Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-01/04-01/06**
Date: **31 January 2019**

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Document

Submissions of the Defence for Mr Thomas Lubanga Dyilo filed pursuant to the order of the Appeals Chamber ICC-01/04-01/06-3435, "Order on the conduct of the proceedings"

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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PROCEDURAL HISTORY

1. On 15 December 2017, Trial Chamber II ("Chamber") handed down the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable" ("Decision").[1]

2. On 21 December 2017, the Chamber notified a corrected version of the Decision[2] and its annex I.[3]

3. On 16 January 2018, the Legal Representatives of the V01 group of victims,[4] and the Defence[5] filed their notices of appeal against the Decision.

4. By order of 6 November 2018,[6] the Appeals Chamber scheduled hearings in order to hear submissions from the parties on the appeals.

5. The Chamber also invited the parties to present their views in court on a group of issues set out in the order.

6. The hearings were postponed until 7 and 8 February 2019.[7]

7. By order of 2 January 2019,[8] the hearings were cancelled and the Appeals Chamber invited the parties' written submissions on the issues outlined in the order of 6 November 2018.

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[1] ICC-01/04-01/06-3379-Conf; ICC-01/04-01/06-3379-Red.

[2] ICC-01/04-01/06-3379-Conf-Corr-tENG; ICC-01/04-01/06-3379-Conf-Corr-Anx-tENG; ICC-01/04-01/06-3379-Red-Corr-tENG; ICC-01/04-01/06-3379-Red-Corr-Anx-tENG.

[3] ICC-01/04-01/06-3379-AnxI-Corr-tENG; ICC-01/04-01/06-3379-AnxI-Corr-Anx-tENG.

[4] "Notice of Appeal against Trial Chamber II's '*Décision fixant le montant deréparations auxquelles Thomas Lubanga est tenu'* of 15 December 2017 ", 16 January 2018, ICC-01/04-01/06-3387-tENG.

[5] "Notice of Appeal by 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 way of the Decisions of 20 and 21 December 2017 ", 16 January 2018, ICC-01/04-01/06-3388-tENG.

[6] "Order scheduling an oral hearing and determining the conduct of that hearing", 6 November 2018, ICC-01/04-01/06-3429.

[7] "Scheduling order for a hearing before the Appeals Chamber", 20 December 2018, ICC-01/04-01/06-3433.

[8] "Order on the conduct of the proceedings", 2 January 2019, ICC-01/04-01/06-3435.

8. The Appeals Chamber further invited the parties to include in their submissions their responses to the "Observations pursuant to rule 103 of the Rules of Procedure and Evidence"[9] filed by the Trust Fund for Victims ("Trust Fund").

9. The Defence for Mr Lubanga files the present submissions pursuant to the above directions.

THE DEFENCE'S FIRST GROUND OF APPEAL

10. The Chamber made an error of law by imposing on Mr Lubanga the financial liability for the harm suffered by "hundreds and possibly thousands more victims" who have not put any application before the Chamber.[10]

11. Article 75 of the Rome Statute and rule 95 of the Rules of Procedure and Evidence presuppose that, in matters of reparations, rulings of the International Criminal Court ("Court") are limited to what the applications bring before it, save where justified by "exceptional circumstances".

12. So, where a Chamber hands down an order on reparations, without citing the existence of "exceptional circumstances" which would allow it to rule *proprio motu* on the "the extent of any damage, loss or injury", its jurisdiction is circumscribed by the applications placed before it.

13. That being so, the Chamber can order the convicted person to pay only an amount which is equal to the sum-total of the reparations awarded to applicants who were granted the standing of victim, but it is barred from taking account of the harm suffered by hypothetical victims "who may be identified during the implementation of reparations".

[9] "Observations pursuant to rule 103 of the Rules of Procedure and Evidence", ICC-01/04-01/06-3430, 15 November 2018.
[10] Decision, paras. 244 and 280.

14. Furthermore, in order to seek compensation as a victim, a person must file an application for reparations with the Court before pronouncement of the order for reparations.

15. The filing of a full dossier is also required of applicants who were granted the standing of participating victim, since the standard of proof to qualify as a victim for the purpose of reparations is higher than that to qualify as a participating victim.

