

1 International Criminal Court
2 Appeals Chamber
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Thomas Lubanga Dyilo - ICC-01/04-01/06
5 Presiding Judge Piotr Hofmański
6 Delivery of Judgment - Courtroom 1
7 Thursday, 18 July 2019
8 (The hearing starts in open session at 9.30 a.m.)
9 THE COURT USHER: [9:30:31] All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 PRESIDING JUDGE HOFMAŃSKI: [9:30:56] (Microphone not activated)
13 THE COURT OFFICER: [9:31:05] Good morning, Mr President.
14 The situation in the Democratic Republic of the Congo, in the case of The Prosecutor
15 versus Thomas Lubanga Dyilo, case reference ICC-01/04-01/06.
16 And for the record, we are in open session.
17 PRESIDING JUDGE HOFMAŃSKI: [9:31:21] (Microphone not activated)
18 I will start from the beginning. My name is Piotr Hofmański. I am Presiding Judge
19 in the appeal arising from the case of the Prosecutor versus Thomas Lubanga Dyilo.
20 My fellow judges in this appeal are Judge Eboe-Osuji, Judge Howard Morrison,
21 Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa.
22 May I ask the parties and participants to introduce themselves for the record, starting
23 with the Defence.
24 MS MABILLE: [9:32:08] (Interpretation) The Defence team is represented by
25 Virginie Lefebvre to my left, who is case manager; Jean-Marie Biju-Duval, who is

1 co-counsel; and myself Catherine Mabilie, lead counsel. Thank you, Mr President.

2 PRESIDING JUDGE HOFMAŃSKI: [9:32:31] Thank you very much.

3 And then Victims V01.

4 MS OMBENI: [9:32:43] (Interpretation) The first team is represented by myself

5 Ms Ombeni, and then Madam Estelle Vairevese.

6 PRESIDING JUDGE HOFMAŃSKI: [9:32:54] Thank you very much.

7 And Victims V02.

8 MR KETA: [9:33:00] (Interpretation) Good morning, Mr President. The V02 team is
9 represented by Maître Joseph Keta, assisted by Sylviane Glodjinon.

10 PRESIDING JUDGE HOFMAŃSKI: [9:33:12] Thank you very much.

11 And then OPCV.

12 MS MASSIDDA: [9:33:18] Good morning, Mr President.

13 The Office of Public Counsel for Victims is composed today by Ms Sarah Pellet,
14 counsel; Ms Caroline Walter, legal officer; and myself Paolina Massidda, principal
15 counsel.

16 PRESIDING JUDGE HOFMAŃSKI: [9:33:34] Thank you very much.

17 And Trust Fund for Victims.

18 MR DE BAAN: [9:33:39] Good morning, your Honour. The Trust Fund for Victims
19 today is represented by Mr Cheihk Fall, associate legal officer; Tars van Litsenbourgh,
20 legal associate; and myself Pieter de Baan.

21 PRESIDING JUDGE HOFMAŃSKI: [9:33:51] Thank you very much. Today the
22 Appeals Chamber is delivering its judgment on two appeals filed, pursuant to
23 Article 82(4) of the Statute, by Mr Lubanga and the V01 group of victims, against the
24 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo
25 is Liable', which Trial Chamber II issued on 15 December 2017. The Trial Chamber's

1 decision will be referred to as the "impugned decision".

2 The Appeals Chamber's judgment was rendered unanimously, with Judge Eboe-Osuji
3 and Judge Ibáñez Carranza filing separate opinions.

4 The summary I read today is not a part of the written judgment. Please note that
5 only the written judgment and two separate opinions are authoritative.

6 Mr Lubanga was convicted on 14 March 2012 of the crimes of conscripting and
7 enlisting children under the age of 15 years into the Patriotic Forces for the Liberation
8 of the Congo and using them to participate actively in hostilities.

9 On 7 August 2012, Trial Chamber I issued a decision on reparations which was
10 subsequently appealed.

11 The Appeals Chamber, on 3 March 2015, rendered a judgment in relation to those
12 appeals. The Appeals Chamber amended Trial Chamber I's decision and also issued
13 an amended reparations order. In its judgment, the Appeals Chamber found, among
14 other things, that it was, I quote, "appropriate to exceptionally seek the Trust Fund's
15 assistance in requesting that it provide [...] the anticipated monetary amount that it
16 considers necessary to remedy the harms by the crimes for which Mr Lubanga was
17 convicted." End quote.

