

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

No.: **ICC-01/04-01/06**
Date: **30 January 2019**

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 Bossa

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. LUBANGA DYILO***

Public Document

Submissions pursuant to the Order of 2 January 2019

Source: Legal Representatives of the V01 Group of Victims

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

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I. PROCEDURAL HISTORY

1. By Order of 8 November 2018, the “Order scheduling an oral hearing and determining the conduct of the hearing”,¹ the Appeals Chamber invited written observations from the Trust Fund for Victims on the appeals and scheduled a hearing, inviting the parties to answer a series of questions.
2. On 15 November 2018, the Trust Fund filed its observations.
3. On 2 January 2019, the Appeals Chamber cancelled the planned hearings and invited written submissions from the parties on the issues rehearsed in its order of 8 November 2018, and to respond to the Trust Fund’s observations.

II. SUBMISSIONS ON THE APPEALS

Preliminary issue: status of the OPCV in the proceedings

4. The Legal Representatives advert to their submissions in their consolidated response of 20 August 2018². b

¹ See “Order scheduling an oral hearing and determining the conduct of that hearing”, ICC-01/04-01/06-3429 A7 A8”.

² See the “Reply to the ‘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’ filed on 18 May 2018 by the Office of Public Counsel for Victims”, ICC-01/04-01/06-3416-tENG, 5 October 2018.

First group of subjects: legal basis and methodology for determining the size of a collective reparations award

(1) Mr Lubanga's appeal: error in awarding a sum of 6,600,000 in respect of hundreds and possibly thousands of victims

5. All the decisions issued in the case by Trial Chambers I and II and the Appeals Chamber rightly provide that victims who did not file individual applications for reparations may be awarded the collective reparations. The Appeals Chamber even explicitly decided that the collective reparations would be based on a programme of services, not on individual applications, thus affirming Trial Chamber I's decision to reject the individual applications already introduced.³

6. To the questions put by the Appeals Chamber on this issue, the Legal Representatives respond as follows:
 -) It lies in their view with the Trust Fund to set a cut-off date, if need be, for the enrolment of victims in a particular service-based programme, depending on the local circumstances and the nature of the projects. The date need not be the same for all projects and all sites where they are delivered.

 -) There is no reason to offer different services depending on whether the victims have already been identified or are identified during the implementation of the programmes.

 -) Reason dictates that the reparations award to the victims, expressed monetarily, must be equal to the cost of the reparations, which depends

³ See the disposition of the "Decision establishing the principles and procedures to be applied to reparations", ICC-01/04-01/06-2904, 19 February 2013.

on the form of reparations the Court decides is appropriate. The Court may make a final determination of that cost on the basis of an estimate of what is necessary and reasonable in order to implement a satisfactory reparations programme, or, as is generally the case in national proceedings, it may make a provisional award and determine the final sum-total after the conclusion of the reparations programme.

J) The Appeals Chamber has held: “When collective reparations are awarded, these should address the harm the victims suffered on an individual and collective basis.”⁴ Collective reparations are intended for a “community”, in the sense of a “group of people sharing a certain characteristic” (which is the fact of being a victim, as defined in the trial judgment).⁵ If fewer people than estimated take part in the programme, it does not mean that the Court misjudged the group’s suffering. If need be, the Trust Fund can improve the quality of the services offered. There is no risk of the victims’ receiving “too much” reparation, since the very nature of the harm in the instant case means that there is no reparation that can ever completely erase the consequences of the suffering. While full reparation is possible for purely material, quantifiable harm, it is not so for the consequences of childhood trauma, for the death of a child or family member, or for other emotional harm. Therefore the question of what to do with any “surplus” of the sums awarded does not arise.

⁴ *Lubanga*, Appeals Chamber, “Order for Reparations (amended)”, -AnxA, para. 33.

⁵ “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’”, 3 March 2015, ICC-01/04-01/06-3129 (“Appeals Judgment”), paras. 210, 211 and 214.

