chamber did not err in delegating to the Trust Fund an administrative process of screening applications for reparations.²¹ The Appeals Chamber also noted that an order for reparations must either identify the eligible victims or determine the criteria for eligibility.²² The Appeals Chamber further underlined that the Court's legal provisions applicable to reparations confer discretion on the Trial Chamber to determine reparations²³ and therefore this discretion applies all the more so to the reparations proceedings.

²⁰ See "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" (Trial Chamber II), ICC-01/04-01/06-3218-tENG, 15 July 2016, para. 8.

²¹ See "Judgment on the appeal of the victims against the 'Reparations Order'" (Appeals Chamber), ICC-01/12-01/15-259-Red2, 8 March 2018, paras. 60-63 and 72.

²² *Ibid.*, para. 64: "The Appeals Chamber also recalls more generally that, in previously setting out general principles on reparations, it found that one of the five essential elements for an order for reparations under article 75 of the Statute was that the order "must identify the victims eligible to benefit from the awards for reparations or set out the criteria for eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted (emphasis added)."

²³ *Ibid.*, para. 60: "As has been stated more fully above, the applicable legal texts at the Court confer discretion on the trial chamber in its determination of reparations. Beyond article 75 (1) of the Statute and rule 97 (1) of the Rules, there are no provisions that regulate the content of a chamber's final decision on reparations."

19. The Legal Representative points out that only one of the Trial Chamber's previous decisions on the method it intended to apply gave rise to a request for leave to appeal by the LRVs, which the Chamber ultimately rejected,²⁴ noting that the LRVs "merely state the points on which they are in disagreement with the Chamber and that the arguments that they present largely suggest a misunderstanding of the Order on Symbolic Collective Reparations and the Order on the Identification Process."²⁵ The Chamber also held "that the arguments developed primarily on the basis of conflicting opinions, or which inaccurately reflect the decisions of the Chamber, cannot be considered issues likely to give rise to an interlocutory appeal."²⁶

20. The Legal Representative submits, however, that it is on the basis of this same difference of opinion that the LRVs are once again attempting to challenge the process laid down by the Chamber and which, in any event, is being implemented. Consequently, even if the LRVs remain dissatisfied with the outcome of the application of this process in the case at hand, they are henceforth time-barred from appealing against a decision that simply applied a principle established by previous decisions of the Chamber. In addition, the arguments in support of their appeal are limited to reiterating arguments reflecting the disagreement which prompted the Trial Chamber to reject their initial request for leave to appeal, since the issues raised could not be characterized as appealable.²⁷

²⁴ See "Decision rejecting the application for leave to appeal of the Legal Representatives of the 01 Group of Victims" (Trial Chamber II), ICC-01/04-01/06-3263-tENG, 8 December 2016. See also "Application from the V01 group of victims requesting leave to appeal the 'Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016' and the 'Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations'", ICC-01/04-01/06-3254-tENG, 28 October 2016.

²⁵ See "Decision rejecting the application for leave to appeal of the Legal Representatives of the 01 Group of Victims", *idem*, para. 16.

²⁶ *Idem*.

²⁷ See "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", footnote 20, above. See also "Order to complete the process of identifying victims potentially eligible to benefit from reparations" (Trial Chamber II), ICC-01/04-01/06-3267-tENG, 21 December 2016 and "Order Instructing the Parties to File Submissions on the Evidence Admitted for the Determination of Thomas Lubanga Dyilo's Liability for Reparations" (Trial Chamber II), ICC-01/04-01/06-3339-tENG, 13 July 2017. None of these decisions were appealed.

21. Moreover, the LRVs claim that the Trial Chamber determined the same fixed sum for every victim.²⁸ On the contrary, the Chamber did differentiate between the types of harm caused to the victims and, in accordance with the collective nature of reparations in the case, approved the implementation of services, and not of fixed awards. In so doing, the Chamber delegated to the Trust Fund the organization of the beneficiaries' access to those services, in accordance with the needs identified by and for each of the victim beneficiaries and therefore in their interests.