18 The Appeals Chamber stated that the Trial Chamber's decision on the amount of
19 Mr Lubanga's liability for reparations would be appealable.

20 It is the Trial Chamber's decision on 15 December 2017 - the impugned
21 decision - which set the amount of Mr Lubanga's monetary liability, which has now
22 been appealed. In that decision, the Trial Chamber held Mr Lubanga liable for
23 reparations to the sum of 10 million US dollars in respect of 425 victims it found
24 eligible for reparations and any other victims who may be identified.

25 On 15 January 2018, Victims V01 and Mr Lubanga filed notices of appeal against that

1 decision. Mr Lubanga has raised six grounds of appeal against the impugned
2 decision and Victims V01 have raised three.

3 Before addressing these grounds, the Appeals Chamber considered four preliminary
4 issues. Briefly, the Appeals Chamber:

5 Rejects Victims V01 apparent request to challenge the standing of the OPCV in these
6 appeals;

7 Accepts the OPCV's consolidated filing of a response, despite this not being expressly
8 provided for in the provisions;

9 Rejects the OPCV's request to dismiss the appeals outright, finding this request to be
10 unfounded, and;

11 Rejects Mr Lubanga's request for suspension of the Trial Chamber's decision of
12 7 February 2019, noting that that decision was not under appeal.

13 As certain grounds of appeal overlap, the Appeals Chamber grouped them, with four
14 grounds addressing the system for the award of reparations, three grounds
15 addressing the assessment of the individual requests and the standard of proof, and
16 two concerning other issues.

17 The four grounds of appeal which concern the system for the award of reparations are
18 Mr Lubanga's first and fourth grounds of appeal and Victims V01's first and second
19 grounds of appeal.

20 These grounds of appeal raise the question of the correctness of the Trial Chamber's
21 approach or methodology in deciding on the monetary amount of reparations for
22 which Mr Lubanga was held liable, in addition to its decision to decide on the
23 eligibility for reparations of certain individual victims, together, they raise issues that
24 concern the system in place for the award of collective reparations.

25 Under his first ground of appeal, Mr Lubanga essentially argues that the Trial

1 Chamber erred in taking into account victims who had not filed requests for
2 reparations when it had not found exceptional circumstances to do so. He argues
3 that the Statute only allows for this in exceptional circumstances.

4 The Appeals Chamber considered that the restriction argued for by Mr Lubanga does
5 not exist in the Statute and that it would be incorrect to assume that the number of
6 victims may only be established based on the individual requests for reparations
7 received by the Court. The Appeals Chamber considered that it would be
8 undesirable for the Trial Chamber to be restrained in that determination simply
9 because not all victims had presented themselves to the Court by making a request.

10 In making that determination, the Trial Chamber should consider the scope of
11 damage as it is in the current reality, based on the crimes for which the convicted
12 person was found culpable.

13 The Appeals Chamber considered that, in deciding what reparations are appropriate,
14 a Trial Chamber must take into account the rights of the convicted person. The
15 reparations order must not go beyond the crimes for which he or she was convicted.

16 The convicted person must be given a sufficient opportunity to make submissions on
17 the scope of reparations, the scope of victimhood to be repaired, the type of
18 reparations, et cetera, so as to comply with the requirements of fairness. If the
19 Trial Chamber resorts to estimates as to the number of victims, such estimates must
20 be based on a sufficiently strong evidential basis; any uncertainties must be resolved
21 in favour of the convicted person, for instance, by assuming a lower number of
22 victims or by discounting the amount of liability.

23 The Appeals Chamber rejected this ground of appeal.

24 Under his fourth ground of appeal, Mr Lubanga argues that the Trial Chamber erred
25 in not making an award against him based only on the actual cost of the collective

1 award that was made.

2 The Appeals Chamber considered that the amount of the convicted person's liability
3 should be fixed taking into account the cost of reparations considered to be
4 appropriate and that are intended to be put in place - which can include reparations
5 programmes - and the different harms suffered by the different victims, both
6 individual victims, direct and indirect, in addition to, in particular circumstances, the
7 collective of victims. In setting the amount, the Trial Chamber must also ensure that
8 it takes into account the convicted person's rights and interests.