16. Since participating victim status is accorded on the basis of a *prima facie* assessment, unlike eligible victim status, which requires proof on "a balance of probabilities", the applicants represented by the Legal Representatives could not have been unaware that their dossiers would be subject to the thorough scrutiny that applies in the case of the other potentially eligible victims.

17. The decision to opt for collective reparations does not entail rejection of that principle. Since the award against the convicted person, where collective reparations have been ordered, is equal to the cost of the programmes introduced, it is paramount that the victims and the nature and extent of the harm done to them first be identified, so that the Chamber can issue an order for reparations.

18. That being so, a potential victim cannot seek post facto to qualify as a victim for the purpose of the reparations awarded by order of the Court.

19. Since the size of the award against the convicted person was determined on the basis of specific information, *viz.*, the number of victims, the harm done to them and the programmes needed to assist them, the sum-total awarded to the victims will necessarily be paid out in its entirety.

20. That said, a potential victim who has not filed an application for reparations before the order was given may nonetheless approach the Trust Fund to avail

him- or herself of the programmes which fall within its assistance mandate (Regulation 50 of the Regulations of the Trust Fund).

21. Nonetheless, Mr Lubanga cannot be held liable for the cost of that assistance because he will not have had the opportunity to acquaint himself with the applicants' dossiers or to make submissions and because the standing of victim will not have been granted as a result of judicial proceedings but by an administrative process.

22. Turning lastly to the purported existence of "hundreds and possibly thousands more victims", it must be said that three groups of Legal Representatives of Victims, including the Office of Public Counsel for Victims, have been involved in the proceedings for over eleven years.

23. It is therefore legitimate to think that any additional victims would have made themselves known, or, at the very least would have been identified by the Legal Representatives, well before the order was given on 15 December 2017.

THE DEFENCE'S SECOND GROUND OF APPEAL

24. The Chamber made an error of law in failing to apply "a balance of probabilities", contenting itself to describe the uncorroborated statements of the applicants for reparations as "coherent and credible" in finding that they qualified as victims.

25. The distinction between the "balance of probabilities" and the standard of proof based on the "coherent and credible" nature of the statements lies in the fact that the latter standard does not call for corroboration.

26. This standard of proof based on the "coherent and credible" nature of statements is applied in international law only to the assessment of eligibility for refugee status under the 28 July 1951 Geneva Convention relating to the

status of refugees, whose protective aim justifies a less exacting standard of proof.

27. In that context, an applicant for asylum is not duty-bound to present evidence in addition to his or her claims by way of corroboration: it suffices for the applicant's statements to be coherent and credible vis-à-vis his or her overall account of events and vis-à-vis matters of common knowledge and the situation in the country of origin.[11]

28. That precise reasoning was adopted by the Chamber in its order of December 2017 because it granted victim standing to 320 applicants who had, nonetheless, not provided any document in support of their statements.

29. The Chamber has been content on numerous occasions to describe the statements as "coherent and credible", in finding that applicants in the proceedings qualified as victims.

30. However, at the reparations phase, the requisite standard of proof before the Court is "a balance of probabilities", which demands that an applicant bring evidence in support of his or her statements.

31. Black's Law Dictionary defines the balance of probabilities thus:

> The greater the weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact **but by evidence that has the most convincing force**; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. (Emphasis added).

32. The definition makes clear that to tender evidence is a requisite: statements alone do not suffice to lend probability to an account. So has held the Extraordinary Chambers in the Courts of Cambodia.[12]

[11] "Note on Burden and Standard of Proof in Refugee Claims", UNHCR, 16 December 1998, para. 11.
[12] ECCC, Supreme Court Chamber, Case File No. 001/18-07-2007-ECCC/SC, "Appeal Judgment", 3 February 2012, para. 528 affirming the trial judgment, Doc. No. E188, para. 647.

33. The preponderance of the evidence is framed in identical terms by Professor Royen and Professor Lavallée:

> [TRANSLATION] In discharge of the burden of persuasion, a party must provide proof which makes the existence of a fact more probable than not, save where the law calls for more cogent proof. **The quantum of proof does not denote quantitative character, but qualitative character. The evidence adduced is appraised not on the basis of the number of witnesses called by each party, but on the basis of its cogency.** Accordingly, the party must show that the fact in issue is not only possible, but also probable.[13]

34. Whereas the nature or volume of evidence or the quantum of proof may vary, the requirement for an applicant to provide one or more items of evidence in addition to his or her statements is, however, a requisite.

