

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: French

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

Date: 4 March 2019

TRIAL CHAMBER II

Before: Judge Marc Perrin de Brichambaut, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Péter Kovács

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public Document

**Decision on the Application by the Defence Team for Thomas Lubanga Dyilo for
Leave to Appeal Against the Decision of 7 February 2019**

Decision 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 Thomas Lubanga Dyilo

Ms Catherine Mabil

Mr Jean-Marie Biju-Duval

Legal Representatives of V02 Victims

Ms Carine Bapita Buyangandu

Mr Paul Kabongo Tshibangu

Mr Joseph Keta Orwinyo

Office of Public Counsel for Victims

Ms Paolina Massidda

Trust Fund for Victims

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

TRIAL CHAMBER II (“Chamber”) of the International Criminal Court, acting pursuant to article 82(1)(d) of the Rome Statute (“Statute”) and regulation 65(3) of the Regulations of the Court, rules as follows.

I. Procedural history

1. On 15 December 2017, the Chamber handed down its “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable”¹ (“Decision of 15 December 2017”). In the decision, the Chamber analysed the applications for reparations of 473 individuals claiming to be victims of the crimes of which Thomas Lubanga Dyilo (“Mr Lubanga”) was convicted. The applications had been transmitted to the Chamber by the Trust Fund for Victims (“Trust Fund”) working in collaboration with the Legal Representatives of the V01 and V02 groups of victims (“Legal Representatives of V01 and V02 Victims”) and the Office of Public Counsel for Victims (“OPCV”).² The Chamber found that, of those 473 individuals, 425 had shown on a balance of probabilities that they had suffered harm as a consequence of the crimes of which Mr Lubanga was convicted.³ Accordingly, the Chamber ruled that they were entitled to the collective reparations it had awarded in the case at bar⁴ (“425 Beneficiaries”). The Chamber found, however, that the 425 beneficiaries were not the total number of victims who had suffered harm as a consequence of the crimes of which Mr Lubanga was convicted and that, in fact, hundreds and possibly thousands of other victims (“New Applicants”) had also been affected by his crimes.⁵ Lastly, the Chamber pointed out that, at the implementation stage of the

¹ “Corrected version of the ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’”, 21 December 2017, ICC-01/04-01/06-3379-Red-Corr-tENG, with two public annexes (Annex I and Annex III) and one confidential annex *ex parte* the Registry, the Trust Fund for Victims, the Legal Representatives of victim groups V01 and V02, and the Office of Public Counsel for Victims (Annex II), and one confidential redacted version of Annex II. This decision was handed down, with its annexes, on 15 December 2017 while the corrected versions were filed on 21 December 2017.

² Decision of 15 December 2017, paras. 35-191.

³ Decision of 15 December 2017, para. 190.

⁴ Decision of 15 December 2017, para. 194.

⁵ Decision of 15 December 2017, p. 92 and, in particular, paras. 232-244.

reparations, the Trust Fund would screen for eligibility those persons who had not been in a position to submit a dossier.⁶

2. On 15 January 2018, the Trust Fund presented observations to the Chamber in relation to locating new applicants and determining their eligibility for reparations, while recalling the preliminary exchanges with OPCV and the Legal Representatives of Victims V01 and V02⁷ (“Observations of the Trust Fund of 15 January 2018”).

3. On 25 January 2018, the Chamber directed the Trust Fund to provide, by 12 February 2018, further information on the procedure for locating new applicants and determining their eligibility for reparations.⁸

4. On 16 March 2018, the Chamber instructed the Trust Fund to file the documents requested by the Chamber on the procedure for locating new applicants and determining their eligibility for reparations, on the possibility of earmarking an additional amount for reparations and on the progress in the implementation of reparations.⁹

5. On 21 March 2018, in compliance with the orders of the Chamber and after having obtained a number of extensions of the time limit,¹⁰ the Trust Fund submitted further information on the procedure for locating new applicants and determining their eligibility for reparations¹¹ (“Observations of the Trust Fund of 21 March 2018”).

⁶ Decision of 15 December 2017, para. 293, referring to the “Decision on the Motion of the Office of Public Counsel for Victims for Reconsideration of the Decision of 6 April 2017”, 13 July 2017, ICC01/04-01/06-3338-tENG, para. 11.

⁷ “Observations in relation to locating and identifying additional victims pursuant to the Trial Chamber’s decision of 15 December 2017”, 15 January 2018, ICC-01/04-01/06-3386.

⁸ “Order Directing Further Information from the Trust Fund for Victims on the Procedure for Determining Victim Status at the Implementation Stage of Reparations”, 25 January 2018, ICC-01/04-01/06-3391-tENG.

