



Original: English

**No. ICC-01/04-01/06 A7 A8
Date: 6 November 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 Bossa

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public

**Order scheduling an oral hearing
and determining the conduct of that hearing**

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

Legal Representatives of V01 Victims

Mr Luc Walley
Mr Franck Mulenda

Counsel for the Defence

Ms Catherine Mabil
Mr Jean-Marie Biju-Duval

Legal Representatives of V02 Victims

Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo

Trust Fund for Victims

Mr Pieter de Baan

Office of Public Counsel for victims

Ms Paolina Massidda

Registrar

Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeals of the legal representatives of the V01 group of victims (ICC-01/04-01/06-3396-Corr-Red-tENG) and of Mr Thomas Lubanga Dyilo (ICC-01/04-01/06-3394-Red-tENG) against the decision of Trial Chamber II entitled ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’ of 15 December 2017, of which a corrected version was filed on 21 December 2017 (ICC-01/04-01/06-3379-Red-Corr-tENG),

Noting the ‘Scheduling order for a hearing before the Appeals Chamber and invitation to the Trust Fund for Victims to submit observations’ of 21 September 2018 (ICC-01/04-01/06-3419), wherein the Appeals Chamber, *inter alia*, scheduled a hearing on these appeals for 17 October 2018,

Noting the ‘Order regarding the hearing scheduled by the Appeals Chamber’ of 4 October 2018 (ICC-01/04-01/06-3423), wherein the Appeals Chamber postponed the aforementioned hearing, stating that it would be held in December 2018, with the date to be set in due course,

Issues the following

ORDER

1. A hearing before the Appeals Chamber will be held on 11 December 2018 (from 13h30) and 12 December 2018 (from 9h00) in order to hear submissions and observations on the above-mentioned appeals.
2. Over these two days, the Appeals Chamber invites the parties and the Trust Fund for Victims to provide their views on the issues as outlined below. The questions are intended to guide the parties and the Trust Fund for Victims in their submissions and need not be answered individually. The parties may also include, within the time allocated to them in the hearing, their oral responses to

the written observations by the Trust Fund for Victims, which are due to be filed by 15 November 2018.¹

Preliminary issue

- a. Standing of the Office of Public Counsel for victims to participate in these appeals – as raised by the legal representatives of the V01 group of victims.²

First group of issues: legal basis and methodology for making the award for collective reparations

1) Mr Thomas Lubanga Dyilo’s first ground of appeal – error in assessing USD 6,600,000 in respect of hundreds, and possibly thousands, more victims

- a. Without prejudice to the determination of the issue as to the (legal) circumstances, if any, in which the Court may award reparations in respect of victims who have not submitted individual requests for reparations:
 - i. Should there be a cut-off date after which potential victims can no longer come forward to claim reparations which have been awarded?
 - ii. Is there any difference between collective reparations for identified victims and collective reparations for unidentified victims?
 - iii. How should collective reparations in respect of, as yet, unidentified victims be calculated? And, if collective awards are made in respect of, as yet, unidentified victims, but no such victims or a limited number of such victims materialise, what becomes of the sum, if any, set aside for, or having been awarded in respect of, such victims?

¹ ‘Decision on Trust Fund for Victims’ request for time extension’, 10 October 2018, ICC-01/04-01/06-3428.

² ‘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’, 20 August 2018, [ICC-01/04-01/06-3416-ENG](#), paras 8-13.

**2) Mr Thomas Lubanga Dyilo’s fourth ground of appeal –
error in failing to set the award for reparations based on
the cost to repair the harm**

- a. How should collective reparations be calculated?
- b. Must the cost of repair (for example, the nature and extent of repair) be calculated in order to determine the value of reparations. If so, why and what is the best method to do so?
- c. Is there any relationship between the cost to repair harm and the value of the harm?
- d. Mr Thomas Lubanga Dyilo argues that a collective award could ‘only be lower than the aggregate individual harm’.³ Is it correct that the amount of a collective award can only be lower than the value of the aggregate of the individual harms?
- e. In its decision of 14 August 2015, Trial Chamber II (hereinafter: ‘Trial Chamber’) identified the following five points that the Trust Fund for Victims must have included in its draft implementation plan:
 1. A list of the victims potentially eligible to benefit from the reparations, including the requests for reparations and the supporting material;
 2. An evaluation of the extent of the harm caused to the victims;
 3. Proposals for the modalities and forms of reparations;
 4. The anticipated monetary amount [that is necessary to remedy the harm caused by the crimes of which Thomas Lubanga Dyilo was convicted]; and

³ ‘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 March 2018, [ICC-01/04-01/06-3394-Red-t-ENG](#) (hereinafter: ‘Mr Lubanga’s Appeal Brief’), paras 222-223.

5. The monetary amount which could potentially be advanced [by the Trust Fund for Victims].⁴

Did the Trust Fund for Victims comply with these instructions?

If not, what precise challenges did the Trust Fund for Victims face in carrying out the instructions of the Trial Chamber?

- f. How should the Court identify and assess the different types of harm which can arise in different types of victims in a collective reparations assessment – e.g. direct victims, indirect victims, collective victims, individual victims?
- g. How should the Court repair the harm of ex-child soldiers who, among other damages, may have suffered harm to their life project and expectations?

3) The legal representatives of the V01 group of victims’ first ground of appeal –the Trial Chamber exceeded its mandate in individually assessing the eligibility of victims

- a. Are collective reparations necessarily at odds with, and thus a bar to, the examination and determination of individual applications for reparations?
- b. Was it necessary for the Trial Chamber to individually assess the eligibility of victims for reparations in this case?
- c. What procedure, rather than the one used, should the Trial Chamber have used to assess collective reparations in this case?
- d. Noting that victims can both participate in the proceedings and seek reparations, should victims who were permitted to participate in proceedings automatically receive reparations and what would the implications of this be on the procedure to apply to participate in proceedings?