35. That same set of issues is apparent in the preparatory discussions on the drafting of the Rome Statute, which canvassed not the issue of adduction of evidence but what "proof" meant.[14]

36. The distinction thus made between the standards of proof − "a balance of probabilities" versus the "coherent and credible" nature of the statements − finds support in the decisions of domestic jurisdictions.[15]

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[13] Jean-Claude Royer and Sophie Lavallée, *La preuve civile*, Cowansville, Éditions Yvon Blais 2008, p. 126.

[14] Peter Lewis and Håkan Friman, "Article 75" in Roy S. Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001), p. 486.

[15] "Note on Burden and Standard of Proof in Refugee Claims", UNHCR, 16 December 1998, para. 17: "substantial body of jurisprudence has developed in common law countries on what standard of proof is to be applied in asylum claims to establish well-foundedness. This jurisprudence largely supports the view that there is no requirement to prove well-foundedness conclusively beyond doubt, or even that persecution is more probable than not. To establish 'well-foundedness', persecution must be proved to be reasonably possible".
See also, Supreme Court of the United States, *INS v. Stevic*: with regard to the standard applicable in asylum proceedings, it pointed out that a moderate interpretation of the "well-founded fear" standard would indicate "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility"; *INS v. Cardoza-Fonseca*: to show a "well-founded fear of persecution" an alien "need not prove that it is more likely than not that he or she will be persecuted in his or home country", the Court reaffirmed the standard stipulated in the Stevic case, that of "a reasonable possibility".
The House of Lords of the United Kingdom, *Fernandez v. Government of Singapore*: The House of Lords concluded that it was not necessary to show that it was more likely than not that the individual would be detained or restricted if returned, a lesser degree of likelihood sufficed, such as a "reasonable chance", "substantial grounds for thinking" or "a serious possibility"; R. v Secretary of State for the

37. The requirement for evidence in addition to the applicants' statements may also vary with the nature of the crimes and the circumstances of their commission. In the case *sub judice*, as the Defence has underscored, the crimes at bar and the harm suffered, by their very nature, lend themselves to proof by a spectrum of evidence.[16]

38. That being so, the Chamber has applied a much lower standard of proof than that required, which has done considerable prejudice to Mr Lubanga by virtue of the fact that his monetary liability was made commensurate with the number of applicants who were found to qualify as victims.

39. The Chamber also failed to draw the necessary conclusions from the factual incoherence and evidentiary deficiencies that it identified, or should have identified.

40. In the first place, despite noting that "in most cases the potentially eligible victims were not in a position to submit supporting documentation to prove their allegations",[17] the Chamber accorded the standing of victim to 320 applicants who had not provided any document in support of their

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Home Department *ex parte* Sivakumaran: the House of Lords called for a test less stringent than the "more likely than not" standard, such as "reasonable degree of likelihood".
The Australia High Court, *Chan Yee Kin v. The Minister for Immigration and Ethnic Affairs*: the High Court used the term "real chance". Mason C.J. said, "the Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns." Dawson C.J. preferred a test which "requires there to be a real chance of persecution before fear of persecution can be well-founded". He explained there need not be "certainty" or "even probability that (a fear) will be realised". McHugh J. said, "Obviously, a far-fetched possibility of persecution must be excluded. But if there is a real chance that the applicant will be persecuted, his or her fear should be characterised as 'well-founded' for the purpose of the Convention and Protocol".
Canada, *Joseph Adjei v. Minister of Employment and Immigration*: the Court of Appeal rejected the "more likely than not" test stating "It was common ground that the objective test is not so stringent as to require a probability of persecution." MacGuigan J. adopted a "reasonable chance" standard which was equated with "good grounds for fearing persecution" and "a reasonable possibility" of persecution. See also, Federal Court of Appeal, Salibian v. Canada.

[16] "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" ("Brief"), 15 March 2018, ICC-01/04-01/06-3394-Red-tENG, paras. 65-70.

[17] Decision, para. 61.

statements, which runs counter to the applicable standard of proof.

41. Moreover, in the view of the Chamber, "that an application for reparations contains slight discrepancies does not, on the face of it, cast doubt on its credibility",[18] where the remainder of the account is coherent and credible.

