

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

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

Date: **24 May 2018**

THE APPEALS CHAMBER

Before:

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

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

Confidential

**Defence Application for Leave to File a Consolidated Reply to the Responses of
the Legal Representatives of the V01 Group of Victims and the Office of Public
Counsel for Victims Respectively Filed on 15 and 18 May 2018**

Source: Defence Team for Mr Thomas Lubanga Dyilo

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

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Legal Representatives of victims

Mr Luc Walley
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Mr Paul Kabongo Tshibangu
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REGISTRY

Registrar

Mr Peter Lewis

Trust Fund for Victims

Mr Pieter de Baan

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

CLASSIFICATION

1. The Defence marks the present application as confidential for its reference to documents disclosed on a confidential basis.

PROCEDURAL HISTORY

2. On 15 March 2018, the Defence filed its appeal brief¹ against the “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable”² handed down by Trial Chamber II on 15 December 2017 (“Chamber”).
3. On 15 May 2018, the Legal Representatives of the V01 group of victims (“V01 Legal Representatives”) filed their response³ to the appeal brief of the Defence for Mr Lubanga (“Response of the V01 Legal Representatives”).
4. On 18 May 2018, the Office of Public Counsel for Victims (“OPCV”) filed its consolidated response⁴ to the appeal briefs from the Defence and the V01 Legal Representatives (“OPCV Response”).
5. Pursuant to regulation 60 of the Regulations of the Court, the Defence seeks leave to file a consolidated reply to the Response of the V01 Legal Representatives and the OPCV Response.

¹ “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”, 15 March 2018, ICC-01/04-01/06-3394-Conf-tENG.

² “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.

³ “Response of the Legal Representatives of the V01 Group of Victims to the 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”, 15 May 2018, ICC-01/04-01/06-3405-tENG.

⁴ “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”, 18 May 2018, ICC-01/04-01/06-3407-Conf-tENG.

SUBMISSIONS

6. Regulation 60 provides that the Appeals Chamber may order the appellant to file a reply whenever it considers it necessary in the interests of justice.
7. To assist the Appeals Chamber, the Defence would like the opportunity to elaborate as follows on the V01 Legal Representatives' and the OPCV's responses.

(1) Reply to the Response of the V01 Legal Representatives

-The response to the first ground of appeal (paragraphs 9-17)

8. The V01 Legal Representatives submit that Trial Chamber I, by its decision of 7 August 2012, which the Appeals Chamber affirmed on 3 March 2015, decided to "proceed with reparations *proprio motu*".⁵
9. The Defence did not have the opportunity to respond in its previous submissions to this argument as the Response of the V01 Legal Representatives raises it for the first time.
10. However, the Appeals Chamber did not decide "to proceed with reparations *proprio motu*", that is, "on its own motion" within the meaning of article 75 of Statute, but simply upheld Trial Chamber I's choice of collective reparations over individual reparations.
11. It is precisely because the Decision appealed fails to adhere to the procedure and the conditions applicable to the award of reparations made "*proprio motu*", that is, "on [the Chamber's] own motion", laid down in article 75 of the Rome Statute and rule 95 of the Rules of Procedure and Evidence, that the Decision is affected by an error of law.

⁵ ICC-01/04-01/06-3405-tENG, para. 12.

-The response to the second ground of appeal (paragraphs 19-22)

12. The V01 Legal Representatives misrepresent the Defence's position in claiming that, in its brief, the Defence acknowledged that "the balance of probabilities" standard "is also the standard generally applied in international law in the context of asylum".⁶
13. Quite the contrary: in its appeal brief, the Defence argues that the "balance of probabilities" standard of proof is different, and is more stringent than the standard of proof based on the "coherent and credible" nature of the statements, which applies in international law only to the assessment of eligibility for refugee status.⁷

-The response to the fourth ground of appeal (paragraphs 51-55)

14. The V01 Legal Representatives misrepresent the Defence's position.
15. Contrary to the V01 Legal Representatives' assertion,⁸ the Defence has never argued that the quantum of the individual harm should be assessed. It has, however, consistently underscored that the existence and the nature of the individual harm must be evaluated in order to devise appropriate collective reparations.
16. Furthermore, the V01 Legal Representatives misquote the Defence.
17. The V01 Legal Representatives claim that the Defence stated that the size of the collective award "cannot evidently be lower than the aggregate individual harm".⁹

⁶ ICC-01/04-01/06-3405-tENG, para. 21.

