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Date: **29 May 2017**

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

Response by the Defence for Mr Lubanga to “*Informations relatives aux enjeux ainsi qu’aux préoccupations et souhaits des bénéficiaires potentiels dans la procédure en réparations*” filed on 13 April 2017 by the Office of Public Counsel for Victims

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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CONTEXT

1. On 13 April 2017, the Office of Public Counsel for Victims (“OPCV”) filed a document entitled “Information regarding the Issues as well as the Concerns and Wishes of the Potentially Eligible Victims in the Reparations Proceedings”¹ (“OPCV Transmission”).
2. On 26 April 2017, the Defence for Mr Lubanga filed a document entitled “Réponse de l’équipe de Défense de M. Lubanga aux ‘Informations relatives aux enjeux ainsi qu’aux préoccupations et souhaits des bénéficiaires potentiels dans la procédure en réparations’ déposées par le Bureau du conseil public pour les victimes”.²
3. The Defence moved Trial Chamber II (“Chamber”) to declare the OPCV Transmission inadmissible or, in the alternative, to allow the Defence additional time to respond to it.
4. In a Decision of 19 May 2017,³ the Chamber declared the OPCV Transmission admissible and instructed the parties to file their responses by 29 May 2017.
5. The Defence is filing these observations in response to the OPCV Transmission of 13 April 2017.

GENERAL OBSERVATIONS

1. APPLICANTS’ PROOF OF IDENTITY AND CIVIL STATUS

¹ “Information regarding the Issues as well as the Concerns and Wishes of the Potentially Eligible Victims in the Reparations Proceedings”, 13 April 2017, ICC-01/04-01/06-3293-Conf-tENG. A corrigendum and an explanatory note were filed on 25 April 2017 (ICC-01/04-01/06-3293-Conf-Corr and ICC-01/0401/06-3293-Conf-Corr-Anx). A public redacted version was filed on the same day (ICC-01/0401/06-3293-Red-tENG).

² ICC-01/04-01/06-3300.

³ “Decision on the Admissibility of Documents filed by the Parties on 13 and 21 April 2017 and 5 May 2017”, 19 May 2017, ICC-01/04-01/06-3314-tENG.

6. The OPCV refers to the uncertainties that might affect the information indicated on “voting cards” and on “IPM (*impôt personnel minimum* [minimum personal income tax]) cards” presented by applicants as proof of identity and, in particular, of their date of birth.⁴
7. In the case at bar, however, each applicant’s right to reparations, whether as a direct or indirect victim, presupposes first and foremost that proof has been provided of the enlistment of children under the age of 15 years into the ranks of the armed forces of the UPC between September 2002 and August 2003.
8. Concerning direct victims, proof must be provided that they were enlisted under the age of 15 years. This presupposes that their date of birth has been established with certainty.
9. Concerning indirect victims, relatives in this case, proof of kinship must be provided.
10. Under Congolese law, “[TRANSLATION] unless otherwise provided by law, the civil status of citizens shall only be established and may only be proved by civil status documents”.⁵ The law institutes a central registry which is located at the administrative headquarters of the *commune*, *secteur* or *chefferie*.⁶ Anyone can request and be issued copies of civil status documents concerning them.⁷
11. However, none of the applications for reparations forwarded include civil status documents establishing the applicant’s date of birth or relation to a child who was enlisted under the age of 15 years. The voting cards and IPM cards

⁴ OPCV Transmission, paras. 13-15.

⁵ Annex I, “*Les Codes Larcier, République Démocratique du Congo, Droit civil et judiciaire* [The Larcier Codes, Democratic Republic of the Congo, Civil and Procedural Law]”, article 72, p. 9.

⁶ Annex II, *Loi modifiant et complétant la loi n° 87-010 du 1^{er} août 1987 portant code de la famille* [Law Amending and Supplementing Law No. 87-010 of 1 August 1987 on the Family Code], 15 July 2016, article 73, pp. 3-4.

⁷ Annex II, “*Loi modifiant et complétant la loi n° 87-010 du 1^{er} août 1987 portant code de la famille*”, article 99, p. 7.

included in the applications are not suitable for establishing the civil status of their holders.

12. None of the applications submitted show that measures had been taken to obtain civil status documents from the competent authorities, such documents being the only ones suitable for establishing with certainty the date of birth of the person concerned or his or her kinship with an enlisted child. Moreover, no reference is made to any particular difficulty in obtaining the documents, which alone would have justified recourse to other means of proof.

13. The Legal Representatives responsible for the defence of the applicants should have taken the necessary steps with the relevant authorities to obtain the requisite civil status documents, and should not have relied solely on the information provided by the applicants.

14. It is odd that, more than 10 years after the commencement of proceedings, such steps have yet to be taken.

15. This omission now deprives the Court of key material for determining the eligibility of applicants for reparations.

2. PROOF OF ENLISTMENT IN THE UPC ARMED FORCES DURING THE PERIOD COVERED IN THE CHARGES

16. The OPCV refers to the difficulty of collecting demobilization documents that were allegedly given to the enlisted children; the difficulty these children face in recalling the location of their enlistment or salient events which occurred during their enlistment; and, more generally, the difficulty of gathering the evidence needed to show that they qualify for reparations.⁸

⁸ OPCV Transmission, ICC-01/04-01/06-3293-Conf-Corr, paras. 17, 21 to 27.

17. It should be recalled that the Appeals Chamber has set a standard of proof that requires the submission of relevant and reliable evidence, since the determination of whether someone is eligible for reparations cannot depend solely on the applicant's own summary and incomplete statements.