⁹ “Order Instructing the Trust Fund for Victims to File the Documents Requested by the Chamber on the Process of Screening New Victims, the Progress of Discussions with the Stakeholders Involved in Locating and Identifying New Victims, the Possibility of Earmarking an Additional Amount for Reparations and the Progress of the Implementation of Reparations”, 16 March 2018, ICC-01/04-01/06-3395-tENG (“Order of 16 March 2018”).

¹⁰ Order of 16 March 2018, paras. 5-7.

¹¹ “Observations in relation to the victim identification and screening process pursuant to the Trial Chamber’s order of 25 January 2018”, 21 March 2018, ICC-01/04-01/06-3398.

6. On 13 April 2018, the Trust Fund filed, *inter alia*, additional information on the procedure for locating new applicants and determining their eligibility for reparations¹² ("Submissions of the Trust Fund of 13 April 2018"). The Trust Fund also informed the Chamber of the decision taken by its Board of Directors to complement the full supplementary amount needed to cover the entire amount for which Mr Lubanga was held liable in compliance with the Decision of 15 December 2017.¹³

7. On the same day, the Trust Fund submitted the fourth progress report on the implementation of reparations¹⁴ ("Fourth Trust Fund Report").

8. On 25 and 26 April 2018, subsequent to the Chamber's authorization,¹⁵ the Defence¹⁶ ("Defence Response"), the OPCV¹⁷ ("Response of the OPCV"), and the Legal Representative of V01 and V02 victims¹⁸ ("Response of the Legal Representatives of V01 and V02 Victims") submitted their respective responses to the submissions of the Trust Fund of 21 March 2018 and 13 April 2018.

9. On 2 October 2018, in compliance with an order of the Chamber¹⁹ and having obtained an extension of the time limit,²⁰ the Trust Fund submitted the fifth report on

¹² "Further information on the reparations proceedings in compliance with the Trial Chamber's order of 16 March 2018", 13 April 2018, ICC-01/04-01/06-3399-Conf. A public redacted version was submitted on 4 December 2018.

¹³ Submissions of the Trust Fund of 13 April 2018, para. 42.

¹⁴ "Fourth progress report on the implementation of collective reparations as per Trial Chamber II's orders of 21 October 2016 and 6 April 2017", 13 April 2018, ICC-01/04-01/06-3400 and two confidential annexes *ex parte*.

¹⁵ Email from the Chamber on 23 March 2018 at 10.41.

¹⁶ "Réponse consolidée de la Défense aux Observations du Fonds au profit des victimes communiquées les 21 mars et 13 avril 2018", dated 24 April 2018 and registered on 25 April 2018, ICC-01/04-01/06-3401.

¹⁷ "Réponse aux observations du Fonds au profit des victimes sur le processus d'identification et de sélection des autres victimes potentiellement éligibles aux réparations ainsi que sur les prochaines étapes de la mise en œuvre des réparations", 26 April 2018, ICC-01/04-01/06-3403-Conf.

¹⁸ "Réponse consolidée aux 'Observations in relation to the victim identification and screening process pursuant to the Trial Chamber's order of 25 January 2018' du 23 mars 2018 et au 'Fourth progress report on the implementation of collective reparations as per Trial Chamber's II's orders of 21 October 2016 and 6 April 2017' avec annexes du 13 Avril 2018", 26 April 2018, ICC-01/04-01/06-3402-Conf with one confidential annex.

¹⁹ "Order Directing the Trust Fund for Victims to File the Fifth Progress Report on the Implementation of Reparations", 20 September 2018, ICC-01/04-01/06-3418-Conf-tENG.

²⁰ Email from the Chamber to the Trust Fund on 28 September 2018 at 12.48. Email from the Trust Fund to the Chamber on 28 September 2018 at 8.00.

the implementation of collective reparations²¹ (“Fifth Trust Fund Report”). In the report, the Trust Fund stated that it would appreciate any guidance from the Chamber in relation to the procedure for locating new applicants and determining their eligibility for reparations.²²

10. On the same day, the Trust Fund notified the Chamber of the decision by its Board of Directors to allocate a supplementary complement of EUR 2,500,000 in addition to the initial complement of EUR 1,000,000 earmarked for reparations ordered in the instant case.²³

11. On 12 December 2018, the Trust Fund informed the Chamber of the commitment made by the Government of the Netherlands to make a voluntary contribution of EUR 350,000 towards the reparations ordered in the instant case.²⁴

12. On 7 February 2019, the Chamber issued a decision which in essence approved the proposals of the Trust Fund in relation to locating new applicants and determining of their eligibility for reparations²⁵ (“Decision of 7 February 2019”).

13. On 13 February 2019, the Defence filed an application for leave to appeal against the Decision of 7 February 2019²⁶ (“Application for Leave to Appeal”).

