



Original: **French**

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

Date: **29 May 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

Defence Reply to the 8 April 2013 “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”*”

Source: Defence team for Mr Thomas Lubanga Dyilo

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

Office of the Prosecutor

Ms Fatou Bensouda
Mr Fabricio Guariglia

Counsel for the Defence

Ms Catherine Mabille
Mr Jean-Marie Biju-Duval
Ms Caroline Buteau

Legal Representatives of Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Paul Kabongo Tshibangu
Mr Joseph Keta

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

Ms Paolina Massidda

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

1. On 8 April 2013, the Office of Public Counsel for Victims and the Legal Representatives of the V02 group of victims filed their joint response to the document of the Defence for Mr Thomas Lubanga in support of its appeal against the 7 August 2012 decision on reparations ("Response").¹
2. In accordance with the Appeals Chamber's order of 24 May 2013,² the Defence hereby presents the following observations in reply to the Response:

OBSERVATIONS

3. As indicated in its application of 19 April 2013 seeking leave to file a reply,³ the Defence's observations pertain solely to the testimonies to which the OPCV and the Legal Representatives refer in paragraphs 100 and 102 of their Response.⁴

- Testimonies of P-0293, P-0294 and P-0213

4. The OPCV and the Legal Representatives rely on the testimonies of Witnesses P-0294 and P-0213 in support of several statements which they make in paragraphs 100 and 102 on the ill-treatment which child soldiers in the FPLC allegedly suffered, but they fail to mention that the Trial Chamber did not take account of these testimonies in its judgment.⁵
5. Furthermore, the OPCV and the Legal Representatives refer indirectly to the testimony of Witness P-0294 by referencing an excerpt of the testimony of his mother, Witness P-0293, who relates what her son allegedly told her about his military service.
6. However, the Trial Chamber took no account of those testimonies in its judgment, in particular because the witnesses had been introduced to the

¹ ICC-01/04-01/06-3010.

² ICC-01/04-01/06-3030.

³ ICC-01/04-01/06-3020.

⁴ ICC-01/04-01/06-3010, paras. 100-102.

⁵ *Idem*, para. 100.

Office of the Prosecutor by Intermediary P-0321. The Chamber emphasised that P-0213 “is not a witness who can be safely relied upon”.⁶ As for Witness P-0294, the Chamber stated: “Given P-0294’s credibility and the reliability of his evidence are seriously at issue, the Chamber is unable to rely on his account.”⁷ The Chamber further noted that “[t]he documentary and oral evidence establishes he did not tell the truth about his age, and there are real concerns he lied about his military service”.⁸

7. Since the Chamber found that Witness P-0294 most likely lied about his military service in the FPLC, the OPCV and the Legal Representatives cannot cite a passage of his mother’s testimony in which she reports a conversation with her son in which he allegedly explained how he became a soldier.⁹
8. Furthermore, the Chamber noted that “[g]iven the mother of P-0294 (P-0293) was called to give evidence on the personal history of her son, which the Chamber is not relying on, the Chamber has not considered her evidence further”.¹⁰
9. Hence there is no question that having discarded P-0294’s testimony, the Chamber similarly rejected his mother’s testimony as to her son’s purported military history.
10. Contrary to the submissions of the OPCV and the Legal Representatives of Victims in their “Joint response to the Defence application for leave to reply”,¹¹ the Defence appeal does not challenge the Trial Chamber’s findings of fact in the judgment in their entirety. As it set out explicitly in its notice of appeal of 3 October 2012, the Defence appealed against “the Decision entered into the

⁶ Judgment, para. 406.

⁷ *Idem*, para. 415.

⁸ *Idem*, para. 415 [emphasis added].

⁹ T-153-CONF-FRA-CT, p. 48, lines 21 *et seq.*

¹⁰ Judgment, footnote 1481.

¹¹ ICC-01/04-01/06-2024-tENG.

record under number ICC-01/04-01/06-2842 as worded in the final operative part thereof at paragraphs 1358 and 1359".¹²

11. Furthermore, a reading of the Defence's appeal brief confirms that it essentially concurs with the Chamber's findings on the credibility of the witnesses who were presented by the Prosecution as former child soldiers.¹³
12. Nor are these findings challenged by the Prosecution in the appeal.

- Testimony of P-0038

13. In paragraph 102 of their Response, the OPCV and the Legal Representatives present P-0038 as a "former child soldier[] forcibly recruited".
14. During his testimony, the witness stated that he was born in 1984.¹⁴ This information was not challenged at trial.
15. The Chamber noted that P-0038 "does not allege that he was a child soldier below the age of 15 within the UPC".¹⁵
16. It follows that the OPCV and the Legal Representatives erroneously present Witness P-0038 as a "former child soldier[] forcibly recruited".

- Testimony of P-0017

17. The OPCV and the Legal Representatives cite the testimony of P-0017 in support of their claim that there was a "practice of forcing recruits, including children under the age of 15 years, to drink alcohol and smoke hemp".¹⁶

¹² ICC-01/04-01/06-2934-tENG.

¹³ The Defence made a number of references in its appeal brief to the fact that the Chamber had not accepted the testimonies of all of the individuals presented by the Prosecution as former child soldiers. See, for example, ICC-01/04-01/06-2948-Red, paras. 1 *et seq.* and 124 *et seq.* The relevant witnesses are P-0007, P-0008, P-0010, P-0011, P-0157, P-0213, P-0294, P-0297 and P-0298.

¹⁴ T-113-Red2-FRA-CT, p. 28, line 4.

¹⁵ Judgment, para. 340.

¹⁶ ICC-01/04-01/06-3010, para. 100.

18. However, a careful assessment of P-0017's testimony reveals that he speaks of an incident where a recruit was allegedly whipped for having threatened to shoot someone after taking drugs. At no point in his testimony does P-0017 indicate that the recruit was forced to take drugs.¹⁷
19. Hence, the OPCV and the Legal Representatives misrepresent P-0017's testimony by arguing that he confirmed that there was a practice within the FPLC of forcing recruits to consume alcohol and drugs.
20. Since the testimonies of Witnesses P-0293 and P-0294 were set aside by the Chamber in its judgment, there is no evidence to support the allegation of the OPCV and the Legal Representatives that there was a practice of forcing recruits to consume drugs or alcohol.¹⁸

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

TAKE NOTE OF these observations.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 29 May 2013, at The Hague

¹⁷ T-158-CONF-FRA-CT, p. 30, lines 9-14.

¹⁸ ICC-01/04-01/06-3010, para. 100, footnotes 175-177.