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**International
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Court**

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TRIAL CHAMBER II

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

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

Public Document

Application from the V01 group of victims requesting leave to appeal the “Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016” and the “Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations” of 21 October 2016

Source: Legal Representatives of the V01 group of 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 issued the “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’” and amended the initial order for reparations, directing the Trust Fund for Victims (“TFV”) to submit a draft implementation plan for reparations.³ The TFV filed the draft on 3 November 2015.⁴
2. On 9 February 2016, the Chamber issued an “Order instructing the Trust Fund for Victims to supplement the draft implementation plan”.⁵
3. On 31 May 2016, the TFV submitted the first batch of victim files, with almost half of the victims belonging to the V01 group. The TFV also requested in its filing that the order of 19 February be reconsidered and announced the decision of its Board of Directors to suspend the process for identifying victims and assessing the harm suffered.¹
4. In its “Order pursuant to rule 103 of the Rules of Procedure and Evidence” of 15 July 2016,² the Chamber considered that it lacked the collective reparation projects for the victims of Mr Lubanga which would allow it to fulfil its mandate, and called for proposals from organizations outside the ICC, ordering that several hearings be held to discuss these proposals and the organization of collective reparations processes in general. The hearings took place on 11 and 13 October 2016.
5. Following these hearings, the Chamber issued two orders on 21 October 2016: one approving a supplementary plan by the TFV relating only to symbolic

¹ ICC-01/06-01/06-3208.

² ICC-01/04-01/06-3214-tENG.

reparations,³ and the other ruling on a request by the Office of Public Counsel for Victims (“OPCV”) of 16 September 2016,⁴ with guidelines on how to proceed.

6. The Legal Representatives hereby request leave to appeal these two orders, in accordance with rule 155.

II. GROUNDS OF APPEAL

7. The Legal Representatives will argue that the Chamber committed an error of law, infringing the rights of the victims by:

- 1) ordering the TFV to implement symbolic reparations without simultaneously approving the service-based reparations programme for victims, by refusing to reconsider the order of 9 February 2016 in the light of the problems encountered during its implementation;
- 2) indefinitely deferring approval of the collective reparations plan in order to continue a process to identify individuals who may be eligible on an individual basis and to assess the scope of the harm suffered.

8. The Legal Representatives consider that the two decisions of 21 October are inseparable and should be allowed to be submitted jointly to the Appeals Chamber for adjudication.

9. Since the Appeals Chamber rendered its decision, the victims have been waiting for the Court to decide on a collective reparations plan in the hope that this programme, or at least certain aspects of it, might contribute to

³ ICC-01/04-01/06-3251.

⁴ ICC-01/04-01/06-3252-tENG.

remedying the harm suffered as a result of the crimes of which Mr Lubanga was convicted.

10. The victims of the V01 group were extremely disappointed when, by its order of 9 February 2016, the Chamber decided to make approval of the plan proposed by the TFV contingent on a process to identify all the victims, check their victim status, assess their individual harm and calculate the cost of remedying that harm.
11. An additional problem arose from the fact that victims wishing to benefit from the future programme were supposed to disclose their identity and file to the Defence, even though any possibility of individual compensation had been rejected in favour of a programme limited to collective reparations. The content of this programme has not yet been approved, and the victims still do not know whether it will be of any use to them whatsoever.
12. The victims of the V01 group nevertheless suffered a painful process of having their militia background checked and the resulting traumatic effects, and have transmitted documents attesting to their identity to the TFV. All the victims of the group interviewed by the TFV in April 2016 submitted a complete file to the TFV and all were considered eligible. Nearly all of them refused to have their identity disclosed to the Defence, thereby risking being excluded from any participation in the programme.

Order on symbolic reparations

13. The V01 group of victims did not object to the proposal to include certain symbolic reparations in the future reparations plan. They nonetheless consider that such a programme cannot be disassociated from the reparations programme as a whole, and certainly cannot be an alternative to it.

14. As Judge Herrera Carbucciona rightly pointed out in her dissenting opinion, the TFV itself considers that

a symbolic reparations project is indeed feasible as long as is it is not conceived as a stand-alone undertaking, disconnected from forthcoming service-based awards. [...] Therefore, the Trust Fund respectfully submits that it will be important to launch the service-based collective reparations during the implementation of the symbolic reparations project, in order to not lose the momentum and in particular keep both communities and victims engaged regarding the purpose and benefits of the entire Court-ordered collective reparations programme. Conversely, any inadvertent disconnect between the implementation of symbolic and service-based collective reparations projects will greatly diminish the value and efficiency and effectiveness of both [Emphasis added].⁵

15. Yet, the Chamber has confirmed its decision of 9 February 2016 refusing to approve service-based reparations until the victim identification process has been completed and a final ruling made on the amount of the convicted person's liability, while at the same time imposing a strict timetable on the TFV for symbolic reparations. Consequently, this partial programme of symbolic reparations is to be implemented before the effective reparations plan is approved, or could even replace this programme altogether.