14. On 18 February 2019, the OPCV²⁷ (“Response of the OPCV”) and the Legal Representative of V01 Victims²⁸ (“Response of the Legal Representatives of V01

²¹ “Fifth progress report on the implementation of collective reparations as per Trial Chamber II’s orders of 21 October 2016 and 6 April 2017”, 2 October 2018, ICC-01/04-01/06-3421 with a confidential annex *ex parte* Registry, Legal Representatives of Victims and OPCV.

²² Fifth Trust Fund Report, pp. 4-5.

²³ “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.

²⁴ “*Notification d’un complément additionnel en vertu de la règle 56 du Règlement du Fonds au profit des victimes*”, 12 December 2018, ICC-01/04-01/06-3432.

²⁵ “*Décision approuvant les propositions du Fonds au profit des victimes portant sur la procédure visant à localiser et décider de l’admissibilité aux réparations des nouveaux demandeurs*”, 7 February 2019, ICC-01/04-01/06-3440-Conf. A public redacted version was submitted on XX March 2019.

²⁶ “*Requête de la Défense aux fins d’autorisation d’interjeter appel de la Décision rendue le 7 février 2019*” (ICC-01/04-01/06-3440-Conf), dated 13 February 2019 and reclassified as confidential on 18 February 2019, ICC-01/04-01/06-3441. A public redacted version of the application was filed on 20 February 2019 and notified on 21 February 2019.

Victims”) submitted their respective responses to the Application for Leave to Appeal.

II. Analysis

A. Preliminary issue

15. The Chamber notes that, on 26 February 2019, the Legal Representatives of V02 Victims filed a response to the Application for Leave to Appeal²⁹ (“Response of the Legal Representatives of V02 Victims”). The Chamber notes that the filing was made outside the time limit of three days stated in regulation 65(3) of the Regulations of the Court. It also draws the attention of the Legal Representatives of V02 Victims to the fact that, in their submissions, they cite an outdated version of regulation 34(b) of the Regulations of the Court, which allowed a time limit of 21 days for filing a response under regulation 24 of the Regulations of the Court.³⁰

16. Consequently, the Response of the Legal Representatives of V02 Victims is inadmissible.

B. On the merits

17. The Chamber notes that article 82(1)(d) of the Statute stipulates that:

1. Either party may appeal any of the following decisions in accordance with the Rules [...]:

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an

²⁷ “Réponse à la Requête de la Défense aux fins d’autorisation d’interjeter appel de la Décision rendue le 7 février 2019 (ICC-01/04-01/06-3440-Conf)”, 18 February 2019, ICC-01/04-01/06-3442.

²⁸ “Réponse des Représentants légaux des victimes V01 à la ‘Requête de la Défense aux fins d’autorisation d’interjeter appel de la Décision rendue le 7 février 2019’”, 18 February 2019, ICC-01/04-01/06-3443-Conf.

²⁹ “Réponse des représentants légaux du groupe des victimes V02 à la Requête de la Défense aux fins d’autorisation d’interjeter appel de la Décision rendue le 7 février 2019 (ICC-01/04-01/06-3441-Conf)”, 26 February 2019, ICC-01/04-01/06-3444-Conf.

³⁰ Regulation 34(b) of the Regulations of the Court was amended on 6 December 2016 and entered into force on 6 December 2016.

immediate resolution by the Appeals Chamber may materially advance the proceedings.

18. The Chamber may grant an application for leave to appeal submitted by either party subject to the satisfaction of the following three cumulative criteria:

- a) The matter at stake is an appealable issue.
- b) The issue at hand could significantly affect:
 - i. the fair and expeditious conduct of the proceedings; or
 - ii. the outcome of the trial; and
- c) In the opinion of the Pre-Trial or Trial Chamber, an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings.

19. The Chamber also notes that, mindful of the cumulative nature of the criteria stipulated in article 82(1)(d) of the Statute, an application for leave to appeal will be rejected if one or more of them are not met.³¹

20. The Appeals Chamber has held that a right to appeal a decision in application of article 82(1)(b) of the Statute arises only if the Pre-Trial or Trial Chamber is of the opinion that the impugned decision must receive the immediate attention of the Appeals Chamber.³²

21. The Defence requests the Chamber's leave to appeal against the Decision of 7 February 2019 and, in this connection, to submit to the Appeals Chamber the question whether additional victims who are yet to be identified should be taken into

³¹ "Decision rejecting the application for leave to appeal of the Legal Representatives of the 01 Group of Victims", 8 December 2016, ICC-01/04-01/06-3263-tENG, para. 14 and references.