22. Lastly, akin to the Defence argument in its appeal,²⁹ the Legal Representative submits that the LRVs' allegation that the Chamber decided upon the size of Mr Lubanga's liability without attempting to calculate the quantum of the aggregate harm suffered and without any consideration for the cost of the reparations programmes – which, the LRVs contend, would show that the process of assessing individual dossiers mattered little – is without merit.³⁰ In fact, the Chamber reckoned that the figure of USD 10,000,000 would correspond to the services required to address the types of harm suffered by the estimated number of victims; it did so precisely on the basis of the information provided in the proceedings, in particular by the Legal Representatives themselves.

2. Second ground of appeal

23. In their second ground of appeal, the LRVs submit that the Trial Chamber committed an error of law by assessing the two groups of applicants differently and thus meant that the victims were not treated equally.³¹ The LRVs claim that the victims they represent underwent a more stringent verification procedure and were

²⁸ See LRV01 Appeal, footnote 3, above, para. 29.

²⁹ See Defence Appeal, footnote 2, above, fourth ground of appeal, paras. 208-225. See also the arguments in response to this ground, above.

³⁰ See LRV01 Appeal, footnote 3, above, para. 30. See also the "*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*", footnote 1, above, annex III.

³¹ *Idem.*, paras. 33-43.

thus discriminated against in relation to the victims represented by the Legal Representative.³²

24. The Legal Representative contests the LRVs' argument in its entirety. The compilation of information about the victims represented by the LRVs was decided *proprio motu* by the LRVs and the Trust Fund. It was not imposed on the LRVs by the Trial Chamber. On the contrary, the Trial Chamber held "that it falls to the legal representatives of victims to determine the best approach to conducting interviews with Potentially Eligible Victims, on the basis of their shared expertise and experience".³³ In so doing, the Chamber moreover emphasized to all of the Legal Representatives that

Potentially Eligible Victims must be treated equally and that the approach adopted must be both effective and economical. To this end, the Chamber directs the Legal Representatives of V02 Victims and the TFV to confer on how best to proceed with the Identification Process and with the preparation and transmission of files, and in particular on whether it is necessary to conduct the interviews with a doctor, a psychologist, a counsel and one additional person present.³⁴

25. In this respect, if the victims were indeed misled, as the LRVs claim, it would be rather difficult to attribute that to the Trial Chamber.³⁵ The Legal Representative once again recalls that the Legal Representatives of V01 Victims asked for leave to appeal against the order of 21 December 2016 – which applied to them *mutatis mutandis* – and that the Chamber denied them leave to appeal.³⁶ Consequently, the order of 21 December 2016 is *res judicata* and any appeal against the Decision of 15 December 2017 considering the terms that simply rehearse and take note of the Order is as a result inadmissible.³⁷

³² *Ibid.*, para. 34.

³³ See "Order to complete the process of identifying victims potentially eligible to benefit from reparations", footnote 27, above, para. 11.

³⁴ *Idem.*

³⁵ See LRV01 Appeal, footnote 3, above, para. 35.

³⁶ See "Decision rejecting the application for leave to appeal of the Legal Representatives of the 01 Group of Victims", footnote 24, above.

³⁷ See also para. 19, above.

26. Moreover, at this stage of the proceedings, it was not for the Trust Fund to decide unilaterally on the eligibility of the dossiers that it was compiling. If the Trust Fund had such a discretionary power – as the LRVs claim it does –³⁸ whereas the Legal Representative did not have such a power in relation to the dossiers of potential beneficiaries which she compiled, that procedure would have been vitiated by a procedural error, since only the dossiers of the potential beneficiaries represented by the Legal Representative would have been examined by the Chamber. Such a procedure would have imposed differential treatment of the dossiers compiled for the purpose of reparations by the different teams of Legal Representatives, which would have been clearly discriminatory towards the majority of the victims known to date in the case. Therefore neither the Trust Fund, nor its experts,³⁹ nor the Legal Representatives from any of the three teams had the power to make decisions on the admissibility of those dossiers. Only the Trial Chamber had that power, thus guaranteeing fair, non-discriminatory treatment of the dossiers.

