

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

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

Date: **25 April 2013**

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Anita Ušacka
Judge Ekaterina Trendafilova

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

Public Document

Joint response to the Defence application for leave to reply

Source: Office of Public Counsel for Victims
V02 team of Legal Representatives

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

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**Organisations authorised by the Trial
Chamber to submit observations**

REGISTRY

Registrar and Deputy Registrar
Mr Herman von Hebel and Mr Didier
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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. BACKGROUND

1. On 14 March 2012, Trial Chamber I (“the Chamber”) issued its *Judgment pursuant to Article 74 of the Statute* (“the Judgment”)¹ whereby it convicted Mr Thomas Lubanga Dyilo of the crimes of conscription and enlistment of children under the age of fifteen years into the *Force Patriotique pour la Libération du Congo* and using them to participate actively in hostilities pursuant to articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute between September 2002 and 13 August 2003.²

2. On 7 August 2012, the Chamber issued its *Decision establishing the principles and procedures to be applied to reparations* (“the Impugned Decision”).³

3. On 24 August 2012, Principal Counsel of the Office of Public Counsel for Victims (“the OPCV”) and the Legal Representatives of the V02 team filed the “Appeal against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparations* of 7 August 2012”⁴ pursuant to article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.

4. On 3 September 2012, the Legal Representatives of the V01 team filed their “Appeal against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparation* of 7 August 2012” under article 82(4) of the Rome Statute

¹ See *Judgment pursuant to Article 74 of the Statute* (Trial Chamber I), ICC-01/04-01/06-2842, 14 March 2012 (“the Judgment”).

² *Idem*, para. 1358.

³ See *Decision establishing the principles and procedures to be applied to reparations* (Trial Chamber I), ICC-01/04-01/06-2904, 7 August 2012 (“the Impugned Decision”).

⁴ See “Appeal against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparations* of 7 August 2012”, ICC-01/04-01/06-2909-tENG A, 24 August 2012.

and rule 150 of the Rules of Procedure and Evidence.⁵

5. On 6 September 2012, the Defence filed its “Appeal of the Defence for Mr Thomas Lubanga against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparation rendered on 7 August 2012*” pursuant to article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.⁶

6. On 14 December 2012, the Appeals Chamber issued its *Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings*,⁷ whereby it invited, *inter alia*, the Defence and, jointly, the OPCV and the Legal Representatives of the V02 team to file documents in support of their appeals against the Impugned Decision by 4 p.m. on 5 February 2013.⁸ The Appeals Chamber further invited, *inter alia*, the Defence and, jointly, the OPCV and the Legal Representatives of the V02 team to file responses to the documents in support of the appeals against the Impugned Decision by 4 p.m. on 8 April 2013.⁹

7. On 5 February 2013, the Office of Public Counsel for Victims and the Legal Representatives of the V02 team filed a joint document in support of their appeal

⁵ See “Appeal against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparation of 7 August 2012*”, ICC-01/04-01/06-2914-tENG A2, 3 September 2012.

⁶ See “Appeal of the Defence for Mr Thomas Lubanga against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparation rendered on 7 August 2012*”, ICC-01/04-01/06-2917-tENG A3, 6 September 2012.

⁷ See *Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings* (Appeals Chamber), ICC-01/04-01/06-2953 A A2 A3 OA21, 14 December 2012.

⁸ *Idem*, p. 4.

⁹ *Ibid.*

against the Impugned Decision.¹⁰

8. That same day, the Legal Representatives of the V01 team¹¹ and the Defence¹² filed their respective documents in support of their appeals against the Impugned Decision.

9. On 8 April 2013, Principal Counsel of the OPCV and the Legal Representatives of the V02 team filed a “Joint Response to the « *Mémoire de la Défense de M. Thomas Lubanga relatif à l’appel à l’encontre de la ‘Decision establishing the principles and procedures to be applied to reparations’*, rendue par la Chambre de première instance le 7 août 2012 »” (“the Joint Response”).¹³

10. That same day, the Defence filed a response to the documents filed by the Legal Representatives of the victims in support of their appeals against the Impugned Decision.¹⁴

11. On 22 April 2013, the Defence filed its “*Requête de la Défense aux fins de solliciter l’autorisation de déposer une réplique à la « Joint Response to the “Mémoire de la*

¹⁰ See “Document in support of the appeal against Trial Chamber I’s 7 August 2012 Decision establishing the principles and procedures to be applied to reparation”, ICC-01/04-01/06-2970-tENG A, 5 February 2013.

¹¹ See “Document à l’appui de l’appel contre la ‘Decision establishing the principles and procedures to be applied to reparations’ du 7 août 2012”, ICC-01/04-01/06-2973 A2, 5 February 2013.

¹² See “*Mémoire de la Défense de M. Thomas Lubanga relatif à l’appel à l’encontre de la ‘Decision establishing the principles and procedures to be applied to reparations’*, rendue par la Chambre de première instance le 7 août 2012 ”, ICC-01/04-01/06-2972, 5 February 2013.

¹³ See “Joint Response to the ‘*Mémoire de la Défense de M. Thomas Lubanga relatif à l’appel à l’encontre de la ‘Decision establishing the principles and procedures to be applied to reparations’*, rendue par la Chambre de première instance le 7 août 2012’”, ICC-01/04-01/06-3010 A3, 8 April 2013 (“the Joint Response”).