(2) Mr Lubanga's appeal: error in failing to determine the size of the reparations award on the basis of cost of the reparations

7. The Legal Representatives have consistently argued that where reparations take the form of a service-based programme organized by the Trust Fund the only criterion to be taken into account in determining the financial liability of the convicted person is the cost of implementing the programme⁶ and not the aggregate of any damages which could have been awarded to the victims had reparation of harm been by individual monetary compensation.
8. If the size of a collective reparations award is equal to the cost of implementing the reparations, the exact number of victims who will personally receive the reparations is of little consequence. For example, the cost of a medical and psychological assistance programme or a series of vocational training courses will depend more on the arrangements for the services offered (remuneration of the medical team or instructors, travel, logistics, etc.) than on the number of participants.
9. Furthermore, the "value" of reparations depends not on their cost but on their meaning and relevance to the recipient of the reparations, which varies from person to person and over time. For example, a psychological assistance or vocational training programme for former child soldiers may be of greater "value" if implemented promptly.
10. There is no relationship between the cost of a service-based collective reparations programme and the cost of reparations by financial compensation to individual victims. Although the Defence submits that the cost of one is necessarily less than that of the other, as a matter of fact the reverse seems true. Five hundred

See the "Response of the Legal Representatives of the V01 Group of Victims to the Appeal Brief of the Defence", paras. 52-53.

euros may be a very considerable sum to a victim in a situation of extreme hardship and vulnerability in rural Ituri, but €500,000 will probably not be enough to implement a service-based programme catering to the needs of 1,000 people.

11. Individual compensation for emotional harm (such as the death of a child) or future material harm (such as loss of opportunity in the job market) is never the “value” of the harm suffered, but the amount which a tribunal finds fair or justified to award the victim. Moreover, as the Appeals Chamber explained in its judgment of 3 March 2015, where only collective reparations are awarded under rule 98(3) it does not make sense to attempt to calculate in financial terms the harm to each victim.⁷

12. On 15 August 2015, the Chamber directed the Trust Fund to compile an exhaustive list of the persons potentially eligible for the reparations; to set out the individual harm done to them; to propose modalities and forms of reparation appropriate to each victim; and to estimate the sum total necessary to deliver the reparations. In its “Filing on reparations and draft implementation plan” of 15 November 2015, the Trust Fund did not execute that direction, but arrived at an interpretation of it which was based on the judgment of the Appeals Chamber.⁸ When the Chamber reiterated its position in the order of 9 February 2016, the Trust Fund contended that that position was contrary to law and sought leave to refer the matter to the Appeals Chamber.⁹ After the

⁷ Appeals Chamber, “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012”, 15 March 2015, ICC-01/04-01/06-3129, para. 152.

⁸ ICC-01/04-01/06-3177, para. 144: “[T]he Trust Fund interprets that in the present case, the Trial Chamber, in its reminder in the decision of 14 August 2015, has not required the Trust Fund to collect individual applications for reparations from potentially eligible victims and to compile those into a list for consideration by the Trial Chamber at the present stage of proceedings and as part of this submission, which would have been an instruction previously not made by the Appeals Chamber.”

⁹ See the “Request for Leave to Appeal against the ‘Ordonnance enjoignant au Fonds au profit des victimes de compléter le projet de plan de mise en œuvre’”, ICC-01/04-01/06-3200, para. 17: “[T]he Trust Fund

Chamber denied leave, partial execution of the order proved to be not only labour-intensive, but also costly, and disproportionately so, to both the Trust Fund¹⁰ and the Court.

13. It has to be noted that the Trial Chamber itself desisted from not only determining the number of victims but also from calculating the harm to each victim. After postponing its decision for more than two years, it ultimately set the size of the reparations award on the basis of a very approximate estimate of the number of potential recipients of the reparations and determined an identical fixed sum for all the victims, direct or indirect, irrespective of harm. This has generally been the approach of the Congolese courts as well.