3. Third ground of appeal

27. In their third ground of appeal, the LRVs submit that the Trial Chamber committed an error of law by failing to properly reason its decision to reject some dossiers and, as a result, its decision ran counter to the assessments of the Trust Fund and its experts.⁴⁰

28. The Legal Representative cannot comment on the first claim of this ground because she does not have access to the dossiers of the victims represented by the LRVs. Regarding the second claim, the Legal Representative has already underlined that, at this stage of the proceedings, it was not for either the Trust Fund or its experts or for the Legal Representatives of Victims to assess the dossiers, but for the

³⁸ See LRV01 Appeal, footnote 3, above, para. 12.

³⁹ *Idem*, para. 18.

⁴⁰ *Ibid.*, paras. 44 *et seq.*

Trial Chamber.⁴¹ The screening process for which the Trust Fund will be responsible has not yet begun. It is therefore incorrect to contend that the Chamber interfered in the way in which the Trust Fund discharges its task by acting counter to “decisions on eligibility that had already been taken by the Trust Fund”.⁴² At no point did the Chamber confer such a decision-making power on the Trust Fund at this stage of the process. Moreover, the Trust Fund did not consider it appropriate, or necessary, to respond to the content or the consequences of the Decision of 15 December 2017. Conversely, the Trust Fund seems to have welcomed the additional information about the victims’ needs submitted in the proceedings, as well as the next stages decided by the Chamber.⁴³

29. In conclusion, the Legal Representative submits that all of the grounds raised by the LRVs merely express disagreement with the Chamber’s previous decisions and/or suggest a misunderstanding of the Decision of 15 December 2017 and that, as a result, they must all be rejected. She further stresses that the procedure identified by the Trial Chamber seems to allow for the victims whose dossiers were rejected to supply additional information to the Trust Fund, which may determine, in accordance with the Chamber’s instructions, whether their dossiers meet the established criteria. In that regard, the LRVs’ claim that the Chamber implicitly barred the Trust Fund from including those persons in one of its programmes is erroneous, since a review of their applications is still possible, if the reason for rejection given by the Chamber allows for the submission of additional information. If, at the outcome of that new assessment, the person concerned is still ineligible, he or she will not receive the reparations ordered in these proceedings, in accordance with the legal principles applicable in this case.

⁴¹ See also para. 26, above.

⁴² See LRV01 Appeal, footnote 3, above, paras. 31 and 53.

⁴³ See “Observations in relation to the victim identification and screening process pursuant to the Trial Chamber’s order of 25 January 2018”, 21 March 2018, ICC-01/04-01/06-3398; “Further information on the reparations proceedings in compliance with the Trial Chamber’s order of 16 March 2018”, 13 April 2018, ICC-01/04-01/06-3399-Conf; and “Fourth progress report on the implementation of collective reparations as per Trial Chamber II’s orders of 21 October 2016 and 6 April 2017”, 13 April 2018, ICC-01/04-01/06-3400 + Conf-Exp-AnxA and Conf-Exp-AnxB.

B. Submissions in response to the Defence Appeal

1. First ground of appeal

30. In its first ground of appeal,⁴⁴ the Defence claims that the Trial Chamber committed an error of law by violating the provisions of article 75 of the Rome Statute and rule 95 of the Rules of Procedure and Evidence since it was barred from examining on its own motion applications for reparations which had not been put before it. The Legal Representative contests the Defence argument in its entirety and objects to the interpretation of the legal texts proposed by the Defence, in support of which, moreover, it fails to cite any relevant case law.

31. Regarding the Defence argument that a Chamber was barred from ruling on reparations *proprio motu* where no application to that effect had been laid before it,⁴⁵ the Legal Representative submits that the Chamber was duly informed by the Legal Representatives of Victims and by the Trust Fund of the existence of hundreds of additional victims identified for the purpose of reparations in the instant case. In that sense, the victims' applications were put before the Chamber.

32. Moreover, the collective nature of the reparations decided in this case implies that all of the individual beneficiaries be identified on a rolling basis through a procedure clearly mapped out by the Chamber which respects the rights of the parties. The Defence appears to find fault with the Chamber for having delegated the remaining stages of the identification process to the Trust Fund. Yet the Appeals Chamber confirmed such a procedure in *Al Mahdi*.⁴⁶ In the instant case, the Trial Chamber strictly circumscribed the identification of additional potential beneficiaries in its Decision of 15 December 2017, by setting out the categories of beneficiaries and

⁴⁴ See Defence Appeal, footnote 2, above, paras. 11-48.

