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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

Request for guidance from the Chamber further to the Order of 15 July 2016

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL BACKGROUND

1. On 3 March 2015, the Appeals Chamber delivered its judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations”, and the “Order for Reparations (amended)”, directing the Trust Fund for Victims (“the TFV”) to submit its draft implementation plan on reparations (“the Draft”) within six months.¹

2. On 3 November 2015, the TFV submitted the Draft.²

3. On 9 February 2016, the Chamber issued its “Order instructing the Trust Fund for Victims to supplement the draft implementation plan” (“the Order of 9 February”)³ instructing the TFV to prepare files of victims potentially eligible to benefit from reparations, to submit those files to the Chamber by the dates indicated⁴ and to develop the details of the programmes and transmit them to the Chamber by 7 May 2016.

4. On 15 February 2016, the TFV submitted a request for leave to appeal against the Order of 9 February,⁵ which was dismissed *in limine* by the Chamber on 4 March 2016.⁶

¹ “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2” (Appeals Chamber), ICC-01/04-01/06-3129 A A2 A3, 3 March 2015.

² “Filing on Reparations and Draft Implementation Plan”, ICC-01/04-01/06-3177-Conf and ICC-01/04-01/06-3177-AnxA, 3 November 2015.

³ “Order instructing the Trust Fund for Victims to supplement the draft implementation plan”, ICC-01/04-01/06-3198-tENG, 9 February 2016 (“the Order of 9 February”).

⁴ *Ibid.*, paras. 17 and 18.

⁵ “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, 15 February 2016.

⁶ “Decision on the request of the Trust Fund for Victims for leave to appeal against the order of 9 February 2016” (Trial Chamber II), ICC-01/04-01/06-3202-tENG, 4 March 2016.

5. On 23 March 2016, the TFV submitted a request for an extension of time to submit the first victim files,⁷ which the Chamber granted on 29 March 2016, extending the time limit to 31 May 2016.⁸

6. On 3 May 2016, the TFV submitted a further request for an extension of time to submit additional information on the proposed reparations programmes,⁹ which the Chamber again granted on 4 May, extending the time limit to 7 June 2016.¹⁰

7. On 31 May and 7 June 2016, the TFV submitted the first victim files and additional information on the proposed programmes.¹¹

8. On 10 June 2016, Principal Counsel of the Office of Public Counsel for Victims (“the OPCV”), acting as legal representative of the potential beneficiaries (“the Legal Representative”),¹² sent an e-mail requesting authorisation from the Chamber to make a consolidated response to the TFV’s submissions.¹³ On 14 June 2016, the Chamber granted that request, instructing the legal representatives of all victims, and the Defence, to submit their observations on the TFV’s submissions by 1 July 2016.¹⁴

⁷ “Request for extension of time to submit the first transmission of potential victim dossiers”, ICC-01/04-01/06-3204, 23 March 2016.

⁸ “Decision on the request of the Trust Fund for Victims for an extension of the time limit for the submission of the first batch of files of potential victims” (Trial Chamber II), ICC-01/04-01/06-3205-tENG, 30 March 2016.

⁹ “Request for extension of time to submit additional reparation programme information.”, ICC-01/04-01/06-3206, 3 May 2016.

¹⁰ “Decision extending the time limit for the submission of additional reparation programme information” (Trial Chamber II), ICC-01/04-01/06-3207-tENG, 4 May 2016.

¹¹ “First submission of victim dossiers”, ICC-01/04-01/06-3208 and Conf-Exp-Anx1 to 12, 31 May 2016, and “Additional Programme Information Filing”, ICC-01/04-01/06-3209, 7 June 2016.

¹² “Decision on the OPCV’s request to participate in the reparations proceedings” (Trial Chamber I), ICC-01/04-01/06-2858, 5 April 2012.

¹³ E-mail sent by Principal Counsel of the OPCV to Trial Chamber II’s Legal Officer on 10 June 2016 at 12.42.

¹⁴ “Order setting the time limit for observations on the latest documents filed by the Trust Fund for Victims” (Trial Chamber II), ICC-01/04-01/06-3210-tENG, 14 June 2016.

9. On 1 July 2016, the Legal Representative submitted a consolidated response to the TFV's submissions of 31 May and 7 June 2016.¹⁵ She offered practical suggestions to facilitate the effective implementation of the Order of 9 February, as may be amended by the Chamber.