14. It follows that this ground is well-founded.

(3) Appeal of the V01 Legal Representatives: the Chamber exceeded its mandate by itself individually assessing the victims' eligibility

15. The Court may award reparations on the basis of individual applications (rules 94-95), purely collective reparations (rule 98(3)) or a combination of the two (see the decisions in *Katanga* and *Al Mahdi*). In the instant case, the Trial Chamber and the Appeals Chamber declined to adjudicate individual applications and opted for a regime of service-based collective reparations.¹¹ Trial Chamber II, which is tasked with overseeing the Trust Fund programme, should not, therefore, undertake an individual assessment of the potential victims.

considers it both legally inappropriate and operationally impractical, prior to commencing the actual implementation of any collective award, to compile a detailed list of potentially eligible victims".

¹⁰ See in particular the "First submission of victim dossiers" filed by the Trust Fund on 31 May 2019, ICC-01/04-01/06-3208, paras. 81-84.

¹¹ See the "Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'", ICC-01/04-01/06-3379-Red-Corr-tENG, para. 246.

16. The Legal Representatives share the view taken by the Appeals Chamber in its judgment of 3 March 2015¹² and by the Trust Fund for Victims in numerous submissions¹³ that it falls to the Trust Fund to assess who may be admissible to its programme and to determine the form of reparations most suited to their personal circumstances. It also appears to make more sense, on grounds of efficiency and out of respect for the victims, to engage in that assessment at the time of programme implementation. The Trust Fund assessed the first group of victims in April 2016, when it was not yet in a position to invite them to join a specific programme. Once several years have passed and the reparations programmes are in place, it will be necessary to ascertain that the experts' findings still hold true (e.g. as to the need for psychological care) and to consider which programme is appropriate to each victim. The premature assessment of those victims' admissibility to a reparations programme – whose contents had yet to be determined and whose benefits were, therefore, unclear to the victims – necessarily subjected them to an onerous experience, which they found pointless and hurtful, led to further victimization and violated the maxim, “do not harm”.
17. The standing of participating victim in the proceedings was accorded by a Chamber of the Court after the parties had the chance to review and make submissions on their applications. It can therefore be supposed, on the balance of probabilities, that most such persons are genuine victims rather than imposters. Whereas this does not automatically entitle them to the reparations, it would be reasonable to give them the immediate benefit of the doubt unless new information requires revocation of their victim status.
18. As it happened, the opposite approach was taken: the participating victims were subjected to a more exacting assessment than the potential victims who made themselves known only years after Mr Lubanga was convicted.

¹² Appeals Judgment, para. 152.

¹³ See the Observations of the Trust Fund of 15 November 2018, paras. 7-8 and footnotes 18 and 20.

(4) Appeal of the V01 group of victims: error in creating a discriminatory system of assessment

19. In assessing the admissibility of the known potential recipients of the reparations, relying, in some cases, on the Trust Fund's interview notes and, in others, on a document written by their counsel, the Chamber applied a discriminatory procedure.
20. At no point did the Chamber give the V01 group of victims notice of its intention to rule on their eligibility for the reparations. They responded to an inquiry from the Trust Fund, which had been invited by the Chamber to identify the victims and assess the harm to them for the purpose of determining the size of the reparations award for which Mr Lubanga was liable. They were never invited to submit an application for reparations or supply any specific information, let alone file any documents. Only post facto did the Chamber come to the conclusion, impliedly at least, that the Trust Fund should have asked further questions (about commanders, for example) or sought further documentation or statements.
21. The individual decisions were clearly affected by the fact that the victims who had already been accorded that standing by the Chamber had to undergo interviews and assessments by the Trust Fund and evaluation by experts, whereas other victims were assessed on the basis of a document from their counsel and which had only had counsel's input.
22. The Legal Representatives are of the opinion that the only way to put the victims back on an equal footing is to extend the reparations to all the victims whom the Trust Fund has identified as eligible. Such a decision should not affect

the size of the award ordered against Mr Lubanga, which is based on fixed sums that are estimates.