⁴⁵ *Idem*, paras. 14-20.

⁴⁶ See "Judgment on the appeal of the victims against the 'Reparations Order'", footnote 21, above. See also para. 17, above.

⁴⁶ *Idem*, paras. 60-63 and 72.

the criteria for identifying them, as laid down by the Appeals Chamber.⁴⁷ The Chamber also factored those beneficiaries into the size of the award for which Mr Lubanga is liable, as determined in its Decision. In that sense, the convicted person's liability was determined on the basis of the information available to the Trial Chamber and is not open to subsequent amendment, thus satisfying the rules of a fair trial and the principle of legal certainty.

33. Similarly, the Legal Representative submits that the Defence argument regarding the time Mr Lubanga has had to wait for the determination as a result of the introduction of a process to identify additional potential beneficiaries is clearly without merit.⁴⁸ The Chamber convicted Mr Lubanga and handed down a final determination on his responsibility. The implementation of the orders for reparations has no bearing on those decisions.

34. Moreover, the Legal Representative recalls that for the 11 years during which, according to the Defence appeal brief,⁴⁹ the potential victims had adequate time and facilities to make themselves known, the reparations procedure had not yet started. In order to protect the rights of the victims and avoid delaying the proceedings to the detriment of the rights of the parties, the Chamber introduced a process enabling the potential victim beneficiaries to make themselves known to the Trust Fund.

⁴⁷ *Ibid.*, para. 64.

⁴⁸ See Defence Appeal, footnote 2, above, paras. 29-33.

⁴⁹ *Idem*, para. 32.

2. Second ground of appeal

35. In its second ground of appeal,⁵⁰ the Defence contends that the Trial Chamber committed an error of law by violating the standard of proof that should apply at the reparations stage.

36. The Legal Representative contests the Defence argument in its entirety. She recalls that, as the Appeals Chamber stated, reparations proceedings are “fundamentally different” from proceedings at trial and therefore a more flexible evidentiary standard should apply.⁵¹ Therefore, the Appeals Chamber determined that the standard of proof that applies at the reparations stage is a “balance of probabilities”, as opposed to the criminal standard, “beyond reasonable doubt”.⁵² That approach has been used in the instant case, and Trial Chamber II in *Katanga* also rehearsed and defined the principle as follows: “the Applicant must show that it is more probable than not that he or she suffered harm as a consequence of one of the crimes of which [the Accused] was convicted”.⁵³

37. The Legal Representative further submits that it is clear from that case law that the standard of proof applied depends on the “various factors specific to the case” and must reflect the difficulty “victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence”.⁵⁴ Those factors have a significant impact on the availability of the relevant documentary – and other – proof for the victims in the present case. The claims of the Defence – including its arguments about uncorroborated statements, deficiencies in

⁵⁰ *Ibidem*, paras. 22-23. See also the arguments set out in paras. 14-15 and footnote 22, above, in response to the LRVs’ first ground of appeal.

⁵¹ See “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012”, footnote 18, above, para. 81.

⁵² *Idem*, para. 65 and footnote 37.

⁵³ See “Order for Reparations pursuant to Article 75 of the Statute” (Trial Chamber II), ICC-01/04-01/07-3728-tENG, 24 March 2017, para. 50.

⁵⁴ See “Order for Reparations” annexed to the “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012”, 1 August 2016, ICC-01/04-01/06-3129-AnxA, para. 22.

documentation, dates of enlistment and conscription, certificates of demobilization, and the training camps and commanders enumerated – are not new⁵⁵ and were taken into account by the Trial Chamber in its Decision of 15 December 2017.⁵⁶

3. Third ground of appeal

38. In its third ground of appeal,⁵⁷ the Defence maintains that the Trial Chamber violated the rules of a fair trial with respect to the rights of the convicted person in that he had access only to redacted reparations dossiers.