¹⁴ See “*Réponse de la Défense de M. Thomas Lubanga aux documents déposés par les victimes ausoutien de leurs appels à l’encontre de la « Décision fixant les principes et procédures applicables en matière de réparations » rendue par la Chambre de première instance le 7 août 2012’*”, ICC-01/04-01/06-3011 A A2 A3, 8 April 2013.

Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la 'Decision establishing the principles and procedures to be applied to reparations', rendue par la Chambre de première instance le 7 août 2012"», déposée le 8 avril 2013" ("the Defence Application").¹⁵

12. Pursuant to regulation 24(2) of the Regulations of the Court, Principal Counsel of the OPCV and the Legal Representatives of the V02 team (the "Legal Representatives") hereby submit their joint response to the Defence Application.

II. THE LEGAL REPRESENTATIVES' JOINT RESPONSE

13. The Legal Representatives submit that by setting out four points which it wishes to address in its reply, the Defence has already raised substantive arguments in that regard. Yet, the Defence ought only to expound on substantive arguments where leave to reply is granted. Hence, the substantive arguments as propounded by the Defence exceed the purview and sole raison d'être of an application for leave to apply under regulation 60 of the Regulations of the Court.

14. Further still, since the Defence has already advanced substantive arguments on the four points rehearsed in its Application, to accord it leave to file a reply in respect of said points, which would be founded on arguments already raised, would be inopportune and thus of no service whatsoever to the interests of justice.

15. In this regard, the Legal Representatives question why the Defence allowed 14 days to elapse after the Joint Response before filing its Application, rather than

¹⁵ See "*Requête de la Défense aux fins de solliciter l'autorisation de déposer une réplique à la «Joint Response to the "Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la 'Decision establishing the principles and procedures to be applied to reparations', rendue par la Chambre de première instance le 7 août 2012"», déposée le 8 Avril 2013"*", ICC-01/04-01/06-3020 A3, 22 April 2013 (dated 19 April 2013) ("the Defence Application").

doing so earlier so as to avoid to delaying the proceedings to the detriment of the interests of justice to which the Defence adverts in its Application.¹⁶

16. To the extent that the Defence advances substantive arguments, the Legal Representatives note that the Defence both relies on the findings of Trial Chamber I set forth in the Judgment to dispute the credibility of the statements of certain witnesses who testified at trial and canvasses the content of the witnesses' statements.¹⁷

17. In this regard, the Legal Representatives submit that on 3 October 2012, the Defence filed a notice of appeal against the Judgment,¹⁸ wherein it prayed that said Judgment be set aside in its entirety.¹⁹

18. The Legal Representatives submit that the Defence cannot found its Application on the findings of the Judgment, which it sought to have set aside *in toto*. Such an approach by the Defence offends the universally recognised principle of law proscribing the assertion of a position in flagrant contradiction with a previously held position and prejudicial to another party – *non concedit venire contra factum proprium* – known as the principle of estoppel in international law²⁰ and both the Romano-Germanic and Common Law traditions.²¹ Accordingly, the Appeals

¹⁶ *Idem*, para. 3.

¹⁷ *Ibid.*, para. 4.

¹⁸ See "Notice of Appeal lodged by the Defence for Mr Thomas Lubanga against Trial Chamber I's Judgment pursuant to Article 74 of the Statute of 14 March 2012", ICC-01/04-01/06-2934, 3 October 2012.

¹⁹ *Idem*, para. 4 and p. 4.

²⁰ In this respect see, ICJ, *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 15 June 1962, I.C.J. Reports 1962, p. 32; IACHR, *Neira Alegría et al. v. Peru*, Preliminary Objections, Judgment of 11 December 1991, Series C No. 13 (1991), para. 29; IACHR, *Ernesto Máximo Rodríguez v. Argentina*, Case No. 10382, Report of 21 February 1998, para. 39; IACHR, *Acevedo Buendía et al. v. Peru*, Preliminary objections, merits, reparations and costs, Judgment of 1 July 2009, para. 57.

²¹ See in this regard, *inter alia* :

<http://fr.jurispedia.org/index.php/Actualit%C3%A9 de la th%C3%A9orie de l'estoppel dans la jur>

Chamber should not countenance the approach taken by the Defence.

19. As regards the content of the witnesses' statements, the Legal Representatives submit that the Appeals Chamber, which for the purposes of proceedings under article 81 of the Rome Statute, is vested with all of the powers of the bench *a quo*,²² has unfettered discretion²³ in the appraisal of evidence. Furthermore, the Appeals Chamber is in no way bound by the findings set forth by Trial Chamber I in its Judgment, including as regards the credibility and the veracity of such *viva voce* evidence, particularly inasmuch as the appeal against the Judgment remains *sub judice*.

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In this respect, see also Gaillard, E., "L'interdiction de se contredire au Détriment d'Autrui comme Principe Général du Droit du Commerce International", *Revue de l'arbitrage*, 1985, p. 242; and Ferrand, F., "The French Approach to the Globalisation and Harmonisation of Civil Procedure", in Kramer, X.E. and Rhee, C.H. (eds.), *Civil Litigation in a Globalising World*, Springer, 2012, p. 345.

²² See article 83(1) of the Rome Statute.

²³ See rule 63(2) of the Rules of Procedure and Evidence.

Accordingly, the Legal Representatives respectfully pray the Appeals Chamber to:

- deny the Defence Application.

[signed]
Paolina Massidda
Principal Counsel

[signed]
Carine Bapita Buyangandu
On behalf of the V02 team

Dated this 25 April 2013

At The Hague, the Netherlands and Kinshasa, Democratic Republic of the Congo