16. The victims are concerned about the financial consequences of the Chamber's decisions. In its submissions of 31 May 2016, the Fund explained that 10 per cent of the amount allotted by its Board of Directors for reparations in the instant case had already been absorbed in the first phase of implementation of the Chamber's order. The Chamber is now ordering the TFV to continue this costly process, and the TFV's tentative assessment of the cost of symbolic reparations is €170,000 (possibly an underestimate), which represents a further 17 per cent of the budget. Resumption of the identification process and the implementation of symbolic reparations entail a significant risk, therefore, that the entirety of the amounts available will be absorbed and that the reparations in the instant case will ultimately be limited to the symbolic component.

⁵ ICC-01/04-01/06-3252-Anx-tENG ("Dissenting Opinion"), para. 1.

17. The victims have also expressed a fear that symbolic reparations will inevitably fail if the process is not supported by their community, which necessarily requires a positive attitude on the part of the convicted person who continues to exert influence over this community. The discussions of 13 October revealed that, at this stage, the TFV cannot guarantee that some of the activities intended as “symbolic reparations” will not be sabotaged, manipulated or even transformed into justification for the crimes committed, in particular by local leaders who still support the convicted person.⁶ There is no comfort in the Defence’s statement that Mr Lubanga could only consider expressing his remorse to the victims at a traditional ceremony in their presence, which would imply waiting until the end of his detention.

18. Lastly, the decision to implement only the symbolic reparations component, deferring to an unspecified date in 2017 the TFV’s programme that was presented in November 2015, means that the reparations process will be delayed nearly two years, which is at odds with the letter, or at least with the spirit, of the Order for Reparations amended by the Appeals Chamber.

19. In conclusion, the victims wish to appeal this order insofar as it does not approve the full reparations plan, but only a marginal aspect thereof, which moreover is not the least problematic.

Order relating to the request from the OPCV

20. In the second order of 21 October, the Chamber:

- instructed the TFV to continue the identification process (implicitly rejecting the TFV’s request for reconsideration);

⁶ ICC-01/04-01/06-T-368-Red-FRA WT 13-10-2016 44/77 SZ T

- instructed the Registry to continue outreach missions in the field with support from the OPCV Counsel;
- authorized the OPCV to continue the identification process using the approach it deemed suitable, provided that it used the same form previously used by the TFV; and
- instructed the OPCV to transmit its files to the Chamber through the Victims Participation and Reparations Section (“VPRS”).

21. The Legal Representatives of the V01 group of victims respectfully submit that the above decisions discriminate between victim groups and that they do not take into account either the observations – which are not considered – or the needs of their clients, and consequently violate articles 68(1) and (3) and 75(6) of the Statute and rules 86 and 97(3) of the Rules of Procedure and Evidence.

22. In its Order of 9 February 2016, the Chamber deferred approval of the plan submitted by the Fund, conferring on it a three-fold task:

- “prepare a file for each potential victim, with a copy of the identification documents or other means of identification presented, the interviews and the TFV’s conclusions with regard to the victim’s status and the extent of the harm he or she has suffered, as well as any other relevant information the TFV has taken into account in reaching its conclusions”;
- “propose an evaluation of the extent of the harm caused to the victims, the anticipated amount of Mr Lubanga’s liability, and the monetary amount which could potentially be advanced by the TFV [...]. The amount of the evaluation corresponds to the aggregate harm suffered by the potential victims”.

23. This task was therefore not simply to identify victims who could potentially be eligible for collective reparations, but was essentially to determine the harm to be remedied by Mr Lubanga, whose contribution will be established by the Chamber by aggregating the harm suffered by all the potential victims.

