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

Date: **31 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 of the Legal Representatives of the V02 Group of Victims pursuant to
the Order of the Appeals Chamber, ICC-01/04-01/06-3429

Source: V02 Team of Legal Representatives of Victims

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

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A – PROCEDURAL HISTORY

1. On 6 November 2018, the Appeals Chamber (“Chamber”) scheduled hearings for 11 and 12 December 2018 to discuss certain issues raised by the appeals filed by Mr Thomas Lubanga Dyilo (“Defence”) and by the V01 group of victims (“V01 Victims”) against the “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable”.¹
2. On 15 November 2018, the Trust Fund for Victims (“Trust Fund”) filed its observations pursuant to rule 103 of the Rules of Procedure and Evidence.²
3. On 5 December 2018, the Chamber postponed the hearings until January 2019; no dates were specified.³
4. On 20 December 2018, the Chamber scheduled said hearings for 7 and 8 February 2019.⁴
5. On 27 December 2018, the Legal Representatives of the V01 group of victims (“LRV01”) requested that the hearings be rescheduled to before 31 January or after 16 February 2019, as they would be otherwise unavailable.⁵
6. On 2 January 2019, the Chamber cancelled the scheduled hearings and invited submissions from the parties by 31 January 2019.⁶
7. The V02 group of victims (“V02 Victims”) hereby presents its submissions on the issues raised in the appeals.

¹ ICC-01/04-01/06-3429.

² ICC-01/04-01/06-3430.

³ ICC-01/04-01/06-3431.

⁴ ICC-01/04-01/06-3433.

⁵ ICC-01/04-01/06-3434-Conf.

⁶ ICC-01/04-01/06-3435.

B - SUBMISSIONS

8. It is to be recalled that, in its Order of 6 November 2018, the Chamber invited the views of the parties on the issues raised by the above-mentioned appeals, including their oral responses to the written observations filed by the Trust Fund on 15 November 2018.⁷
9. The V02 Victims consider that all of the issues raised by the above-mentioned appeals in essence go to (I) the financial assessment of the collective reparations; (II) the convicted person's liability for the collective reparations; and (III) victim eligibility during the implementation of the collective reparations.

I – Financial assessment of the collective reparations

10. It bears recalling that, in the case *sub judice*, collective reparations alone were awarded pursuant to rule 98(3) of the Rules of Procedure and Evidence.⁸
11. According to that rule, in the case of collective reparations, the Court may order that the award for reparations against a convicted person be made through the Trust Fund for Victims.
12. It follows that to do so, the Court must first determine the size of the award so that the Trust Fund can devise a plan for the implementation of the collective reparations.
13. That, however, is no easy task at all, often entailing efforts to find out who the victims are and how many of them there are (victim eligibility) and to determine the scope and extent of any damage, loss or injury to, or in respect of, the victims.

⁷ ICC-01/04-01/06-3429.

⁸ ICC-01/04-01/06-2904; ICC-01/04-01/06-3129, para. 132.

14. Whereas it is the case, as the Trust Fund has said on the issue of victim eligibility with reference to the previous decisions of the Court,⁹ that the prior identification of the number of victims eligible for reparations is not a pre-requisite to the determination of the size of the award for which the convicted person is liable, regard must nonetheless be had to the scope and extent of any damage, loss or injury suffered, particularly since the number of victims eligible is less decisive to the assessment of the size of the award for which the convicted person is liable.
15. That being so, if the victims who are authorized to participate in the proceedings were automatically to receive reparations – as the V02 Victims,¹⁰ the V01 Victims¹¹ and the Defence¹² have consistently argued that they should – the procedure for applying to participate in the proceedings should nevertheless follow its normal course.
16. As to victims who have yet to be identified, their prior identification is also no pre-requisite to the calculation of the size of the collective reparations award. It suffices that account be taken of the scope and extent of any damage, loss or injury that those victims might have suffered.
17. Were those unidentified victims or a small number of them not to make themselves known despite being awarded collective reparations, the sum which might have been set aside or allocated to them will be returned to the Trust Fund for Victims.