18. The applications submitted thus far call for the following general observations:

19. Firstly, with a few exceptions, accounts of the events given by applicants in their application for reparations, far from being precise and detailed, are extremely summary. The Legal Representatives who assisted the applicants have not considered it necessary to elicit from them, in a form that ensured their reliability, detailed statements describing, to the best of the applicants' recollection, the circumstances surrounding their initial enlistment; the time and location of their military training; their assignment; the details of events up to their demobilization; and the details of their demobilization.

20. Some of the inconsistencies in the accounts may be explained by the length of time that has elapsed since 2002-2003, but contrary to the OPCV's submission,⁹ the trauma inherent in being a child soldier does not explain the gaps and inconsistencies noted in numerous accounts given in support of applications for reparations.¹⁰

21. Secondly, as suggested by the OPCV, in some cases the alleged enlistments could have been corroborated by evidence of demobilization. In particular, further investigations could have been conducted at Transit and Orientation Centres (CTOs) to collect archived documents which in some cases might have corroborated the applicant's account. Although the documents from the CTOs are

⁹ OPCV Transmission, ICC-01/04-01/06-3293-Conf-Corr, para. 22.

¹⁰ T-166-Conf-FRA, pp. 17 to 20.

not sufficiently reliable to constitute evidence, they could nevertheless have served as a useful indicator for determining whether a child had in fact been enlisted.

22. Yet no investigation was carried out at those centres with the aim of compiling documents for applications for reparations. The only documents provided in relation to demobilization are demobilization certificates which do not mention the armed group concerned and, as a result, are lacking in probative value. Once again, the Legal Representatives responsible for compiling documents for applying for reparations were content with the very few documents submitted by the applicants themselves and did not carry out any further investigation.

23. Thirdly, the alleged enlistments could have been corroborated in some cases by precise and detailed testimonies collected through statements made in a manner that guarantees their reliability. The enlistment of a child into an armed group is, by nature, an act that attracts the attention of numerous witnesses including school staff, relatives, inhabitants of the village, soldiers in the same unit, people and organizations involved in demobilization.

24. Yet, the vast majority of applications for reparations submitted thus far do not include any testimony corroborating the applicants statements, even when the applicant stated that he or she could provide it.

25. In that connection, the OPCV's assertion that, "[TRANSLATION] (...) to the extent possible, the Legal Representative's team endeavoured to seek witnesses' corroboration of the information contained in the application whenever they were present or reachable,"¹¹ is manifestly untrue.

¹¹ OPCV Transmission, ICC-01/04-01/06-3293-Conf-Corr, para. 23.

26. It is reasonable to assume that this unjustifiable flaw in the gathering of evidence deprives some of the applicants of the chance to make effective use of their right to be awarded reparations as victims.

27. The OPCV's assertion that "[TRANSLATION] the Legal Representative's team exercised the utmost caution in compiling the application documents with the potential beneficiaries with the aim of *seeking* to verify and corroborate, to the extent possible, the background of these former child soldiers in the UPC/FPLC in the absence of tangible 'evidence'", unfortunately appears to be unfounded.

3. EVIDENCE OF ALLEGED HARM

28. The OPCV reported "[TRANSLATION] physical injuries and/or diseases contracted and developed" during or as a result of enlistment.¹²

29. There is no question that, given the situation that prevailed in Ituri in 2002-2003, the enlistment of children under the age of 15 years into an armed group exposed them to harm, the harm inherent in being a child soldier.

30. That said, allegations of particular types of harm, such as wounds or physiological or psychological disorders, nevertheless require that evidence be provided in order to confirm their presence and to determine how they came about.

31. The applicant's claims alone are, of course, insufficient to serve as such evidence. In particular, physiological (diseases, pain) or psychological disorders can only be corroborated through a medical diagnosis that is recorded in a formal certificate in which the physician gives an opinion on the cause of the disorders and whether they are consistent with the applicant's account.

¹² OPCV Information, ICC-01/04-01/06-3293-Conf-Corr, para. 28

32. Photographs of scars of the alleged wounds are also insufficient since, in the absence of a medical opinion on whether the scars are consistent with the wound initially claimed in the applicant's account, it is not possible to determine whether they are linked to the applicant's activities as a child soldier.

33. The submission of medical certificates, commonly referred to as "[TRANSLATION] Certificates of Compatibility", is common practice before domestic courts, in particular those called upon to give rulings on claims of persecution in the context of applications for asylum.

34. The submission of medical opinions on the cause of the wounds or disorders is all the more important as such opinions can also help the Court understand what the enlistment was like.

35. In the instant case, the applicants' allegations concerning wounds sustained or diseases contracted, whether or not accompanied by photographs, are not backed by any medical reports establishing a sufficiently probable causal link between the wounds and diseases, and the alleged enlistments.

36. It is unfortunate that applicants for reparations were not properly assisted so that they could meet this requirement for evidence.

37. This situation is all the more unfortunate as it has emerged in the proceedings that, although a number of persons stated that they had been child soldiers, the evidence adduced by the Defence has established that their statements were neither credible nor reliable, Trial Chamber I having ruled that, " given their youth and likely exposure to conflict, they were vulnerable to manipulation".¹³

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

¹³ "Judgment pursuant to Article 74 of the Statute", ICC-01/04-01/06-2842, 31 August 2012, para. 482.

ADJUDICATE in favour of the Defence's previous submissions.

[signed]

Ms Catherine Mabilie, Principal Counsel

Dated this 29 May 2017

At The Hague