

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: **ICC-01/04-01/06**  
Date: **3 November 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**

**Response to the Application for Leave to Appeal the Orders of 21 October 2016**

**Source:** Office of Public Counsel for Victims

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 the V01  
Victims**

Mr Luc Walley

Mr Frank Mulenda

**Legal Representatives of Applicants**

**Legal Representatives of the V02  
Victims**

Ms Carine Bapita Buyangandu

Mr Paul Kabongo Tshibangu

Mr Joseph Keta Orwinyo

**Unrepresented Applicants for  
Participation/Reparations**

**Office of Public Counsel for Victims**

Ms Paolina Massidda

Ms Sarah Pellet

Ms Caroline Walter

**Office of Public Counsel for the  
Defence**

**States' Representatives**

**Trust Fund for Victims**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

## I. INTRODUCTION

1. The Legal Representative of the potential beneficiaries (“Legal Representative”) submits that the application for leave to appeal the Orders of 21 October 2016 (“Application”)<sup>1</sup> filed by the legal representatives of the V01 group of victims must be rejected.

2. In the main, the Legal Representative considers that the Application does not identify any appealable issue. In the alternative, in the unlikely event that the Chamber were to consider that the alleged issues are appealable, the Legal Representative argues that they could not significantly affect the outcome of the trial or even the fair and expeditious conduct of the proceedings, and therefore do not require an immediate resolution by the Appeals Chamber to materially advance the proceedings.

3. The Application addresses two alleged and extremely vague errors, which cannot, in any case, be considered appealable “issues”. Furthermore, the arguments advanced clearly reflect a disagreement with or misunderstanding of the Orders of 21 October 2016.

4. The Legal Representative is, moreover, surprised to note that the Application, as formulated, runs counter to the general interests of the victims.

## II. PROCEDURAL HISTORY

5. On 9 February 2016, Trial Chamber II (“Chamber”) issued its “Order instructing the Trust Fund for Victims to supplement the draft implementation plan”

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<sup>1</sup> “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”, ICC-01/04-01/06-3254-tENG, 28 October 2016 (“Application”).

("Order of 9 February"),<sup>2</sup> directing the Trust Fund for Victims ("TFV") to prepare files for victims potentially eligible for reparations and to transmit them to the Chamber by the dates indicated,<sup>3</sup> and also to propose details of the programmes and to transmit them to the Chamber by 7 May 2016.

6. On 15 February 2016, the TFV filed a request for leave to appeal against the Order of 9 February,<sup>4</sup> which was rejected *in limine* by the Chamber on 4 March 2016.<sup>5</sup>

7. On 31 May and 7 June 2016, after being granted an extension of time,<sup>6</sup> the TFV submitted the first batch of files of potential victims, as well as additional information on the proposed programmes.<sup>7</sup>

8. On 1 July 2016, the Legal Representative filed a consolidated response to the submissions filed on 31 May and 7 June by the TFV,<sup>8</sup> in which she made practical suggestions to assist in the effective implementation of the Order of 9 February, as may be amended by the Chamber.

9. 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

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<sup>2</sup> "Order instructing the Trust Fund for Victims to supplement the draft implementation plan", ICC-01/04-01/06-3198-tENG, 9 February 2016 ("Order of 9 February").

<sup>3</sup> *Ibid*, paras. 17 and 18.

<sup>4</sup> "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.

<sup>5</sup> "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.

<sup>6</sup> "Request for extension of time to submit the first transmission of potential victim dossiers", ICC-01/04-01/06-3204, 23 March 2016, and "Decision on the request of the Trust fund for Victims for an extension of the time limit for the submission for the first batch of files of potential victims" (Trial Chamber II), ICC-01/04-01/06-3205-tENG, 30 March 2016. See also "Request for extension of time to submit additional reparation programme information", ICC-01/04-01/06-3206, 3 May 2016 and "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.

<sup>7</sup> "First submission of victim dossiers", ICC-01/04-01/06-3208 and Conf-Exp-Anxs1 to 12, 31 May 2016 and "Additional Programme Information Filing", ICC-01/04-01/06-3209, 7 June 2016.

<sup>8</sup> "Consolidated response to the submissions filed on 31 March and 7 June 2016 by the Trust Fund for Victims", ICC-01/04-01/06-3212-tENG, 1 July 2016.

Victims to identify victims potentially eligible for reparations” (“Order of 15 July”),<sup>9</sup> in which it did not rule on the TFV’s application for reconsideration or on the practical suggestions proposed by the Legal Representative.