10. On 15 July 2016, the Chamber issued its "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"¹⁶ ("the Order of 15 July"). It did not give a ruling on the TFV's request for reconsideration or on the practical suggestions put forward by the Legal Representative.

II. REQUEST FOR GUIDANCE FROM THE CHAMBER

11. The Legal Representative wishes to inform the Chamber of the developments that have occurred since her latest submissions in the instant case and to seek guidance on the arrangements for identifying potential beneficiaries and on the proper conduct of the reparations proceedings in the instant case. Having noted that the reparations proceedings appear to be at a standstill, the Legal Representative is of the view that such guidance may help to make a difference in the situation faced by the parties to the proceedings.

12. On 1 July 2016, the Legal Representative stated in her submissions that "[TRANSLATION] the resources allocated to the OPCV [were] not currently sufficient to enable it to fulfil its mandate as legal representative of the potential beneficiaries".¹⁷

¹⁵ "Réponse consolidée aux soumissions déposées le 31 mai et le 7 juin 2016 par le Fonds au profit des victimes", ICC-01/04-01/06-3212, 1 July 2016.

¹⁶ "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" (Trial Chamber II), ICC-01/04-01/06-3218-tENG, 15 July 2016 ("the Order of 15 July").

¹⁷ "Réponse consolidée aux soumissions déposées le 31 mai et le 7 juin 2016 par le Fonds au profit des victimes", footnote 15 above, para. 47.

She also indicated that access to the contingency fund could be expected in September 2016, which would resolve the problem.¹⁸ In that regard, the Legal Representative informs the Chamber that the OPCV has now obtained access to the contingency fund and possesses the resources to fulfil its mandate.

13. Furthermore, in keeping with her suggestion,¹⁹ the Legal Representative has identified field counsel who is now joining the OPCV team in accordance with the model that has already proven effective in other cases pending before the Court. Said counsel's appointment took effect on 15 September 2016; certain administrative formalities are being finalised. The designee will travel to The Hague in early October to discuss the work plan with the Legal Representative and to gain familiarity with the proceedings and the working method of the team. The designee will also be able to attend the scheduled hearing and will be fully operational in the field as of 15 October 2016.

14. According to the information available to the Legal Representative, the Registry is actively preparing for outreach missions and the presence of the aforementioned field counsel will be crucial to the proper conduct of these missions. In contrast with the files already transmitted to the Chamber or the situation prevailing in the *Katanga* case, the potential beneficiaries – by definition – have never had any contact with a lawyer, let alone any detailed knowledge of the proceedings before the Court. The field counsel's presence during the outreach missions organised by the Registry is therefore paramount. If the field counsel is present for these missions and can address legal questions early on – and prepare any prospective applicants for their future individual interviews – this could significantly accelerate the subsequent form collection effort.

¹⁸ *Idem.*

¹⁹ *Ibid.*, para. 43.

15. In sum, the OPCV is now prepared to make a tangible and active contribution to this process, in consultation with the Registry. However, without clear instructions from the Chamber, the OPCV is unable to contribute effectively. Accordingly, the Legal Representative respectfully submits this Request to the Chamber, seeking guidance to clarify her role within the terms of the Orders of 9 February 2016²⁰ and 15 July 2016.²¹ The Legal Representative also submits that, although the hearing is scheduled for 11, 13 and 14 October 2016,²² prompt clarification of the arrangements for identifying potential beneficiaries and of proper conduct of the reparations proceedings in the instant case is crucial both in view of the growing expectations of the affected communities on the ground and in order for her to be able to discharge her mandate.

16. In recent e-mail exchanges, the TFV confirmed the suspension of missions to identify potential beneficiaries and compile application forms for reparations, pursuant to a decision by its Board of Directors. The Legal Representative believes that this decision is contrary to the interests of the potential beneficiaries whom she represents,²³ after more than 9 years of proceedings and the 14 years that have elapsed since perpetration of the crimes which caused the victims harm.

17. In this respect, the Legal Representative recalls that:

[TRANSLATION] the significant number of interviewees whom the victims who participated in the TFV's first missions were required to meet is not conducive to the victims' well-being. In addition to the elevated risk of confusing victims and inflating their expectations, the Legal Representative also stresses the risk of re-traumatising them over the course of various successive interviews during which they are obliged to reiterate their story, and the aftermath of the crimes they suffered in 2002-2003, to different interviewees.²⁴

²⁰ "Order instructing the Trust Fund for Victims to supplement the draft implementation plan", footnote 3 above.

²¹ "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", footnote 16 above.

