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TRIAL CHAMBER II

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

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

Public Document

**Observations of Victim Group V01 on the OPCV Request of 16 September 2016
and the Responses of the Trust Fund for Victims and the Registry
filed on 3 October 2016**

Source: Legal Representatives of Victim Group V01

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

Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr Eric MacDonald

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

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

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

Ms Paolina Massidda

Trust Fund for Victims

Mr Pieter de Baan, Executive Director

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. PROCEDURAL HISTORY

1. On 15 July 2016, the Chamber issued an Order “instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations”. On 16 September 2016, OPCV Principal Counsel filed a Request for guidance from the Chamber further to the Order of 15 July 2016 in her capacity as “legal representative of the potential beneficiaries”.¹
2. On 3 October 2016, the Trust Fund for Victims and the Registry filed observations on the Request.
3. The following observations are in response to the three filings cited above.

II. PRELIMINARY OBSERVATION

4. In its Request, the OPCV explains how it sees its role in the reparations process and seeks permission to assume certain functions originally assigned to the TFV and the Registry. It proposes to take over the process of identifying victims and potential reparation beneficiaries,² to conduct harm assessment interviews with them, to ready them for the individual interviews they will undergo later,³ and, last but not least, to prepare additional individual **applications for reparations**.⁴ The OPCV’s justification for this is that the TFV has suspended its own harm

¹ “Request for guidance from the Chamber further to the Order of 15 July 2016”, ICC-01/04-01/06-3222-tENG.

² *Ibid.*, para. 18.

³ *Ibid.*, para. 14.

⁴ *Ibid.*, para. 22.

assessment missions pending a ruling on its request for reconsideration of the Order of 12 February 2016.⁵

5. The OPCV Request touches on a question that is immediately relevant to the way the reparations process as a whole is organized and that will therefore inform the awaited ruling on the draft reparations plan filed by the TFV pursuant to the Appeals Chamber's amended Order for Reparations.⁶ Specifically, the Request concerns the roles to be played by each of the entities and parties involved in the reparations process.
6. The organization of the reparations process has been at issue before this Chamber since its Order pursuant to rule 103 of the Rules of Procedure and Evidence, dated 15 July 2016,⁷ in which it considered that it lacked the collective reparation projects for the victims of Mr Lubanga which would allow it to fulfil its mandate.⁸ It would thus be inappropriate to divorce the question of the entities' and parties' roles from the question of the content of the proposed reparations plan, on which the Chamber will entertain submissions at the hearings of 11, 13 and 14 October.

III. GENERAL FRAMEWORK OF THE REPARATIONS PROCESS

7. The reparations proceedings have been at an impasse for several months following a disagreement between the Chamber (which was mandated to supervise the process) and the Trust Fund for Victims (which must use its own financial resources to implement the reparations).⁹ Part of the disagreement is

⁵ *Ibid.*, para. 18.

⁶ Annex to the Judgment of 3 March 2015, ICC-01/04-01/06-3129-Anx ("Order for Reparations").

⁷ "Order pursuant to rule 103 of the Rules of Procedure and Evidence", ICC-01/04-01/06-3217-tENG.

⁸ *Ibid.*, para. 6.

⁹ TFV "Request for Leave to Appeal" dated 15 February 2016 against the Order of 9 February 2016 (ICC-01/04-01/06-3200) and the TFV's request for reconsideration of that Order filed on 31 May 2016 (ICC-01/04-01/06-3237).

over how to interpret the general framework within which the collective reparations programme is to be organized. The Legal Representatives respectfully submit that the Appeals Chamber handed down a definitive ruling on this framework in its Judgment of 3 March 2015¹⁰ and the amended Order for Reparations annexed thereto.¹¹

8. The Appeals Chamber mandated the Trial Chamber hearing these proceedings to

monitor and oversee the implementation stage of the present order, including having the authority to approve the draft implementation plan submitted by the Trust Fund. The Chamber may be seized of any contested issues arising out of the work and the decisions of the Trust Fund.¹²

In its Judgment, the Appeals Chamber noted that “the duties assigned to the newly constituted Trial Chamber, namely the approval of the draft implementation plan and the hearing of any contested issues, are limited”.¹³

9. In the Order for Reparations, the Trust Fund for Victims was assigned responsibility for the implementation of collective reparations and directed to prepare a draft reparations plan specifying the anticipated monetary amount necessary to remedy the harm, “based on information gathered during the consultation period leading up to the submission of the draft implementation plan”.¹⁴ **When its plan has been approved**, the TFV must contact the victims to request their consent to participate in the programme.¹⁵ Victim participation must therefore be entirely voluntary, but beneficiaries must be given the

¹⁰ ICC-01/04-01/06-3129 (“Appeals Chamber Judgment” or “Judgment of 3 March 2015”).

¹¹ ICC-01/04-01/06-3129-AnxA (“Order for Reparations”).

¹² Order for Reparations, para. 76.

¹³ Judgment of 3 March 2015, para. 234.

¹⁴ Order for Reparations, para. 78.