Second group of issues: the assessment of the eligibility of individual victims and the identification of hundreds or thousands of victims: assessment of Mr Lubanga's liability for reparations

(5) Mr Lubanga's appeal: error in finding 425 victims eligible for the reparations

23. In the Legal Representatives' view, the Chamber applied a stricter standard of proof than the balance of probabilities. It rejected many of the victims who had been accorded that standing by other Chambers, including many young persons from underprivileged Hema families who lived in Ituri and were between the ages of 10 and 15 years at the material time, whose accounts were found credible by experienced Trust Fund staff and who suffer from physical and/or mental trauma which independent experts identified as the consequence of the events they allege they experienced. That persons fitting this profile are indeed victims is very likely. That likelihood is, at any rate, greater than that of their being imposters – especially as the reasoning given for such a conclusion was very scant and highly questionable.

24. In determining whether, on the balance of probabilities, a person who claims to have experienced particular events is telling the truth, a "coherent and credible account" is certainly an important factor, but it is not the only one. Other factors include the consistency of the account with established fact; the victim's personal characteristics (ethnic group, age, social background, etc.); the presence of physical or mental trauma which may be the consequence of the events

alleged; and possibly the person's demeanour during interview (quickness to answer, body language, etc.).

25. In proceedings based on individual claims for reparations made directly against the convicted person, it is hard to conceive of a convicted person being ordered to pay a victim a specified sum on the basis only of an application for reparations, or, for that matter, only an interview. It would also stand to reason that such reparations should be awarded by the Chamber after a process affording notice of and the opportunity for submissions on each victim's allegations. Conversely, screening for admission to a collective reparations programme is not a matter for judicial proceedings, since the convicted person's contribution to the reparations programme is, or will be, determined on the basis of the cost of a programme of services to be implemented, which is not affected by admission or rejection of a potential recipient of the reparations.

26. Discrepancies and vagueness in an account do not of themselves point to fraud, and must be seen in context. For example, memories can fade or be distorted by a range of factors – the time elapsed since the event, the traumatic nature of the event, the context of the event (which may lead to repressed memories), the consequences of the event (depression, drug addiction) and age when the incident occurred. Memories can also be “contaminated” by a person's circle (influenced by the memories of those in that circle). Cultural factors can also influence an account. In some rural communities, for example, many do not know their exact dates of birth (which does not stop a date from being entered on an administrative document); they use names other than their legal names, make no distinction between marriage and cohabitation and give a wider meaning to terms denoting family relationships.

27. This ground is therefore well-founded.

28. The Legal Representatives are not in a position to comment on the application of the standard of proof to the other victims because they are not privy to their dossiers.

(6) Mr Lubanga's appeal: error in the assessment of Mr Lubanga's liability for reparations

29. It is generally accepted that a crime committed jointly by a number of perpetrators attracts *responsabilité solidaire* on their part to make reparation for the harm occasioned, whereas *responsabilité in solidum* may arise from different crimes committed by a number of perpetrators but who contributed to the same harm. In both cases the (co-)perpetrators each bear liability for reparation of the totality of the harm, but if one of them has satisfied part or all of the debt, that person can ask that the others also pay a share and/or can recover contribution from them. This doctrine prevents a victim being compensated more than once for the same harm and is therefore in the interest of the Defence.

30. War crimes and crimes against humanity are always the deed of a multitude of persons, which makes apportionment of liability between them particularly difficult. Apportionment between all those responsible for a crime of that kind would make reparation almost unfeasible. Were hundreds of persons to have had a part in a war crime as co-perpetrators or accessories, as is the case in the recruitment of child soldiers, each victim would receive reparations for only a fraction of the harm done to him or her, simply because all the perpetrators could never be prosecuted and convicted, and even if they could it would be impracticable for a victim to proceed against all the convicted persons and claim from each a small sum. This is certainly true of the cases tried by the International Criminal Court, where only the foremost perpetrators are prosecuted for crimes which they clearly did not commit singlehandedly. So it is

hard to see why the doctrine of *responsabilité solidaire* or *responsabilité in solidum* should not apply before the Court.