24. The TFV started with the easiest task: that of contacting the victims who had been participating in the proceedings for years and who had already been identified, examining their files and determining whether they indeed qualified as victims and as potential beneficiaries of collective reparations, in order to assess the extent of their material loss. These victims had to undergo an in-depth interview concerning their account and the visible truncations between the statements given in the requests for participation and their current statements, undergo a medical and psychological examination, and have their personal situation reviewed by a social worker to determine their socio-economic harm. They also had to provide proof of their identity or obtain such proof if they did not have any.
25. After the first series of interviews with the participating victims, the TFV asked the Chamber to reconsider the decision of 9 February. All the participating victims were in support of this request which was disregarded by the Chamber and implicitly rejected with no reasons being given. Nonetheless, the Chamber no longer seems to consider that the process to identify all the victims and assess their harm is crucial in determining the extent of the convicted person's civil liability, given that the order of 15 July 2016 and the present orders suggest that the Chamber might be satisfied with a sample of files representative of all potential victims,⁷ which in fact confirms the relative futility of the process.
26. It makes sense to identify the potential beneficiaries of a collective reparations programme once that programme has been approved and can be publicized in some manner. Moreover, both the TFV and the experts consulted⁸ are of the opinion that it is easier and less traumatic for the victims if the extent of the harm suffered is assessed while they are under their care. The Chamber could

⁷ ICC-01/04-01/06-3218-tENG, para. 8.

⁸ ICC-01/04-01/06-3240, paras. 25 and 51.

therefore most certainly have approved the reparations programme while ordering Mr Lubanga to pay a provisional amount pending a final determination of the harm.

27. In its request of 16 September, the OPCV rightfully argued that the current process generates exorbitant costs and seems to be detrimental to the victims.⁹ Yet, it is difficult to see how the TFV could have acted differently while implementing the Chamber's order. Despite the substantial investment of resources, the TFV has still not been able to determine the monetary value of the harm suffered by each victim interviewed, probably because the Chamber has provided no indication of how to make a financial assessment of the various types of harm suffered (including disability, loss of schooling, psychological, behavioural and/or sexual problems, drug addiction, suffering as a result of sexual violence and other degrading treatment, or the death of a child).

28. By an order of 21 October, the Chamber instructed the TFV to continue the task assigned to it by the Chamber, without redefining it. This suggests that the TFV is to continue to examine the eligibility of the victims that it identifies and assess the harm they have suffered and the monetary value of that harm.

29. The Chamber also authorized the OPCV to "continue the Identification Process", but using the approach it deemed suitable, and ordered the OPCV's files to be transmitted to the Chamber through the VPRS. The OPCV is authorized to identify the victims and prepare files on them, but is not responsible for assessing their eligibility or their harm. This would, in any case, be problematic since the principal counsel of the OPCV considers herself to be the legal representative of these potential victims and would therefore be

⁹ ICC-01/04-01/06-3222-tENG, para. 20.

expected to assist those wishing to challenge any decision excluding them from the programme.

30. That means that another organ, either the Registry (VPRS) or the Chamber, would have to decide as to the eligibility of these victims, potentially requiring a new verification procedure, with the delays that that would entail.
31. The Legal Representatives note that, in any case, the potential victims identified and assisted by the OPCV would be subject to a very different assessment procedure from the one their own clients had to follow. Different assessment procedures mean different options for the Defence to challenge the completeness of a file and the eligibility of a victim, hence the risk of discrimination between the various victim groups.
32. The result of the impugned decision is that the OPCV, which considers itself to be the “legal representative” of potential victims, even those who have not submitted a request for participation in the reparations proceedings, must combine the duties of identifying potential victims, which is ordinarily the preserve of the VPRS; assessing their eligibility and the extent of their harm, initially mandated to the TFV; and ensuring the legal representation of those victims – thereby taking on roles that are inherently incompatible. Indeed, it is not for counsel to seek potential clients and to convince them to be represented, or to assess the eligibility or non-eligibility of their own clients, lest they become both judge and party.
33. By conflating the functions of the OPCV, the VPRS and the TFV and authorizing various organs to conduct parallel activities, the Chamber is likely to cause additional confusion among the victims, who often have trouble differentiating between the organs and sections of the Court.

34. Lastly, by implicitly rejecting the request to reconsider its decision of 9 February 2016, which makes approval of the reparations plan contingent on the identification of potential beneficiaries and the assessment of the harm suffered, despite the negative experience of the initial attempt at implementing this order, the Chamber is postponing approval of the plan for reparations, other than symbolic reparations, to an unspecified date in 2017 at the earliest. This will entail a delay of one and a half to two years in the approval of the reparations plan, which could be perceived by the victims as a denial of justice. In her dissenting opinion, Judge Herrera Carbuccion wrote:

Owing to the widespread nature of the crimes committed, a rigid interpretation of what is needed to begin implementing the collective reparations plan would only lead to impunity for Thomas Lubanga (in civil liability terms) and injustice for the victims, who have been waiting 10 years since the start of the proceedings [Emphasis added].