¹⁵ *Ibid.*, para. 76.

opportunity to participate in the process in a way that is “substantive and effective”.¹⁶

10. The TFV believes that the Order of 9 February 2016 erroneously ties the extent of the convicted person’s liability to an inventory and a monetary assessment of the harm suffered by each individual victim, while the Order for Reparations ties it to the overall harm caused in certain localities and communities and to the role of the convicted person in the commission of the crimes, which implies a reasonable but lump-sum determination of the liability amount.¹⁷
11. Disagreement also exists over how to interpret the Appeals Chamber’s instructions to the TFV to provide Mr Lubanga with the opportunity to review **the screening process** – and to do so specifically **at the implementation stage**, i.e. after the extent of his liability has been determined. The Chamber’s rulings would imply that individual files are to be prepared and transmitted to the Defence before the plan is even approved.¹⁸ The Registry, the OPCV and all of the Legal Representatives share the TFV’s position on this point.
12. With regard to the Order of 9 February 2016, the Legal Representatives generally share the observations submitted by the Trust Fund for Victims in its Request for Leave to Appeal¹⁹ and its request for reconsideration of 31 May.²⁰ They regret, however, that the current disagreement between the TFV (responsible for implementing the reparations programme) and the Chamber (responsible for monitoring the programme) – coupled with the suspension of certain TFV activities pending a ruling on its request for reconsideration – should cause such confusion for the victims and test what little confidence they

¹⁶ *Ibid.*, para. 29.

¹⁷ *Ibid.*, paras. 21, 56 and 60.

¹⁸ *Ibid.*, para. 66.

¹⁹ “Request for Leave to Appeal against the ‘Ordonnance enjoignant au Fonds au profit des victimes de compléter le projet de plan de mise en œuvre’ (9 February 2016)”, ICC-01/04-01/06-3200.

²⁰ “Observations on the ‘Requête afin de solliciter des lignes directrices de la Chambre suite à l’Ordonnance émise le 15 juillet 2016’”, ICC-01/04-01/06-3237; ICC-01/04-01/06-3208.

still have left in the Court's operations. The Legal Representatives fear that the OPCV Request, which both the Registry and the TFV have criticized, risks adding further to that confusion.

IV. RESPECTIVE ROLES OF THE REGISTRY, THE TFV, THE LEGAL REPRESENTATIVES AND THE OPCV IN THE REPARATIONS PROCESS

13. The Legal Representatives recall that, in its Order of 5 April 2012, the Trial Chamber considered that the OPCV's expertise was useful in order to safeguard the rights of the potential beneficiaries of an award for collective reparations, and authorized the OPCV to:

- a. act as the legal representative of unrepresented applicants for reparations until their status is determined or until the Registrar arranges a legal representative to act on their behalf; and
- b. represent the interests of victims who have not submitted applications but who may benefit from an award for collective reparations, pursuant to Rules 97 and 98 of the Rules.²¹

14. The three victims originally represented by the OPCV are no longer participating in the proceedings, pursuant to the Judgment of 14 March 2012,²² and the Appeals Chamber has upheld the Trial Chamber's decision of 3 March 2015 not to base the collective reparations process on individual applications for reparations. The OPCV thus no longer appears to be representing individual victims who have applied for reparations and are waiting for the Registry to designate a legal representative. Rather it appears to be acting pursuant to its mandate to represent the interests of victims who may be eligible to benefit from collective reparations in the future ("potential beneficiaries"). This status should not be conflated with that of the Legal Representatives of victims authorized to participate in the proceedings. Some

²¹ "Decision on the OPCV's request to participate in the reparations proceedings", ICC-01/04-01/06-2858, para. 12.

²² "Judgment pursuant to Article 74 of the Statute", ICC-01/04-01/06-2842.

confusion may therefore arise when the term “legal representative” is used to denote the Principal Counsel of the OPCV.

15. As Trial Chamber I previously indicated in its original order for reparations, the Registry will be responsible for arranging legal representation for any victims who express a wish to be assisted by counsel during the implementation phase of the reparations programme. The Legal Representatives submit that the Registry could offer such victims the choice of being represented by one of the teams already on the case or by the OPCV. The Legal Representatives are already in receipt of an unsolicited request for representation, received during the course of a recent mission, from two victims close to those they currently represent.
16. Moreover, although the OPCV’s mandate is to look after the interests of any victims who have not expressed a wish to benefit from the future reparations programme, no one may impose a legal representative on persons who have neither asked to participate in the proceedings nor requested counsel.

V. CONCLUSION

17. The Legal Representatives submit that the OPCV Request is unfounded but contains some worthwhile parts that should be addressed in these proceedings.
18. The Legal Representatives recall that this case provides the first-ever experience of implementing a collective reparations programme. They stress both the historical weight of this process and the responsibility that falls to every entity and party involved. They request that, once the three days of hearings are up, the TFV’s proposed programme and the respective roles of each participating entity and party be reviewed in the light of the Order for Reparations. They

request that the TFV's draft plan be amended as needed on the basis of the observations which the parties filed before the Orders of 15 July 2016, and on the basis of the participants' observations and the upcoming arguments. Lastly, they request that the Chamber give precise instructions on how to move the process forward.

FOR THESE REASONS,

MAY IT PLEASE THE TRIAL CHAMBER TO:

Take formal note of the Legal Representatives' observations.

On behalf of Victim Group V01,

[signed]

Luc Walley, Legal Representative

Dated this 6 October 2016

At Brussels, Belgium