²² "Order pursuant to rule 103 of the Rules of Procedure and Evidence", ICC-01/04-01/06-3217-tENG, 15 July 2016.

²³ "Réponse consolidée aux soumissions déposées le 31 mai et le 7 juin 2016 par le Fonds au profit des victimes", footnote 15 above.

²⁴ *Ibid.*, para. 45.

18. This is why the Legal Representative proposed in her previous submissions to conduct the interviews with the potential beneficiaries herself “[TRANSLATION] in consultation, where applicable, with the Registry (in particular VPRS and the Victims and Witnesses Unit) and with the support of the language services of the Registry, where needed”.²⁵

19. The Legal Representative believes that this issue requires a ruling by the Chamber. After all, the decision of the TFV Board of Directors to refrain from conducting further field missions – which is tantamount to a *de facto* stay of a judicial decision without prior authorisation²⁶ – significantly affects the rights of potential beneficiaries.

20. Field missions conducted by the Legal Representative would provide a way out of this impasse and drive forward the reparations proceedings in the instant case. As far as the practical arrangements for conduct of the missions are concerned, the Legal Representative reiterates the proposals contained in her observations of 1 July 2016,²⁷ including those pertaining to the presence of experts during compilation of application forms for reparations, which would generate enormous costs²⁸ and could be detrimental to victims’ well-being.²⁹ The Legal Representative stresses that the proposed arrangements would ensure better implementation and protect the interests of the victims involved, who, as the TFV underscored, have suffered from the methodology used on previous missions.

21. To ensure consistency throughout the proceedings, the Legal Representative suggests that the form used on previous missions be adopted. This form has since

²⁵ *Ibid.*, para. 46.

²⁶ *Ibid.*, para. 2.

²⁷ *Ibid.*, paras. 38-46.

²⁸ *Ibid.*, para. 28.

²⁹ *Ibid.*, para. 45.

been fully translated into French by the OPCV and can be quickly revised by the language services of the Registry.

22. Moreover, in the Legal Representative's opinion, "[TRANSLATION] the Order [of 9 February] was mainly intended to indicate that the Chamber needed a certain number of files that would enable it to apprehend the nature and scope of victimisation and select, among the programmes proposed by the TFV, those that would address said victimisation".³⁰ If this interpretation of the Order is correct, the proposed approach would enable the Chamber to receive, by the current deadline of 31 December 2016, additional applications for reparations which would enhance its understanding of the scope of victimisation, the harm suffered by victims and the needs of victims.

23. Since the Chamber apparently does not yet wish to rule on the Draft submitted by the TFV, this would also provide it with further information germane to a subsequent evaluation of the Draft. On this issue, the Legal Representative reiterates her view that the Chamber is already in a position to rule on the Draft – at least provisionally – so that the TFV can start implementing it,³¹ and shares the concern expressed by Judge Herrera-Carbuccia in her opinion appended to the Order of 15 July.³²

24. Lastly, the Legal Representative considers that all applications for reparations must be transmitted to the Chamber, including those of victims who have not consented to the disclosure of their identities to the Defence.

25. The Legal Representative is of the opinion, as are the TFV and other legal representatives of victims, that the practice of requiring victims to give their consent

³⁰ *Ibid.*, para. 30.

³¹ *Ibid.*, paras. 28-37.

³² "Opinion of Judge Herrera-Carbuccia" appended to the Order of 15 July, footnote 16 above, paras. 7-10.

in this regard before they can be allowed to take part in the reparations process appears to be detrimental to any proceedings intended to guarantee victims eligibility to reparations in the instant case.³³ Moreover, to require such consent as a precondition for the review of their files by the Chamber could undo all the reparations work done so far and void these proceedings.³⁴ The Legal Representative recalls her observations on this issue, and in particular:

[TRANSLATION] 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 [since] the Judges have full competence to ensure that applicants' identities are established and that their applications are complete for the purposes of the reparations proceedings.³⁵

³³ *“Réponse consolidée aux soumissions déposées le 31 mai et le 7 juin 2016 par le Fonds au profit des victimes”*, footnote 15 above, para. 48.

³⁴ *Idem.*

³⁵ *Ibid.*, para. 50.

FOR THESE REASONS, the Legal Representative respectfully requests the Chamber to issue guidance on the arrangements which, in its view, should be implemented to further the reparations proceedings in the instant case.

[signed]

Paolina Massidda
Principal Counsel

Dated this 16 September 2016

At The Hague, Netherlands