39. The Legal Representative contests the Defence argument in its entirety. That argument has already been rejected twice: by the Appeals Chamber in its Judgment of 3 March 2015;⁵⁸ and by the Trial Chamber.⁵⁹ Consequently, she submits that this argument is no longer admissible at this stage of the proceedings since the issue is *res judicata*. Moreover, mere disagreement with the decisions of the Chambers does not constitute a ground for appeal nor does it necessarily signify that the Chamber has committed an error of law, an error of fact or a procedural error. It can be added that the Trial Chamber correctly applied the Appeals Chamber's previous rulings and allowed the Defence to make detailed submissions on all of the dossiers covered

⁵⁵ See Defence Appeal, footnote 2, above, paras. 57-104, 115-131 and 139.

⁵⁶ See "*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*", footnote 1, above, paras. 65-169.

⁵⁷ See Defence Appeal, footnote 2, above, paras. 147-207.

⁵⁸ See "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012", footnote 18, above, paras. 163-168.

⁵⁹ See Trial Chamber II, "Order for the Transmission of the Application Files of Victims who may be Eligible for Reparations to The Defence Team of Thomas Lubanga Dyilo", 22 February 2017, ICC-01/04-01/06-3275-tENG, paras 14-19. See also Trial Chamber II, "Decision on the Application of the Defence for Thomas Lubanga Dyilo of 24 April 2017 concerning Redactions in some of the Files of Potentially Eligible Victims", 5 June 2017, ICC-01/04-01/06-3328-tENG, in particular, para. 52: "Moreover, the Chamber finds that, despite the redactions, the forms disclose enough information for the Defence to meaningfully exercise its right to respond to the files of Potentially Eligible Victims", and footnote 91. See, lastly, "*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*", footnote 1, above, paras. 44-58, in particular, para. 58: "[TRANSLATION] the Chamber considers that the Defence was in a position to make submissions on the dossiers of victims which are similar to the dossiers of those potentially eligible victims who had refused to disclose their identity to the Defence."

by the impugned decision and, further to the Defence's submissions, even rejected some of the claims for want of sufficiently detailed information.⁶⁰

40. Lastly, the Legal Representative again refers to the Appeals Chamber's rulings in *Al Mahdi*, which confirmed that it rests with the Trial Chamber to assess which redactions are necessary⁶¹ and moreover ruled that the latter had "erred in ordering victims to reveal their identity to Mr Al Mahdi as a precondition to having their claims for individual reparations assessed by the TFV, thereby essentially creating an unnecessary obstacle to certain victims to receive reparations".⁶² Consequently, the Legal Representative submits that, faced with an identical issue in the instant case, the Appeals Chamber can only apply the same principle *mutatis mutandis*. Lastly, the Legal Representative emphasizes that the *Al Mahdi* ruling was made in relation to individual reparations and that the principles arrived at by the Appeals Chamber should find application even more obviously in the collective reparations context at issue here.

⁶⁰ See Defence Appeal, footnote 2, above, para. 205. The Legal Representative further notes that five of the victims referred to in the Defence Appeal (para. 204) are among the 13 clients she represents and whose dossiers have for the time being been rejected for want of sufficient information. The Legal Representative therefore fails to comprehend the Defence argument, which clearly has no merit. See dossiers a/25252/16, a/25287/16 a/30014/17, a/25278/16 and a/30040/17.

⁶¹ See "Judgment on the appeal of the victims against the 'Reparations Order'", footnote 21, above, paras. 89 and 91 (citing the Appeals Chamber's rulings in *Lubanga*).

⁶² *Ibid.*, para. 87.

4. Fourth ground of appeal

41. In its fourth ground of appeal,⁶³ the Defence maintains that the Trial Chamber committed an error of law by ordering Mr Lubanga to pay USD 10,000,000 in violation of the provisions of rules 97 and 98 of the Rules of Procedure and Evidence.

42. The Legal Representative contests the Defence argument in its entirety. Contrary to the Defence's claim, the Legal Representative submits that the Chamber did take the actual cost of the intended collective reparations into account in its Decision of 15 December 2017.⁶⁴ Moreover, given that the Court's legal texts do not specify a method for quantifying a convicted person's liability for reparations, in the case the Chamber appears to have used per capita assessments of each type of harm, along with estimates of the associated services, in order to make an informed, realistic and fair decision on Mr Lubanga's liability. The Legal Representative observes in particular that the Chamber based its decision on all of the information available to it,⁶⁵ including the estimated cost of many types of programmes and services that could be implemented in Ituri. In that sense and contrary to the Defence's claim, the Chamber did base the determination of Mr Lubanga's liability on the actual cost of the reparations ordered.