9 The goal is to set an amount that is fair and properly reflects the rights of the victims,
10 bearing in mind the rights of the convicted person. If the information and evidence
11 upon which the Trial Chamber relies does not enable it to set the amount of liability
12 with precision, for example, because it cannot obtain precise information of the
13 costing of specific reparations programmes, then it may, with caution, consider
14 whether to rely on estimates.

15 The Appeals Chamber considered the two sums of money taken into account by the
16 Trial Chamber in fixing its award, 3.4 million US dollars in respect of the 425
17 applicants it found eligible, and 6.6 million US dollars in respect of other victims who
18 have not yet come forward. It found that, although the Trial Chamber could have
19 been clearer as to how it fixed the sum in question, Mr Lubanga had not
20 demonstrated an error in the Trial Chamber's findings.

21 The ground of appeal is rejected.

22 Regarding their first ground of appeal, Victims V01 argued that the Trial Chamber
23 erred in assessing the individual requests submitted by victims and exceeded the
24 mandate given to them by the Appeals Chamber.

25 The Appeals Chamber considered that neither the relevant provisions nor the

1 Appeals Chamber's previous judgment prevented the Trial Chamber from proceeding
2 in the manner in which it did. It rejected the first ground of appeal.

3 Regarding the second ground of appeal, Victims V01 argued that the Trial Chamber
4 erred in assessing eligibility for reparations based on different procedures, that the
5 participating victims were misled by contradictions arising out of the various
6 Chamber's decisions and interpretations of the Trust Fund, and that the participating
7 victims were as a result discriminated against.

8 The Appeals Chamber considered that it is clear from the proceedings that the
9 participating victims should have been on notice that the Trial Chamber intended to
10 re-examine their status as victims for the purposes of the reparations proceedings.

11 That part of the argument was therefore rejected. As to whether the previously
12 participating victims were misled by contradictions between various decisions and
13 were disadvantaged vis-à-vis future victims, the Appeals Chamber considered further
14 the history of the proceedings and accepts that the differences between these
15 approaches and potential ambiguity created may have led to uncertainty as to what
16 was required of potential victims submitting requests. They may have also affected
17 the manner in which the entities concerned interviewed potential victims and
18 prepared their dossiers. It is conceivable that as a result, some accounts included in
19 the victims' dossiers were more detailed than others and attached more supporting
20 documentation than others. This, in turn, may have led the Trial Chamber to find
21 some of the dossiers to insufficiently substantiate the potential victims' allegations
22 regarding their victimhood.

23 The Appeals Chamber finds that the Trial Chamber's overall procedure for the
24 eligibility assessment failed to ensure equal conditions for all victims and amounts to
25 an error. This error materially affects the impugned decision as some of the victims

1 concerned may have been found eligible had they known more fully what was
2 expected of them in submitting their dossiers, and the Trial Chamber could have
3 given them an additional opportunity to supplement their dossiers or clarify their
4 accounts. The Appeals Chamber also extends this ruling to the other victims whose
5 claims were rejected, but who were not represented by Victims V01.

6 The Appeals Chamber therefore amends the impugned decision to the extent that the
7 Trial Chamber finds that 48 persons had not proven to the requisite standard that
8 they qualify as victims for reparations in this case. The impugned decision is
9 amended such that the victims whom the Trial Chamber found ineligible to receive
10 reparations and who consider that their failure to sufficiently substantiate their
11 allegations, including by supporting documentation, resulted from insufficient notice
12 of the requirements for eligibility, may seek a new assessment of their eligibility by
13 the Trust Fund, together with other victims who may come forward in the course of
14 the implementation stage and as envisaged by the Trial Chamber in the impugned
15 decision. The Appeals Chamber also finds that any recommendations as to
16 eligibility made by the Trust Fund shall be subject to the approval of the Trial
17 Chamber.

18 Regarding Victims V01's third ground of appeal, they argue that the Trial Chamber
19 disregarded the assessment of eligibility carried out by the Trust Fund and make
20 arguments as to how the assessment was done. In view of its conclusion under the
21 second ground of appeal, the Appeals Chamber considered that there was no need to
22 examine this ground of appeal and it is therefore dismissed as moot.