42. It must be underlined that the Chamber has not applied its own criteria: numerous applicants have presented statements inconsistent with their accounts and/or which are not worthy of belief when viewed against the facts as found at trial.

43. For instance, it is illogical for an applicant whose account seeks to prove that he was enlisted into the UPC/FPLC to claim at the same time to have belonged to Germain Katanga's militia.[19]

44. Likewise, many of the accounts are replete with statements which are inconsistent with the facts as found at trial.

45. No credibility can be attached to the account of one applicant who gives dates of enlistment,[20] training[21] and disarmament[22] that run counter to the facts as found at trial; who refers to unknown training camps[23] or to names of military leaders[24] whose identity was not established at trial; and who claims to have been a member of the UPC/FPLC and a subordinate of a commander, whom it has been proven had defected at the material time.[25]

46. Such a litany of inconsistencies within a single account should have prompted the Chamber to note its lack of credibility.

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[18] Decision, para. 86.
[19] Brief, paras. 100-101.
[20] Brief, paras. 76-81.
[21] This is true of a claim to have been trained in Mandro after October 2002, whereas it has been established that the centre had closed by then ("Judgment pursuant to Article 74 of the Statute", ICC-01/04-01/06-2842, 31 August 2012, para. 787; T-345-Red2-ENG, p. 21, lines 18-23).
[22] Brief, paras. 89-92.
[23] Brief, paras. 93-94.
[24] Brief, paras. 95-96.
[25] Brief, paras. 97-99 and 102-103.

THE DEFENCE'S FOURTH GROUND OF APPEAL

47. The Chamber made an error of law by setting the size of the award for which Mr Lubanga is liable at that of the aggregate individual harm rather than the actual cost of the collective reparations.

48. It follows from rules 97 and 98 of the Rules of Procedure and Evidence read together that an award against a convicted person necessarily amounts only to all or part of the cost of the reparations ordered.[26]

49. Where a Chamber determines that reparation is to be made for harm through the award of collective reparations alone, that reparation is effected through programmes which are appropriate to the nature and the extent of the damage done to individually identified victims.

50. That being so, the cost of the collective reparations which the convicted person will be ordered to pay in full or in part is equal to the cost of the programmes introduced for the victims.

51. Yet, an assessment of the cost of the programmes requires that all eligible victims be identified and the harm to them be established before an order for reparations setting monetary liability can be handed down.

52. In ruling on the applicants' victim standing and the existence of harm done by the crimes committed, the Chamber may rely on the dossiers compiled by the Legal Representatives, any medical and/or psychological opinion provided at the behest of the Chamber and the submissions made by the Defence after each party has been afforded notice and heard in relation to the evidence and arguments.

[26] Brief, paras. 208-209.

53. It is only then that specific, suitable and costed programmes may be placed before the Chamber in a draft plan.

54. To so proceed avoids overestimating, on the basis of guesswork and approximation, the cost of the reparations ordered against the convicted person, as cost will have been determined in relation to the harm personally suffered by the victims identified.

55. The aggregation of the reparation of like harm will necessarily have the effect of spreading the cost of the reparations, thereby bringing down the individual cost of implementing the reparations awarded to each eligible victim.

56. By order of 14 August 2015,[27] the Chamber directed the Trust Fund to state in its Draft Plan:

- The victims eligible for reparations;
- An assessment of the extent of the harm caused to the victims;
- Appropriate forms and modalities of reparations;
- The anticipated monetary amount necessary to make reparation for the harm occasioned by the crimes of which Mr Lubanga was convicted;
- The monetary amount which the TFV intends to advance in order to complement the resources collected through awards for reparations, should the Board of Directors so decide.

57. It must be pointed out that the Trust Fund has failed to comply with the directions: it has not listed the victims who may receive reparations (applications for reparations and supporting documentation) or assessed the extent of the harm done to the victims or the monetary amount necessary to implement collective reparations appropriate to that harm.

[27] "Decision on the 'Request for extension of time to submit the draft implementation plan on reparations'", 14 August 2015, ICC-01/04-01/06-3161-tENG, paras. 6-7.

58. Further still, although the Trust Fund has made proposals on the modalities and forms of the reparations, they are too unspecific and general to establish the cost of the programmes and, hence, the size of the award for which Mr Lubanga should be liable.