5. Fifth ground of appeal

43. In its fifth ground of Appeal, the Defence contends that the Chamber committed "an error of law or, at the very least, clearly misappreciated the facts" by ordering Mr Lubanga to pay USD 10,000,000, in violation of the principles applicable to the convicted person's liability for reparations.⁶⁶

⁶³ See Defence Appeal, footnote 2, above, paras. 208-225.

⁶⁴ *Idem*, paras. 214 and 217.

⁶⁵ See, in particular, "Submissions on the Evidence Admitted in the Proceedings for the Determination of Thomas Lubanga Dyilo's Liability for Reparations", 8 September 2017, ICC-01/04-01/06-3360-tENG and annexes, para. 2.

⁶⁶ See Defence Appeal, footnote 2, above, paras. 222-224 and 226-268.

44. The Legal Representative contests the Defence argument in its entirety. She submits that this argument – having regard to the mode of individual criminal responsibility found against Mr Lubanga and to the specific factors that enabled the Trial Chamber to reach its decision – is merely a disagreement with the Chamber's Decision and cannot constitute an admissible ground of appeal.

45. While the Defence minimizes the mode of responsibility held against its client,⁶⁷ the fact remains that the Chamber,⁶⁸ as the victims requested, found his contribution to be very serious in the light of international law and human rights. Regarding the fact that the Decision makes no mention of Mr Lubanga's co-perpetrators, the Legal Representative recalls that the Appeals Chamber, in *Katanga*, emphasized that at the reparations stage, the Trial Chamber must focus on

⁶⁷ See Defence Appeal, footnote 2, above, para. 245.

⁶⁸ See "*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*", footnote 1, above, para. 270: "[TRANSLATION] As to the gravity of the crimes of which Mr Lubanga was convicted, the Chamber recalls that, in its Determination of Sentence, Trial Chamber I held: 37. The crimes of conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities are undoubtedly very serious crimes that affect the international community as a whole. [...] 44. Against this general background the Chamber has considered the gravity of these crimes in the circumstances of this case, with regard, *inter alia*, to the extent of the damage caused, and in particular, "the harm caused to the victims and their families, the nature of the unlawful behaviour, and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person". Trial Chamber I also drew attention to the large-scale and widespread perpetration of the crimes: 49. The Chamber concluded in the Judgment that the evidence established beyond a reasonable doubt that during the period of the charges, recruitment by the UPC/FPLC of young people, including children under 15, was widespread, that a significant number of children were used as military guards and as escorts or bodyguards for the main staff commanders, and that children under 15 years of age were used by the UPC/FPLC in hostilities. [...] However, as the Appeals Chamber held, the Chamber must first and foremost consider, vis-à-vis the specific circumstances of the case, Mr Lubanga's participation in the commission of the crimes of which he was convicted. Accordingly, the Chamber will proceed to examine the factual and legal elements of that participation, as determined by Trial Chamber I in the Judgment Handing Down Conviction and confirmed by the Appeals Chamber in its Appeal Judgment Affirming Conviction, so as to set the size of the reparations award for which he is liable. [...] In that regard, in making its determination the Chamber relies in particular on the fact that, as aforementioned, Mr Lubanga was President of the UPC/FPLC and both Commander-in-Chief of its army and its political leader. Further, it relies on the fact that Mr Lubanga's contributions were essential to a common plan, which he and his co-perpetrators shared and which resulted in the conscription and enlistment of girls and boys under the age of 15 years into the UPC/FPLC and in the use of these children to participate actively in hostilities. Lastly, the Chamber relies on the gravity of the crimes in question and the fact that they were perpetrated, as earlier said, on a large scale and in a widespread manner. Mr Lubanga's individual responsibility, so adjudged, informs the Chamber's assessment of the harm suffered by the victims taken as a whole." [Emphasis added].

repairing the harm resulting from the crimes, i.e. on the extent of the harm and on the cost of repairing that harm and not on the convicted person's role or on the mode of criminal responsibility held against him or her.⁶⁹

46. The Appeals Chamber clearly established that

[i]n principle, the question of whether other individuals may also have contributed to the harm resulting from the crimes for which the person has been convicted is irrelevant to the convicted person's liability to repair that harm. While a reparations order must not exceed the overall cost to repair the harm caused, it is not, *per se*, inappropriate to hold the person liable for the full amount necessary to repair the harm.⁷⁰

The Defence contention that "liability for reparations must be apportioned among the co-perpetrators according to their respective participation in the commission of the crimes. Regardless of his degree of participation, no single co-perpetrator bears all of the liability for the crimes committed"⁷¹ is consequently without merit.