³² Situation in the Democratic Republic of the Congo, Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 20; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Appeals Chamber, "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)'", 1 November 2016, ICC-02/11-01/15-744, para. 12.

account when determining Mr Lubanga's liability for reparations³³ ("Identified Question"). To demonstrate that the Application for Leave to Appeal meets the criteria of article 82(1)(d) of the Statute,³⁴ the Defence asserts that the Decision of 7 February 2019 undermines the fairness of the proceedings in that it predetermines the Appeals Chamber's decision regarding its first ground of appeal against the Decision of 15 December 2017, namely whether the existence of hundreds if not thousands of additional unidentified victims should be taken into account when determining Mr Lubanga's liability for reparations. The Defence submits that in addition the impugned decision violates Mr Lubanga's right to an impartial and independent hearing.³⁵ That said, the Defence is also of the view that the Appeals Chamber might rule in favour of its application, which would then, it contends, call into question the procedure for locating new applicants as approved by the Appeals Chamber in its Decision of 7 February 2019.³⁶ The Defence submits that, were that to be the case, an immediate resolution by the Appeals Chamber of the Identified Question, through joinder with the appeals lodged against the Decision of 15 December 2017, would significantly advance the ongoing proceedings.³⁷

22. Regardless of whether the Identified Question arises from the Decision of 7 February 2019³⁸ and whether it is appealable within the meaning of article 82(1)(d) of the Statute, the Chamber finds that the Defence has failed to establish that immediate resolution by the Appeals Chamber of the Identified Question might materially advance the proceedings. The Chamber considers that, on the contrary, lodging a new appeal before the Appeals Chamber against a matter already pending before it will only delay, rather than advance, the final – implementation – phase of the reparations proceedings.

³³ Application for Leave to Appeal, paras. 6 and 9, p. 7.

³⁴ Application for Leave to Appeal, paras. 6, 10-19.

³⁵ Application for Leave to Appeal, paras. 13-14.

³⁶ Application for Leave to Appeal, para. 18.

³⁷ Application for Leave to Appeal, para. 19.

³⁸ See in this regard: Response of the Legal Representatives of V01 Victims, para. 8, and Response of the OPCV, para. 11.

23. Since the third criterion has not been satisfied, the Chamber finds it unnecessary to examine further whether the Identified Question satisfies the other criteria listed in article 82(1)(d) of the Statute and, consequently, rejects the Application for Leave to Appeal.

24. Lastly, the Chamber notes that, in fact, the objective sought by the Application for Leave to Appeal is to secure suspension of execution of the Decision of 15 December 2017. The Chamber recalls that it was in that decision that it set the amount of Mr Lubanga's liability for reparations, having ruled that the 425 beneficiaries did not represent all the victims who had suffered harm as a consequence of the crimes of which Mr Lubanga was convicted, but that hundreds if not thousands of other victims were also affected by his crimes.³⁹ The Chamber notes that the Defence itself concedes that the Identified Question is awaiting resolution by the Appeals Chamber.⁴⁰ The Chamber accordingly draws the attention of the Defence to the fact that, pursuant to rule 156(5) of the Rules of Procedure and Evidence, it is "[w]hen filing the appeal, [that] the party appealing may request [from the Appeals Chamber] that the appeal have suspensive effect [...]". It finds, therefore, that the Defence has opted not to request such an effect be attached to its appeal against the Decision of 15 December 2017.⁴¹ Consequently, in the absence of such suspensive effect, the Decision of 15 December 2017 is enforceable and the Defence may not seek leave to appeal against the Decision of 7 February 2019 to make amends for its failure to take action regarding the said decision.

C. Confidentiality

25. The Chamber notes that the Response of the Legal Representatives of V01 Victims and the Response of the Legal Representatives of V02 Victims were filed as

³⁹ Decision of 15 December 2017, p. 87 and, in particular, paras. 232-244.

⁴⁰ Application for Leave to Appeal, para. 11. See Public Redacted Version of 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, dated 15 March 2018, ICC-01/04-01/06-3394-Red-tENG, paras. 11-48 ("Defence's Appeal Brief Relevant to the Appeal Against the Decision of 15 December 2017").

⁴¹ Defence's Appeal Brief Relevant to the Appeal Against the Decision of 15 December 2017.

confidential. The Chamber rules, however, that in order to safeguard the public nature of the hearings, public versions of their respective submissions must be filed with the necessary redactions.

FOR THESE REASONS, the Chamber

FINDS inadmissible the Response of the Legal Representatives of V01 and V02 Victims;

REJECTS the Application for Leave to Appeal; and

DIRECTS the Legal Representatives of V01 and V02 Victims to file public redacted versions of their respective submissions.

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

_____ [signed] _____

Judge Marc Perrin de Brichambaut

Presiding Judge

_____ [signed] _____

Judge Olga Herrera Carbuccion

_____ [signed] _____

Judge Péter Kovács

Dated this 4 March 2019

At The Hague, Netherlands