⁹ “Observations pursuant to rule 103 of the Rules of Procedure and Evidence”, 15 November 2018, ICC-01/04-01/06-3430, paras. 31-36.

¹⁰ “Consolidated Response of the Legal Representatives of the V02 Group of Victims to the Briefs of the Defence for Mr Thomas Lubanga Dyilo and the Legal Representatives of the V01 Group of Victims”, 9 May 2018, ICC-01/04-01/06-3404-Conf-tENG, paras. 156-160.

¹¹ “Appeal Brief against the ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’”, 19 March 2018, ICC-01/04-01/06-3396-Conf-tENG, paras. 37-38.

¹² Appeal Brief of the Defence, 15 March 2018, ICC-01/04-01/06-3394-Conf-tENG, paras. 30-32.

18. The size of the reparations award must be calculated not on the basis of the number of victims, but according to the scope and extent of any damage, loss or injury to, or in respect of, the victims. Scope and extent must be determined by the appropriate experts on whom a duty is cast to give consideration not only to material, physical, emotional or psychological harm (heads of harm defined by the Appeals Chamber)¹³ but also to certain factors, including the cost of the services provided in reparation, which, as the Trust Fund duly points out in its observations, was referred to in *Katanga* and *Al Mahdi*.¹⁴
19. Thus, in the case at bar, in making a financial assessment of the collective reparations, the Trial Chamber should have proceeded according to rule 97(2) of the Rules of Procedure and Evidence, which prescribes the use of experts to determine the scope and extent of any damage, loss or injury to, or in respect of, the victims and to suggest various options concerning the appropriate types and modalities of reparations.

II – The convicted person’s liability for collective reparations

20. Under the doctrine of *responsabilité solidaire* or *responsabilité in solidum*, where a number of separate faults [*fautes*] had a part in occasioning the damage [*dommage*], each of those responsible attracts liability for full reparation [*réparation intégrale*] to, or in respect of, the victim, which does not in any way preclude those responsible from proceeding against each other.
21. That principle has even been acknowledged by the Third Civil Division [*Chambre civile*] of the French *Cour de cassation* insofar as “[TRANSLATION] each of those responsible for a same damage must be ordered to make full reparation therefor, such that regard need not be had to the apportionment made of liability between

¹³ Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 132.

¹⁴ “Observations pursuant to rule 103 of the Rules of Procedure and Evidence”, 15 November 2018, ICC-01/04-01/06-3430, paras. 43-44.

them, [which] does not affect the extent of their obligations vis-à-vis the wronged party".¹⁵

22. Likewise, in its seminal judgment of 4 December 1939, the *Cour de cassation* held that where liability is attracted by a personal act "[TRANSLATION] each of the joint tortfeasors of a same damage which was occasioned by their respective faults must be held liable *in solidum* to make reparation for the whole damage, since each fault had a part in causing the whole".¹⁶

23. That same principle may be applied in the context of reparations proceedings before the Court inasmuch as each person culpable for or co-perpetrator of crimes which caused a damage is duty-bound to make full reparation of the harm to, or in respect of, victims.

24. That said, in very much the same vein as the Trust Fund, the V02 Victims take the view, citing previous decisions of the Court in support, that the liability of the convicted person must be proportionate to the harm he caused in accordance with the degree of his participation in the commission of the crimes as a co-perpetrator.¹⁷

25. Specifically, for reparation to a victim to be proportionate or full, it must return the victim to the situation in which he or she would be if the cause of the damage had not arisen.

¹⁵ *cass. 3è civ.28 oct n°02-14799* [*Cour de cassation*, Third Civil Division] 28 Oct. 2003, no. 02-14799.

¹⁶ *cas. Req. 4 déc. 1939* [*Cour de cassation*, *Requête*, 4 December 1939].

¹⁷ Appeals Chamber, "Order for Reparations (amended)", ICC-01/04-01/06-3129-AnxA, para. 21; Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 118: the Appeals Chamber enunciated the principle applicable to determining the scope of a person's liability for reparations as follows: "A convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case"; *Al Mahdi*, "Reparations Order", 17 August 2017, ICC-01/12-01/15-236, paras. 110-134: "[TRANSLATION] The Trial Chamber determined that the size of the award was proportionate to the harm caused by Mr Al Mahdi on the basis of his crimes, having regard to his level of participation and the specific circumstances of the case".