23 The following grounds of appeal relate to the actual assessment of 473 individual
24 requests for reparations and to the applicable standard of proof, as well as to the
25 determination of the 425 victims, are only a sample of the potentially eligible victims,

1 and that hundreds and possibly thousands more victims suffered harm as a
2 consequence of the crimes of which Mr Lubanga was convicted. It is comprised of
3 Mr Lubanga's second and third grounds of appeal and Victims V01's third ground of
4 appeal, the conclusion on which I have just summarised.

5 Under his second ground of appeal, Mr Lubanga challenges the Trial Chamber's
6 conclusion on both the 425 claimants it found eligible for reparations and its
7 conclusion as to the hundreds and possibly thousands other victims, including ones
8 who may come forward at the implementation stage. The Appeals Chamber
9 addressed the arguments raised and concluded that Mr Lubanga has failed to identify
10 an error.

11 Under his third ground of appeal, Mr Lubanga argues that the Trial Chamber erred in
12 the redactions it permitted to the requests for reparations which were disclosed to
13 him. He submits that the level of redactions prevented him from responding
14 properly.

15 The Appeals Chamber noted that the guiding principle for Trial Chambers must be to
16 ensure that the convicted person, as a party to the litigation, has a meaningful
17 opportunity to challenge the information on the basis of which a Chamber will make
18 an award against him or her.

19 The Appeals Chamber noted that the ultimate purpose for which the Trial Chamber
20 used the requests for reparation in this case was limited. In this regard, even though
21 the Trial Chamber made findings as to the eligibility of the 473 victims who filed
22 dossiers before it, it is not clear to the Appeals Chamber that the overall monetary
23 award made, 10 million US dollars, would have changed had the number of eligible
24 victims been different. The overall award made was also based on, inter alia, the
25 Trial Chamber's finding as to the additional hundreds and possibly thousands of

1 other victims, some of whom may be identified during the implementation of
2 reparations.

3 The Appeals Chamber recalls in this context that the Trial Chamber assessed the
4 473 dossiers as a sample in the context of determining Mr Lubanga's overall monetary
5 liability and in the knowledge that there was additional victims who had not yet been
6 identified.

7 These considerations guided the Appeals Chamber in its consideration of the specific
8 arguments made by Mr Lubanga. Having addressed them, the Appeals Chamber
9 found that he had failed to identify an error. This ground of appeal was therefore
10 rejected.

11 The two remaining grounds of appeal are Mr Lubanga's fifth and sixth grounds of
12 appeal. The fifth ground raises the issue of how to take into account, when
13 calculating the monetary value of a person's liability for reparations, a convicted
14 person's role in the commission of the crimes in question, also vis-à-vis other possible
15 co-perpetrators and how to take into account other issues that he or she may raise
16 with a view to mitigating his or her liability. Mr Lubanga's sixth ground of appeal
17 raises the issue of the application of the *non ultra petita* rule in reparations proceedings
18 before the Court.

19 The Appeals Chamber rejected both grounds of appeal finding that Mr Lubanga
20 failed to identify an error in the Trial Chamber's conclusions.

21 The Appeals Chamber concludes that the impugned decision is confirmed subject to
22 an amendment which has already been described.

23 As stated, Judge Eboe-Osuji will file a separate opinion to this judgment.

24 Judge Ibáñez Carranza will also file a separate opinion in which, while concurring
25 with the outcome of the common judgment, she elaborates in depth and clarifies

1 various issues regarding this case. She considers from relevant grounds of appeal
2 and the submissions advanced by the parties as well as activities performed by the
3 Trust Fund for Victims and the methodology followed by the Trial Chamber during
4 the implementation process, there are serious misunderstandings, misappreciations
5 and difficulties regarding the following issues: one, the nature of the reparation
6 proceedings before this Court and the nature and scope of reparations for crimes
7 under the Court's jurisdiction; two, the scope and extent of damages and harm and
8 the scope of victimhood to be repaired in the case at hand; and three, what do
9 adequate, appropriate and effective reparations entail.

10 Consequently, Judge Ibáñez Carranza's opinion addresses those issues to provide
11 further depth and clarity on these fundamental matters and with the ultimate goal to
12 strengthen the common judgment and provide further guidance for the
13 implementation stage.