31. Since Mr Lubanga was convicted of having committed his crimes jointly with other perpetrators, *responsabilité solidaire* will, in principle, take precedence (each is liable for the whole). If another accused is convicted of the same crimes, he or she may also be ordered to pay a share of the costs of the programme of reparations for those crimes, which does not preclude a separate award for crimes which were not tried in *Lubanga*.

32. Lastly, it is the opinion of the Legal Representatives that even if the Court had accepted the mitigating circumstances raised by Mr Lubanga – which it did not – that determination would have had no bearing on the victims’ right to reparation.

33. Neither article 75 of the Statute nor rule 97 provides that in assessing the scope and extent of any damage or in determining the modalities of reparations the Court should take into account the contribution of other persons to the crimes committed or any mitigating circumstances in respect of the convicted person.

34. The Court was therefore right to find Mr Lubanga liable for the sum total of the reparations award.

35. The Legal Representatives also revert to their previous submissions in this appeal.

III. RESPONSE TO THE TRUST FUND’S OBSERVATIONS

36. Whereas in the past the Trust Fund has argued for the concept of “parties” under article 82(1)(d) to be construed broadly in the context of reparations

proceedings¹⁴ and has sought to have several decisions in the case at bar reversed or amended, it now says that it wishes to confine itself to stating its views on the consequences of judicial decisions.¹⁵

37. The Trust Fund nonetheless reasserts the analyses presented in its previous submissions, *viz.* that some of the Chamber's decisions, including that of 9 February 2016, were not consonant with the judgment of the Appeals Chamber, which, the Trust Fund recalls, has already disposed of many of the issues now canvassed in the present appeal.¹⁶

38. The Legal Representatives find it regrettable that the Trust Fund says nothing of the assessments it made of the victims who are now appellants – assessments to which its staff and partners devoted an average of four to five hours per victim.¹⁷

39. Of note, however, is that on the issue of eligibility the Trust Fund has pointed out that in *Al Mahdi* and *Bemba* the Chamber did not require individual assessments to be made of the potential recipients of the collective reparations, and that in *Katanga*, where the Chamber adjudicated individual applications, it specified that that should not necessarily be the *modus operandi* where the number of victims is greater or where crimes have been committed over a longer stretch of time and/or a wider geographical area.¹⁸

¹⁴ See ICC-01/04-01/06-3200, para. 5.

¹⁵ See the "Observations pursuant to rule 103 of the Rules of Procedure and Evidence", ICC-01/04-01/06-3430, para. 22.

¹⁶ *Ibid.*, para. 26.

¹⁷ The Trust Fund has acknowledged: "It is important to note that the events that gave rise to the harm dates back to more than a decade ago, 13-14 years in the past, when eligible victims were under the age of 15 years old. The manner and the age at which the harm was inflicted upon these children at the time caused deep and complex injuries to their psyche, physiology, socialization skills, coping mechanisms, relationships, educational development, and inhibits their developmental capacity." ICC-01/04-01/06-3208, para. 81.

¹⁸ *Ibid.*, paras. 35-36.

40. The Trust Fund also maintains, again with reference to the appeals judgment of 3 March 2015, that the Defence must not review all the dossiers of the potential recipients of the collective reparations.

41. The Trust Fund's submissions therefore essentially concur with those of the victims participating in the proceedings.

Accordingly, the Legal Representatives respectfully request the Appeals Chamber:

To amend the order insofar as it rules on the eligibility for collective reparations of the potential victims in the sample of dossiers submitted to the Chamber.

To set aside Annex II to the Decision.

To charge the Trust Fund for Victims with determining the eligibility of potential victims wishing to participate in one of its programmes.

On behalf of the V01 victims, the Legal Representatives

[signed]

Luc Walley

[signed]

Franck Mulenda

Dated this 30 January 2018,

At Brussels, Belgium, and Kinshasa, DRC