26. In the case *sub judice*, Mr Lubanga was found guilty as a co-perpetrator of the crimes of conscripting and enlisting children under the age of 15 years into the *Union des patriotes congolais* (“UPC”) [Union of Congolese Patriots] and the *Forces patriotiques pour la libération du Congo* (“FPLC”) [Patriotic Forces for the Liberation of Congo] and using them to participate actively in hostilities; he was also sentenced to 14 years of imprisonment and ordered to pay damages to the victims.¹⁸
27. As a co-perpetrator, Mr Lubanga is therefore duty-bound to make full reparation for the harm to, or in respect of, the victims of the crimes of which he was convicted.
28. Furthermore, despite the conviction returned against him, Mr Lubanga was nonetheless declared indigent and his insolvency was thus acknowledged.
29. In that connection, as Mr Lubanga cannot make full reparation for the harm done to the victims, they may still be awarded any reparations ordered against the other perpetrators, each of whose faults had a part in the commission of the crimes.

III – Victim eligibility at the stage of the implementation of the collective reparations

30. It is recalled that in its Decision of 13 July 2017, Trial Chamber II stated that the eligibility for collective reparations of potential victims (or of victims who have not submitted an individual application for reparations or who have not been identified) can be considered only by the Trust Fund at the implementation stage

¹⁸ Trial Chamber I, “Judgment pursuant to Article 74 of the Statute”, dated 24 March 2012, and French translation registered on 31 August 2012, ICC-01/04-01/06-2842; Appeals Chamber, “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction”, 1 December 2014, ICC-01/04-01/06-3121-Conf and two annexes, ICC-01/04-01/06-3121-Anx3 and ICC-01/04-01/06-3121-Anx4.

of the reparations or as part of its assistance programme with the help of certain specialized agencies or organizations.¹⁹

31. In that connection, by Decision of 15 December 2017, Trial Chamber II directed the Trust Fund to file, by 15 January 2018, submissions on the possibility of continuing to seek and identify victims with the assistance of the OPCV and the Legal Representatives of V01 and V02 Victims.²⁰
32. Pursuant to that decision the V02 LRVs travelled twice to the field – in February and in September 2018 – and identified a number of other victims whose dossiers will be submitted to the Trust Fund at the appropriate juncture, including:
33. In view of the number of such victims, it is most desirable that they all, without distinction, receive collective reparations, which would constitute an acknowledgement of the harm suffered by the community as a whole and thereby obviate any discrimination or stigmatization of the victims within their community. The reparations should thus remedy the harm which the victims suffered on both an individual and collective basis.²¹
34. That notwithstanding, it is worth noting that the Chamber may, at the stage of the implementation of the collective reparations, invite the Defence pursuant to rule 103(2) of the Rules of Procedure and Evidence to make submissions on all of the issues, including victim eligibility (contrary to the position taken by the Trust Fund),²² that may contribute to the effectiveness and efficaciousness of implementation which are conducive to the proper administration of justice.

¹⁹ Decision of 13 July 2017, ICC-01/04-01/06-3338, paras. 11-12.

²⁰ “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable”, 15 December 2017, ICC-01/04-01/06-3379-Conf-tENG.

²¹ “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable”, 15 December 2017, ICC-01/04-01/06-3379-Conf-tENG, paras. 192-194.

²² “Observations pursuant to rule 103 of the Rules of Procedure and Evidence”, 15 November 2018, ICC-01/04-01/06-3430, para. 40.

FOR THESE REASONS,**May it please the Appeals Chamber:**

- To entertain and take note of these submissions.

Dated this 31 January 2019

At Kinshasa, Democratic Republic of the Congo.

[signed]

[signed]

[signed]

Paul Kabongo Tshibangu

Carine Bapita Buyangandu

Joseph Keta Orwinyo