14 In Judge Ibáñez Carranza's view, the common judgment has addressed the appeals in
15 a practical manner and the separate opinion addresses in depth these topics that in
16 her view, are extremely important to shed light to this case. Despite the long time by
17 the parties awaited, she considers that this is the most important case on reparations
18 before this Court because it refers to a very broad scope of victimhood that includes
19 potential victims and specific type of damages, all of which has been considered as
20 the basis to determine Mr Lubanga's amount of liability. These reasons further
21 motivates her to issue a separate opinion.

22 With these considerations in mind, Judge Ibáñez Carranza explains in detail that
23 reparations proceedings in atrocious crimes, such as those under the jurisdiction of
24 this Court, which also constitute gross human rights violations, are judicial in nature
25 and emerge from the criminal conviction and include the harm and damages

1 emerging from the breach of the criminal prohibition of the crime and the harm and
2 damages emerging from the grave violation to the core human rights involved.
3 Consequently, and in light of the foregoing, she considers that by virtue of the
4 mandate imposed in Article 21(3), read in conjunction with Article 75(6) of the Statute,
5 international human rights law and human rights standards, guidelines and
6 principles must be considered and applied in reparations proceedings.
7 Furthermore, due to the judicial nature of reparations proceedings, the Trust Fund for
8 Victims, which is an administrative entity created by the Assembly of States Parties,
9 performs a complementary and supporting role in this regard. Its actions are always
10 subject to judicial control, review and final approval by the Trial Chamber. This
11 supporting role is different to the Trust Fund for Victims' assistance mandate. The
12 latter is not linked to any reparations proceedings and as such should not be confused
13 with the former.

14 Judge Ibáñez Carranza explains that the type of harm as suffered defines the type of
15 victim. When repairing victims' harm, attention should be paid to the specific
16 characteristics of each victim, individually, direct or indirect victims, or and
17 collectively. In the case at hand, there is a specific harm to child soldiers, that is, the
18 damage to their project of life. That must be recognised and repaired together with
19 other types of damages. Likewise, the damages to the community must be
20 recognised and repaired.

21 With respect to the eligibility of potential victims, she maintains that the Trial
22 Chamber was entitled to conduct it and to include such victims in the reparations
23 award. This is because the conviction and sentencing decisions in the case at hand
24 already made determinations as to the existence of potential victims and the
25 Trial Chamber had the mandate to follow such determinations in the reparations

1 proceedings.

2 Yet, even if there had been no determinations in this respect, she acknowledges that

3 there were exceptional circumstances that would have enabled the Trial Chamber to

4 search, screen and determine potential victims and consider them for reparations, in

5 setting the final amount of Mr Lubanga's liability.

6 The burden of proof in reparations proceedings for atrocious crimes such as those in

7 the present case cannot be placed exclusively on the victims. The Court, under

8 Rule 97(2) of the Rules of Procedure and Evidence, has the power to appoint experts

9 to determine the harm. In cases of mass criminality, where victims have lost

10 everything, and regarding issues of scope of victimhood, damages and the link of

11 causation, the Court must rely on the support of a multidisciplinary, technical and

12 professional team of experts. This must be done also in the implementation stage by

13 the Trust Fund for Victims, especially in the process of screening, eligibility and

14 determination of the potential victim with the aim to awarding reparations.

15 In cases of crimes that constitute gross violations of human rights such as those under

16 the jurisdiction of the Court, the human right to reparations must be premised on the

17 human rights to truth and justice. Reparations must be adequate, appropriate and

18 effective, and must be based on the principle of *restitutio in integrum*. They must

19 restore dignity and restructure the victim as a human being, in his or her entirety, in

20 his or her individual and communal and social admission. To this end, the

21 reparations process and the implementation stage in the instant case must be guided

22 by internationally recognised human rights and standards.

23 This brings me to the end of the summary.

24 Finally, I stress that the summary is not authoritative. The authoritative version will

25 be notified.

- 1 I thank the court reporters, the court interpreters, and the other Registry staff for their
- 2 invaluable assistance today in holding the hearing.
- 3 The hearing is now adjourned.
- 4 THE COURT USHER: [10:04:57] All rise.
- 5 (The hearing ends in open session at 10.05 a.m.)