THE DEFENCE'S FIFTH GROUND OF APPEAL

i. The principle of *responsabilité solidaire*

59. The principle of *responsabilité solidaire* consists of

> [TRANSLATION] the obligation cast on each perpetrator of, co-perpetrator of or accessory to a same offence or related offences, to pay the sum-total of the damages and costs, with the possibility subsequently to recover contribution from each of the others.[28]

60. In the context of reparations proceedings before the Court, that principle should be understood as allowing just one of the co-perpetrators or accessories to be held liable for the sum-total of the cost of the reparations ordered, and, at the same time, as allowing that person to recover contribution from the other co-perpetrators or accessories.

61. Those two aspects are inseverable. The imposition of liability on just one of the co-perpetrators or accessories for the whole is possible only where it is open to that person, in fact and in law, to proceed effectively against the other co-perpetrators or accessories for recovery of contribution.

62. In a legal sense, however, there is no provision at the Court which governs or authorizes such a cause of action by a convicted person against the other co-perpetrators and accessories.

63. In a concrete sense, moreover, the fact that the trials are separate and separated by a considerable span of time means in effect that there is no

[28] *Vocabulaire juridique*, Gérard Cornu, 11th edition, puf, p. 978.

serious prospect of any real recovery of contribution by the convicted person who has paid for other co-perpetrators and accessories who may subsequently be convicted.

64. It follows that application of the principle of *responsabilité solidaire* to proceedings before the Court would give rise to a situation of manifest unfairness.

65. That is why, as the Chamber has previously held, the principle of holding any one of the perpetrators and accessories liable for the totality of the reparations [*responsabilité solidaire*] "cannot be imported into the particular context of cases before this Court".[29]

66. The fact that the principle of *responsabilité solidaire* cannot be applied has important ramifications for the determination of Mr Lubanga's share of liability for the cost of the reparations.

67. As the Defence has underlined in its previous submissions, and as the Office of the Prosecutor and the Legal Representatives of the Victims have acknowledged, the crimes which gave rise to the impugned reparations were the work of a number of co-perpetrators and accessories, among them Mr Bosco Ntaganda, who is standing trial before the Court for those crimes.[30]

68. Since the principle of *responsabilité solidaire* does not find application, it rests with the bench to apportion the liability for the reparations in accordance with their respective responsibilities as co-perpetrators or accessories and in accordance with a principle of shared liability.

69. In the case at bar, the extent of Mr Lubanga's liability – and he cannot be liable in full, as the existence of co-perpetrators and accessories is not in dispute –

[29] The Prosecutor v. Germain Katanga, "Order for Reparations pursuant to Article 75 of the Statute", 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 263.
[30] Brief, paras. 231, 232 and 240.

must be appraised against the evidence admitted at trial and any decisions which might be handed down against the co-perpetrators.

70. The fact of ongoing proceedings against a purported co-perpetrator and the possibility of that person's conviction for the crimes for which Mr Lubanga is required to make reparation, strengthen the case, therefore, for an individualized appraisal of Mr Lubanga's share of the liability for the commission of the crimes.

71. Failing that, the Court would be beset by a legal nonsense, which the Defence described in its previous submissions.[31]

ii. The "specific circumstances of the case"

72. In its decision of 5 March 2015, the Appeals Chamber held that a convicted person's liability for reparations must be appraised against the "specific circumstances of the case".[32]

73. That principle – part of the general requirement of fairness of which the bench is the guarantor − mandates consideration of all of the factors which allow a fair determination of the convicted person's share of the liability for payment of reparations.

74. Among such factors in the case *sub judice* can be cited the efforts of the convicted person to bring the crimes to an end, in contrast to the Congolese authorities' responsibility against a backdrop of large-scale massacres which were taking place at the time and the serious failure on the part of the United Nations to discharge its responsibility to protect – a failure which had some part in bringing about the crimes held against Mr Lubanga.

75. Consideration of those factors is necessary to circumscribe, at the reparations stage, the convicted person's share of the liability vis-à-vis other forms of

[31] Brief, paras. 237-239.
[32] "Order for Reparations", 5 March 2015, ICC-01/04-01/06-3129-AnxA, para. 21.

responsibility which may be attributed to other persons and may emerge from the "specific circumstances of the case".

