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

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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

Defence Response to the “*Réplique aux Observations déposées par la Défense de M. Lubanga à la huitième transmission des formulaires des potentiels bénéficiaires en réparation*” of 16 August 2017

Source: Defence team for Mr Thomas Lubanga

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

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**Victims Participation and Reparations
Section**

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BACKGROUND

1. On 11 July 2017, the Defence for Mr Lubanga filed its observations on the eighth transmission of dossiers of victims potentially eligible for reparations ("Eighth Observations").¹
2. On 17 July 2017, the Office of Public Counsel for Victims ("OPCV") requested leave to file a reply to the Eighth Observations of the Defence.²
3. In an Order of 20 July 2017,³ Trial Chamber II ("Chamber") authorized the OPCV to reply to the following points:
 - The doubt cast on the credibility of certain potentially eligible victims on the sole basis of discrepancies discerned between the dates of birth stated on the forms and on the identity documents;
 - The objection taken to information included in some dossiers on the ground that it is irrelevant as it does not fall strictly within the ambit of the charges.
4. On 16 August 2017, the OPCV filed its *"Réplique aux Observations déposées par la Défense de M. Lubanga à la huitième transmission des formulaires des potentiels bénéficiaires en réparation"* ("Reply").⁴
5. The Defence for Mr Lubanga hereby submits these observations in response to the OPCV's Reply.

¹ "Observations de la Défense de M. Lubanga à la huitième transmission des formulaires de réparation expurgés du 15 juin 2017", 11 July 2017, ICC-01/04-01/06-3336.

² "Demande d'autorisation de déposer une réplique aux Observations de la Défense de M. Lubanga à la huitième transmission des formulaires de réparation expurgés", 17 July 2017, ICC-01/04-01/06-3340.

³ "Decision on the Application of the Office of Public Counsel for Victims seeking leave to reply to the Observations of the Defence for Thomas Lubanga Dyilo of 11 July 2017", 20 July 2017, ICC-01/04-01/06-3343-tENG.

⁴ ICC-01/04-01/06-3349.

ARGUMENT

6. The Defence notes that in the various filings it has submitted in these proceedings⁵ the OPCV has systematically challenged the place of the Defence in the reparations phase.
7. As the Defence has previously had occasion to recall, Mr Lubanga must be afforded the opportunity to exercise his rights effectively at every stage of the reparations phase.⁶
8. In accordance with the principles laid down by the Appeals Chamber, Mr Lubanga's financial liability shall be determined according to his participation in the commission of the crimes of which he was found guilty and shall also be proportionate to the harm caused to the victims.⁷
9. It is therefore essential that, with regard to the constituent elements of the crime, the Defence be able to submit observations on the dossiers for participation in reparations submitted by the potentially eligible victims, specifically: if the applicant is a direct victim, whether there is proof that he/she was enlisted in the UPC/FPLC during the time frame of the charges when he/she was under the age of 15 years and whether the alleged harm is the consequence of that; if the applicant is an indirect victim, whether he/she has established that he/she has a close family relationship with a direct victim and is claiming personal harm as a result of the enlistment.
10. Accordingly, the Chamber instructed the Registry to disclose all of the dossiers for reparations to the Defence team and sought the Defence's

⁵ See, in particular: ICC-01/04-01/06-3349; ICC-01/04-01/06-3316; ICC-01/04-01/06-3325; ICC-01/04-01/06-3333; ICC-01/04-01/06-3212-tENG.

⁶ "Observations de la Défense de M. Thomas Lubanga relatives au 'Filing on Reparations and Draft Implementation Plan', daté du 3 novembre 2015", 1 February 2016, ICC-01/04-01/06-3196-Conf, para. 6.

⁷ "Order for Reparations", 3 March 2015, ICC-01/04-01/06-3129-AnxA, para. 21.

observations in order to have essential information for assessing the credibility of the statements of the potentially eligible victims.⁸

11. Similarly, the Chamber authorized the OPCV to submit Replies to the Defence Observations.⁹
12. As the Defence has previously had occasion to explain,¹⁰ the purpose of its observations is not to establish that the applications are illegitimate or that the accounts given are inaccurate or mendacious: to do so would require in-depth investigations, which the Defence is not in a position to conduct because of redactions to the information disclosed.
13. Owing to the fragmented nature of the information the Defence has received, its observations are intended merely to enlighten the Chamber as to the relevance and reliability of the information it has been presented with, to enable it to rule on the collective reparations to which the victims of the crimes of which Mr Lubanga was convicted are entitled.
14. Similarly, the Defence reiterates that it is not seeking to deny that children under the age of 15 years were enlisted in the UPC/FPLC during the time frame of the charges.¹¹
15. To challenge the fact that children were enlisted in the UPC/FPLC would be tantamount to challenging the findings of Trial Chamber I, which is certainly not the position of the Defence.

⁸ "Order instructing the Trust Fund for Victims to supplement the draft implementation plan", 9 February 2016, ICC-01/04-01/06-3198-tENG, para. 14.

⁹ "Decision on the Application of the Office of Public Counsel for Victims seeking leave to reply to the Observations of the Defence for Thomas Lubanga Dyilo of 11 July 2017", 20 July 2017, ICC-01/04-01/06-3343-tENG; "Decision on the Applications of the Office of Public Counsel for Victims and the Legal Representatives of the V02 Group of Victims for Leave to Reply to the Observations of the Defence Team of Thomas Lubanga Dyilo of 22, 30 and 31 May 2017", 16 June 2017, ICC-01/04-01/06-3331-tENG.

¹⁰ "Réponse de la Défense de M. Lubanga à la 'Réplique de l'équipe V02 aux observations de la Défense de Monsieur Lubanga (ICC-01/04-01/06-3319 + Anxs)' et à la 'Réplique aux Observations déposées par la Défense de M. Lubanga aux 4ème, 5ème et 6ème transmissions des formulaires des potentiels bénéficiaires' déposées le 22 juin 2017", 28 June 2017, ICC-01/04-01/06-3334, para. 32.

¹¹ ICC-01/04-01/06-3196-Conf, para. 5.

16. The Defence is obliged to note, however, that, as they stand, the dossiers transmitted to it do not enable it to ascertain whether the accounts they contain are credible and consequently whether enlistment and the ensuing harm took place.
17. Regarding the first point of the Reply, the Defence cannot but highlight the discrepancies within a series of dates of birth stated by applicants for victim status and with any documents, where included.
18. Moreover, regarding Victims a/30212/17¹² and a/30237/17,¹³ the observations submitted by the Defence are not limited to the above-mentioned discrepancies in the dates of birth but also concern the consistency of the accounts and the proof of the alleged harm.
19. Regarding the second point of the Reply, Mr Lubanga's liability must be limited to the victims of the crimes of which he was found guilty and to the harm ensuing from those crimes.
20. Accordingly, the funding the education of the direct victims' children cannot be included in the assessment of the harm suffered, since the responsibility to educate one's children does not constitute harm caused by the crimes committed.
21. Concerning the harm allegedly resulting from a family member's assuming moral and financial responsibility for the children of a direct victim as a result of the latter's inability to discharge his or her parental duties, it necessarily turns on proof that such inability ensued from the alleged enlistment.

¹² ICC-01/04-01/06-3336-Conf-Anx1, paras. 284-289.

¹³ ICC-01/04-01/06-3336-Conf-Anx1, paras. 294-300.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER II:

TO TAKE FORMAL NOTE of this response.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 18 August 2017

At The Hague, Netherlands