⁷ ICC-01/04-01/06-3394-Conf-tENG, paras. 53-62.

⁸ ICC-01/04-01/06-3405-tENG, para. 51.

⁹ ICC-01/04-01/06-3405-tENG, para. 51.

18. Yet the paragraph of the Defence appeal brief referenced and purportedly cited verbatim in the Response of the V01 Legal Representatives makes entirely the opposite point:

“Moreover, the size of the collective award envisaged, as yet unknown, can evidently **only** be lower than the aggregate individual harm.”¹⁰
[Emphasis added].

(2) Reply to the OPCV Response

-The motion for inadmissibility (paragraphs 10-12)

19. The OPCV contends that the Defence appeal brief is inadmissible for failure to state clearly, let alone show, that the criteria applicable according to article 82(4) of the Rome Statute have been met.¹¹
20. The OPCV also maintains that “the clear misappreciation of the facts” does not come within the jurisdiction of the Appeals Chamber.¹²
21. It is in the interests of justice that the Defence be allowed to reply to that argument, which the OPCV Response sets out for the first time.
22. Contrary to the OPCV’s assertions, the Defence’s notice of appeal and its appeal brief do meet the criteria of the Rome Statute and the Regulations of the Court, in particular as they do set out for each ground of appeal the errors raised and how they affect the impugned decision.

¹⁰ ICC-01/04-01/06-3394-Conf-tENG, para. 222.

¹¹ ICC-01/04-01/06-3407-Conf-tENG, para. 10.

¹² ICC-01/04-01/06-3407-Conf-tENG, para. 12.

-The response to the first ground of appeal (paragraphs 30-34)

23. The OPCV disputes the Defence's position that the Chamber ruled "on its own motion". The OPCV's ground for doing so was that the Chamber was informed by the Legal Representatives and the Trust Fund of the existence of hundreds more victims identified for reparations in the case and so "the victims' applications were therefore put before" the Chamber.¹³
24. The Defence did not have the opportunity to respond in its previous submissions to this argument as the OPCV Response raises it for the first time.
25. The OPCV cannot legitimately maintain that applications for reparations were put before the Chamber by possible victims who did not submit any application form.

-The response to the fourth ground of appeal (paragraphs 41-42)

26. The OPCV is incorrect in stating that, in setting the size of the reparations award for which Mr Lubanga is liable, the Chamber took into account the actual cost of the reparations.¹⁴
27. Contrary to the OPCV's assertion, in determining the size of Mr Lubanga's financial liability, the Chamber did not at all rely "[on] the estimated cost of many types of programmes and services that could be implemented in Ituri"¹⁵ but had regard solely to an assessment of the individual harm calculated on the basis of a fixed rate.

-The response to the sixth ground of appeal (paragraphs 48-50)

28. The OPCV is incorrect in stating that that it "had asked the Chamber to set the amount of Mr Lubanga's liability at USD 6,000,000 for the victims already

¹³ ICC-01/04-01/06-3407-Conf-tENG, para. 31.

¹⁴ ICC-01/04-01/06-3407-Conf-tENG, para. 42.

¹⁵ ICC-01/04-01/06-3407-Conf-tENG, para. 42.

known” with the effect that “she might well have arrived at a sum-total of USD 12,000,000”.¹⁶

29. To be specific, the figure of \$6,000,000, at which the OPCV arrives in its submissions of 8 September 2017, is the sum-total of fixed sums for a possible 3,000 persons.¹⁷

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO

ALLOW the present application; and

GRANT LEAVE to the Defence to file a consolidated reply to the Response of the V01 Legal Representatives filed on 15 May 2018 and to the OPCV Response filed on 18 May 2018.

[signed]

Ms Catherine Mabile, Lead Counsel

Dated this 24 May 2018,

At The Hague

¹⁶ ICC-01/04-01/06-3407-Conf-tENG, para. 50.

¹⁷ “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, paras. 42 and 46.