⁴ ‘Decision on the “Request for extension of time to submit the draft implementation plan on reparations”’, [ICC-01/04-01/06-3161-tENG](#), pp. 5-6.

**4) The legal representatives of the V01 group of victims’
second ground of appeal – error in creating discriminatory
system for eligibility assessment of victims**

- a. What impact, if any, did the alleged discrimination in the procedure set up by the Trial Chamber to decide on the eligibility of victims for reparations in this case⁵ have on the award for reparations?
- b. Were the victims, whose eligibility for reparations was determined by the Trial Chamber, adequately on notice as to the fact that the Trial Chamber intended to decide on their eligibility in its order on reparations such that they had the opportunity to provide adequate information to the Trial Chamber?

Second group of issues: assessment of eligibility of individual victims and finding of hundreds, and possibly thousands, of others; assessment of Mr Thomas Lubanga Dyilo’s liability for reparations

**5) Mr Thomas Lubanga Dyilo’s second ground of appeal –
error in finding the 425 victims eligible for reparations**

- a. Did the Trial Chamber apply the standard of proof of a balance of probabilities? If not, what are the reasons to say that the Trial Chamber did or did not apply the standard of a balance of probabilities?
- b. Does a standard of proof based on a ‘coherent and credible’ claim differ from one which is based on a balance of probabilities and, if so, how?
- c. What level of corroboration, if any, is required to meet the balance of probabilities standard? In particular, may a Trial Chamber award reparations based only on requests for reparations, in respect of which the description of what happened to the victim is not otherwise corroborated?

⁵ ‘Corrigendum to the Appeal Brief against the “*Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu*” handed down by Trial Chamber II on 15 December 2017, ICC-01/04-01/06-3396-Conf’, 19 March 2018, [ICC-01/04-01/06-3396-Corr-Red-tENG](#), para. 36 *et seq.*

- d. How exactly do the ‘deficiencies’ and ‘lack of coherence’ in the evidence, as alleged in paragraphs 71 – 105 of Mr Lubanga’s Appeal Brief, have a material affect on the decision under appeal? In respect of which victims?

**6) Mr Thomas Lubanga Dyilo’s fifth ground of appeal –
error in the assessment of Mr Thomas Lubanga Dyilo’s
liability for reparations**

- a. What do the parties understand by the legal principle of *responsabilité solidaire* (or, in Latin, liability *in solidum*)?⁶
- b. How should one understand the legal principle of *responsabilité solidaire* or liability *in solidum* in the context of reparations proceedings before the Court?
- c. In determining a person’s liability for reparations, what relevance, if any, do ongoing trial proceedings against alleged co-perpetrators have?
- d. What effect, if any, would subsequent convictions of co-perpetrators have on an existing or completed order for reparations against a convicted perpetrator?
- e. Mr Thomas Lubanga Dyilo argues that the Trial Chamber failed to consider his personal efforts to promote demobilisation of child soldiers and peace.⁷ He also submits that the Trial Chamber did not consider other circumstances including the failure of the United Nations forces and national authorities to take measures to protect civilians.⁸ What is the legal basis for a trial chamber to take into account, when fixing liability, the factors to which Mr Thomas Lubanga Dyilo refers?

⁶ See [Mr Lubanga’s Appeal Brief](#), paras 229, 236; ‘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](#), para. 57.

⁷ [Mr Lubanga’s Appeal Brief](#), paras 248-261.

⁸ [Mr Lubanga’s Appeal Brief](#), paras 262-268.

3. The parties and the Trust Fund for Victims will be invited to address the Appeals Chamber on the issues set out above as follows:

In relation to the preliminary issue and first group of issues (grounds of appeal):

- i. Submissions by Mr Thomas Lubanga Dyilo (35 minutes)
- ii. Submissions by the legal representatives of the V01 group of victims (35 minutes)
- iii. Submissions by the Trust Fund for Victims (35 minutes)
- iv. Response by the legal representatives of the V02 group of victims (35 minutes)
- v. Response by the Office of Public Counsel for victims (35 minutes)
- vi. Response and reply by Mr Thomas Lubanga Dyilo (15 minutes)
- vii. Response and reply by the legal representatives of the V01 group of victims (15 minutes)
- viii. Reply by Mr Thomas Lubanga Dyilo to the response of the legal representatives of the V01 group of victims (5 minutes)

In relation to the second group of issues (grounds of appeal):

- i. Submissions by Mr Thomas Lubanga Dyilo (30 minutes)
- ii. Submissions by the legal representatives of the V01 group of victims (30 minutes)
- iii. Submissions by the Trust Fund for Victims (15 minutes)
- iv. Response by the legal representatives of the V02 group of victims (30 minutes)
- v. Response by the Office of Public Counsel for victims (30 minutes)
- vi. Response and reply by Mr Thomas Lubanga Dyilo (30 minutes)

- vii. Response and reply by the legal representatives of the V01 group of victims (30 minutes)
- viii. Reply by Mr Thomas Lubanga Dyilo to the response of the legal representatives of the V01 group of victims (5 minutes)

Remaining time for rejoinders / replies: 10 minutes per party, participant and the Trust Fund for Victims

- 4. Additional questions may be put to the parties and the Trust Fund for Victims from the bench in respect of the issues outlined above or any other relevant issues.

Done in both English and French, the English version being authoritative.



Judge Piotr Hofmański
Presiding Judge

Dated this 6th day of November 2018

At The Hague, The Netherlands