35. The Chamber also implicitly confirms the decision in the orders of 9 February and 15 July 2016 that the identity of potential victims in the reparations programme must be disclosed to the Defence before the reparations programme is approved, and that any victims who object to this disclosure risk being excluded from the programme, thereby disregarding the nearly unanimous opinion of all those who spoke during the hearings of 11 and 13 October, with the exception of the Defence.

36. Not only is this requirement at odds with the Chamber's ruling,¹⁰ but it once again discriminates against the V01 group of victims, which was the first

¹⁰ ICC-01/04-01/06-3129, paras. 163 and 164: "Mr Lubanga raises other grounds of appeal wherein he submits that the Trial Chamber denied him the opportunity to challenge the individual requests for reparations. Mr Lubanga first submits that, by concluding that a written request for reparations pursuant to rule 94 of the Rules of Procedure and Evidence was not necessary, the Trial Chamber denied him the opportunity to make submissions. Furthermore, he submits that the reparations requests were affected by extensive redactions which essentially concealed the identity of the victims or individuals acting on their behalf and therefore violated his rights to verify the facts submitted. The Appeals Chamber determined above that the Trial Chamber's decision had been to order reparations on a collective basis under rule 98 (3) of the Rules of Procedure and Evidence, rather than to rule on the merits of the individual reparation requests, and found that the Trial Chamber had not

group to be interviewed by the TFV¹¹ and whose members have been in a state of uncertainty for more than six months as to whether they might be excluded from any participation in a collective reparations programme as a result of the majority's refusal to disclose their identity to the Defence.

III. APPLICATION OF ARTICLE 82(1)(d)

37. The two impugned decisions raise issues such as to significantly affect the fair and expeditious conduct of the reparations proceedings. More than 10 years after the start of the proceedings, and more than four years after the Accused was convicted by a final decision, the implementation of reparations to which the victims are entitled is an issue that has now become urgent and can no longer be delayed. The victims constantly repeat that they are tired of the Court's procrastination and are losing confidence in the Court.

38. Resolving these issues could also materially advance the proceedings, since the Appeals Chamber would be able to quash the impugned decisions, but also approve the full reparations plan immediately. Given that it has been more than one year since the TFV complied with the Order for Reparations and submitted a collective reparations plan according to the Appeals Chamber's instructions, it is unacceptable to the victims that the impugned

made any error in this respect. The Appeals Chamber further recalls its holding above that the determination that it was more appropriate to award collective reparations operated as a decision denying, as a category, individual reparation awards. Accordingly, the Appeals Chamber considers that the issue of Mr Lubanga's ability to challenge individual reparation *requests* as such is moot."

¹¹ The Chamber's Order had specified, "The Registrar is instructed to consult, through their Legal Representatives, with the victims who submitted individual applications for reparations in this case in order to seek their consent to disclosure of confidential information to the Trust Fund for purposes of participation in the eventual collective programme(s) that are to be designed by the Trust Fund. The Trust Fund is instructed to refrain from further reviewing the requests for reparations until such consent is received and to permanently remove any confidential information it may have stored electronically or elsewhere in the case that consent is not granted. When the collective reparation awards contained in the draft implementation plan have been approved, the Trust Fund is directed to seek consent to participate therein from the victims whose applications are forwarded to it." See ICC-01/04-01/06-3129-AnxA, 01-08-2016, paras. 73 and 74.

decisions are again delaying the approval of this plan and thus indefinitely deferring the start of implementation of the reparations.

39. The conditions set out in article 82(1)(d) are therefore met to grant leave to appeal.

Conclusion

40. The impugned decisions are such as to have a definitive bearing on the entire reparations proceedings as organized by the Appeals Chamber by delaying implementation, and risk distorting them, permanently undermining the rights of victims as well as the interests of justice.

41. These decisions therefore concern issues that require immediate resolution by the Appeals Chamber.

FOR THESE REASONS,

MAY IT PLEASE THE TRIAL CHAMBER TO:

Grant the V01 group of victims leave to appeal the two orders of 21 October 2016.

On behalf of the V01 group of victims,

[signed]

Luc Walley, Legal Representative

Dated this 28 October 2016

At Brussels, Belgium