47. Lastly, the Legal Representative notes that Mr Lubanga's alleged actions to promote peace,⁷² as laudable and necessary as they may have been, must be distinguished from his criminal liability towards the victims of the crimes of which he was convicted in this case and in respect of which the Court's legal texts provide for the possibility for them to obtain reparation.

⁶⁹ See "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'" (Appeals Chamber), ICC-01/04-01/07-3778-Red, 9 March 2018, paras. 179, 180 and 182.

⁷⁰ *Idem*, para. 6.

⁷¹ See Defence Appeal, footnote 2, above, paras. 233-235.

⁷² *Idem*, paras. 255-261.

6. Sixth ground of appeal

48. In its sixth ground of appeal, the Defence claims that the Chamber committed an error of law by ordering Mr Lubanga to pay USD 10,000,000 in violation of the *non ultra petita* rule.⁷³

49. The Legal Representative contests the Defence argument in its entirety. She kindly refers the Appeals Chamber to its recent ruling in *Katanga* that the Trial Chamber has a discretionary power to determine the size of the award independently of the content of the claims submitted to it. Therefore the *non ultra petita* principle does not apply at the reparations stage of proceedings before the Court. The Appeals Chamber said that

a trial chamber, in making an award for reparations, has the discretion to depart from an applicant's claim for reparations, if it considers it to be appropriate. In this respect, the Appeals Chamber notes that a trial chamber is permitted to issue a decision on reparations without being seized by any party and this, by definition, entails making an award to victims which has not been sought. This precludes the strict applicability of the ultra petita principle to reparations proceedings before the Court. Similarly, article 75 (3) of the Statute, stating that a trial chamber "may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States" (emphasis added), suggests that a trial chamber is not strictly bound by these representations. [...] The Appeals Chamber recalls that, pursuant to article 21 (1) (c) of the Statute, the Court may apply "general principles of law derived by the Court from national laws of legal systems of the world". Nevertheless, even if the ultra petita principle could be considered such a general principle of law, the same provision requires the Court to apply, in the first place, its own Statute, Rules and Elements of Crimes. Given the Court's framework as set out above, the principle does not apply in reparations proceedings before the Court.⁷⁴

50. Moreover, the Legal Representative notes that she 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 she was aware of at least the same number of

⁷³ *Ibidem*, paras. 269-278.

⁷⁴ See "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'", footnote 69, above, paras. 144-148. [Emphasis added].

potential beneficiaries who had not yet been interviewed.⁷⁵ As a result, she might well have arrived at a sum-total of USD 12,000,000. Ultimately, the Chamber set the size of the convicted person's liability at USD 10,000,000.

51. In conclusion, the Legal Representative submits that all of the grounds raised by the Defence are without merit and that all of those grounds should therefore be rejected.

V. CONCLUSION

52. The Legal Representative respectfully asks the Appeals Chamber to dismiss outright the appeals of the Defence and of the Legal Representatives of the V01 Victims against the Decision of 15 December 2017, since neither appellant has stated clearly, let alone proved, that the criteria applicable under article 82(4) of the Rome Statute have been met.

53. If the Appeals Chamber were to consider the appeals admissible, the Legal Representative respectfully requests that they be rejected in their entirety as meritless.

[signed]

Paolina Massidda
Principal Counsel

Dated this 18 May 2018,

At The Hague, Netherlands

⁷⁵ See "Submissions on the Evidence Admitted in the Proceedings for the Determination of Thomas Lubanga Dyilo's Liability for Reparations", footnote 65, above, paras. 31, 42, 43, 46, 50 and 58.