76. The legal basis for consideration of the factors is thus the general principle of fairness, construed by the Appeals Chamber as a requirement to have regard to the "specific circumstances of the case".

RESPONSE TO THE TRUST FUND'S OBSERVATIONS

77. As regards the victim screening process and the role of the Defence in collective reparations, the Defence will in large part revert to the analysis set out on its first ground of appeal.

78. The collective or individual nature of the reparations does not in any way call into question the need for the Chamber to identify which victims are eligible and to make a finding on the harm done to them so that it may assess the size of the reparations award and therefore to set the monetary liability for which the convicted person is liable.

79. Accordingly, the rules of a fair trial and the right to notice and the opportunity to be heard require disclosure to the Defence of the body of material presented by the applicants for victim status, and on which the Chamber will rely to hand down its order for reparations.

80. Moreover, the Trust Fund is wrong to assert that reparations in *Lubanga* have reached the post-order stage, which does not warrant the Defence having any part in the victim screening process.

81. Although an amended order for reparations was given by the Appeals Chamber on 3 March 2015, it is incomplete as Mr Lubanga's monetary liability remained to be determined.

82. Yet, as earlier said, identification of the victims is essential to setting the convicted person's monetary liability.

83. As to the identification of victims unknown at the programme introduction stage, the Trust Fund's submissions on the subject are incorrect.

84. Determination of the extent of the harm, and, therefore, determination of the liability of the convicted person, are inseverable from the identification of eligible victims.

85. The prime purpose of reparations proceedings is to make reparation for **the harm suffered by the victims of the crimes committed**, and not that suffered by hypothetical victims, which would amount not to the awarding of meaningful reparations but to the meting out of a second penalty against the convicted person.

86. An analysis of the committees' discussions confirms that, ultimately, the framers of the Rome Statute and the Rules of Procedure and Evidence clearly discarded the idea of punitive awards, accepting only the compensatory purpose of reparation.[33]

87. Furthermore, in the Appeal Judgment given in *Duch*, the Extraordinary Chambers in the Courts of Cambodia rightly held

[33] Christopher Muttukumaru "Reparation to victims" in Roy S. Lee, *The International Criminal Court – The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law International 1999), p. 266; See also the drafting history of article 75 and the exclusion of the article from the "Penalties" Part: Preparatory Committee on the Establishment of an International Criminal Court, 4 February 1998, *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, A/AC.249/1998/L.13; Preparatory Committee on the Establishment of an International Criminal Court: Working Group on Penalties, 2 December 1997, *ILC draft articles 46 (2) and 47 – Applicable penalties (and related issues)*, A/AC.249/1997/WG.6/CRP.1; Preparatory Committee on the Establishment of an International Criminal Court, Working Group on Penalties, 12 December 1997, *Report of the Working Group on Penalties*, 1-12 December 1997, A/AC.249/1997/WG.6/CRP.14; UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Working Group on Procedural Matters, 24 June 1998, *Report of the Working Group on Procedural Matters*, A/Conf.183/C.1/WGPM/L.2.

> that an award that, in all probability, can never be enforced, i.e., is *de facto fictitious*, would belie the objective of effective reparation and would be confusing and frustrating for the victims.[34]

88. The Court has held that in setting the financial liability of a convicted person indigence does not enter the equation.

89. That notwithstanding, it is apparent from the first orders for reparations handed down that the Trust Fund is not always in a position to disburse the sum-total of the awards made to the victims.

90. Whereas the Chamber set the reparations award for which Mr Lubanga is liable at USD 10 million, the Trust Fund has made known that it is in a position to cover only USD 3.5 million.[35]

91. Accordingly, the need for efficaciousness and clarity should inform the Court's setting of the size of the reparations award.

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

TAKE NOTE of the present submissions.

[signed]

Ms Catherine Mabille, Lead Counsel

Dated this 31 January 2019, at The Hague

[34] Supreme Court Chamber, Case File No. 001/18-07-2007-ECCC/SC, "Appeal Judgment", 3 February 2012, para. 667.

[35] "Notification of the Board of Directors' decision on the Trial Chamber's supplementary complement request pursuant to regulation 56 of the Regulations of the Trust Fund for Victims", 2 October 2018, ICC-01/04-01/06-3422.