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

Date: **6 October 2016**

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

**Observations of the Defence for Mr Thomas Lubanga on the
“Request for guidance from the Chamber further to the Order of 15 July 2016”
filed by the Office of Public Counsel for Victims on 16 September 2016**

Source: Defence team for Mr Thomas Lubanga

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

Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

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 Paul Kabongo Tshibangu

Mr Joseph Keta Orwinyo

Office of Public Counsel for Victims

Ms Paolina Massidda

REGISTRY

Registrar

Mr Herman von Hebel

Trust Fund for Victims

Mr Pieter de Baan

1. On 16 September 2016, the Office of Public Counsel for Victims (“OPCV”) filed a Request¹ for guidance from Trial Chamber II (“Chamber”) further to the Order of 15 July 2016.²
2. On 20 September 2016, the Chamber issued an Order setting time limits for observations on the OPCV Request.³
3. On 23 September 2016, the Chamber issued its “Decision granting an extension of time limit to submit observations on the request of the Office of Public Counsel for Victims of 16 September 2016”.⁴
4. On 3 October 2016, the Registry and the Trust Fund for Victims, respectively, submitted the “Registry’s observations on the ‘*Requête afin de solliciter des lignes directrices de la Chambre suite à l’Ordonnance émise le 15 juillet 2016*’ dated 16 September 2016”,⁵ and “Observations on the ‘*Requête afin de solliciter des lignes directrices de la Chambre suite à l’Ordonnance émise le 15 juillet 2016*’”.⁶
5. The Defence for Mr Lubanga submits these observations in response to the Request of 16 September 2016 and the observations of 3 October 2016.

THE ADVERSARIAL NATURE OF THE REPARATIONS PROCEEDINGS

6. The OPCV contends that “the fact that the Judges alone are privy to the identities of the victims potentially eligible to reparations is sufficient guarantee within the context of collective reparations proceedings”.⁷ The Registry and the Trust Fund for Victims endorse the OPCV’s position and maintain that reparation requests need not be transmitted to the Defence team.⁸
7. This position plainly runs counter to the most basic principles of a fair trial. Under no circumstances can the Judges’ “competence” (which is not at issue) obviate the need

¹ ICC-01/04-01/06-3222-tENG.

² ICC-01/04-01/06-3217-tENG.

³ ICC-01/04-01/06-3224-tENG.

⁴ ICC-01/04-01/06-3228-tENG.

⁵ ICC-01/04-01/06-3238.

⁶ ICC-01/04-01/06-3237.

⁷ ICC-01/04-01/06-3222-tENG, para. 25.

⁸ ICC-01/04-01/06-3237, para. 8; ICC-01/04-01/06-3238, para. 16.

for adversarial proceedings on the materials they are given to consider – the only “guarantee”, and a *sine qua non*, of a fair trial. In the instant case, adversarial proceedings pre-suppose the disclosure to the Defence of all materials submitted to the Judges for consideration, especially key information, i.e. the victims’ identities, the harm done to them, and their explanations as to the causal link between that harm and the crimes of which Mr Lubanga was convicted.

8. Hence the Chamber’s ruling that the victims’ identities and a description of their factual allegations were to be transmitted to the Defence⁹ for observations.
9. The Defence for Mr Lubanga refers to its previous submissions on this issue¹⁰ and recalls the importance of upholding its rights during this stage of the proceedings.¹¹
10. Adversarial proceedings have proven all the more vital in the case since, each time the Defence was put in a position to duly challenge the merits of a participant’s standing of victim, adversarial proceedings led to the conclusion that the standing of victim had been wrongfully obtained.¹² Only thanks to those adversarial proceedings were the Judges – who had previously granted the victims permission to participate in the proceedings on the basis of a non-adversarial *prima facie* evaluation – able to evaluate the reliability or, in this case, unreliability of the statements of the applicants for victim status.

TERMS OF INTERACTION WITH POTENTIALLY ELIGIBLE VICTIMS

11. The Defence has examined the information and practical suggestions submitted by the OPCV, as well as the observations of the Registry and the Trust Fund for Victims.
12. The Defence defers to the Chamber’s judgement regarding the terms of interaction with potentially eligible victims, as long as those terms guarantee the rights of the Defence and the principle of adversarial proceedings.

⁹ ICC-01/04-01/06-3198-tENG, para. 17.

¹⁰ ICC-01/04-01/06-3211-Corr; ICC-01/04-01/06-3196-Conf.

¹¹ Taken together, article 75(3) and rule 94(2) entitle the convicted person to be apprised of reparation requests and to make observations on them.

¹² Judgment, ICC-01/04-01/06-2842, paras. 482-484 and 502.

13. Their observations show that it is essential to identify the “potential beneficiaries”¹³ individually before undertaking any reparation measures.
14. It follows all the more that any materials transmitted to the Chamber in connection with the identification process must necessarily be disclosed to the Defence so that they may be the subject of adversarial proceedings.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER II TO:

CONSIDER these observations.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 6 October 2016

At The Hague

¹³ See, for example, ICC-01/04-01/06-3222-tENG.