10. On 16 September 2016, the Legal Representative filed a “Request for guidance from the Chamber further to the Order of 15 July 2016” (“OPCV’s Request”).<sup>10</sup>

11. On 19 September 2016, at the request of the Chamber,<sup>11</sup> the TFV submitted a symbolic collective reparations project.<sup>12</sup>

12. On 3 and 6 October 2016, respectively, the TFV and the Registry, and then the legal representatives of the V01 group of victims and the Defence, submitted their observations on the OPCV’s Request.<sup>13</sup>

13. On 11 and 13 October 2016, the Chamber held public hearings to discuss the collective reparations projects for the victims of the crimes of which Mr Lubanga was convicted.<sup>14</sup>

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<sup>9</sup> “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 (“Order of 15 July”).

<sup>10</sup> “Request for guidance from the Chamber further to the Order of 15 July 2016”, 01/04-01/06-3222-tENG, 16 September 2016 (“OPCV’s Request”). See also “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.

<sup>11</sup> “Request Concerning the Feasibility of Applying Symbolic Collective Reparations” (Trial Chamber II), ICC-01/04-01/06-3219, 15 July 2016.

<sup>12</sup> “Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals”, ICC-01/04-01/06-3223-Conf + Conf-Anx, 16 September 2016 (of which a redacted public version was filed on 20 September, ICC-01/04-01/06-3223-Red).

<sup>13</sup> “Observations on the ‘Requête afin de solliciter des lignes directrices de la Chambre suite à l’Ordonnance émise le 15 juillet 2016’”, ICC-01/04-01/06-3237, 3 October 2016; “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”, ICC-01/04-01/06-3238, 3 October 2016; “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”, ICC-01/04-01/06-3241-tENG, 6 October 2016; and “Observations of Victim Group V01 on the OPCV Request of 16 September 2016 and the Responses of the Trust Fund for Victims and the Registry filed on 3 October 2016”, ICC-01/04-01/06-3242-tENG, 6 October 2016.

14. On 21 October 2016, the Chamber issued two orders: one authorizing the implementation of the symbolic reparations project proposed by the TFV,<sup>15</sup> and the other relating to the OPCV's Request ("Orders of 21 October").<sup>16</sup>

15. On 28 October 2016, the legal representatives of the V01 group of victims filed an application for leave to appeal the two Orders<sup>17</sup> issued on 21 October 2016.<sup>18</sup>

### III. RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL

#### A. Criteria of article 82(1)(d) of the Rome Statute

16. Article 82(1)(d) of the Rome Statute limits the possibility of appeal to:

[a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

17. Previous rulings of the Court have consistently established that the criteria of article 82(1)(d) of the Rome Statute are complementary, and that each one must be satisfied cumulatively in order for leave to appeal to be granted.<sup>19</sup>

18. In this respect, the Appeals Chamber has previously stated that

[e]vidently, article 82(1)(d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by

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<sup>14</sup> Transcripts of the hearings held before Trial Chamber II on 11 and 13 October, respectively, ICC-01/04-01/06-T-367-FRA ET WT and ICC-01/04-01/06-T-368-Red-FRA ET WT.

<sup>15</sup> "Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations", ICC-01/04-01/06-3251, 21 October 2016 ("Order approving the symbolic reparations").

<sup>16</sup> "Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016", ICC-01/04-01/06-3252-tENG, 21 October 2016 ("Order relating to the OPCV's request").

<sup>17</sup> Application, footnote 1 above.

<sup>18</sup> Footnotes 15 and 16, above.

<sup>19</sup> "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (Appeals Chamber), ICC-01/04-168, 13 July 2006, paras. 7-19. See also "Decision on the prosecution and defence applications for leave to appeal the 'Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'" (Trial Chamber I), ICC-01/04-01/06-2107, 3 September 2009, para. 27.

reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber.<sup>20</sup>

The Appeals Chamber has also stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”<sup>21</sup> and defined the term “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.<sup>22</sup>

19. Moreover, the Court’s existing case law has established that

[n]ot every issue may constitute the subject of an appeal. It must be one apt to “significantly affect”, i.e. in a material way, either a) “the fair and expeditious conduct of the proceedings”, or b) “the outcome of the trial”<sup>23</sup>

and that “[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances”.<sup>24</sup>

20. In that regard, since the Appeals Chamber will intervene in a discretionary decision only under limited conditions, a diverging opinion regarding the Chamber’s exercise of its discretion cannot constitute an “appealable issue” unless the Chamber has erred in the exercise of its discretion.<sup>25</sup>

21. Furthermore, the Chamber that has been seized of an application for leave to appeal must not examine or consider the “arguments on the merits or the substance of the appeal”, which are more appropriately considered and examined by the

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<sup>20</sup> “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, footnote 19 above, para. 8.

<sup>21</sup> *Ibid.*, para. 9.

<sup>22</sup> *Idem.*

<sup>23</sup> *Ibid.*, para. 10.

<sup>24</sup> See, *inter alia*, “Decision on the Prosecutor’s application for leave to appeal the ‘Decision on the “Protocol on investigations in relation to witnesses benefiting from protective measures” (Trial Chamber II), ICC-01/04-02/07-2375-tENG, 7 September 2010, para. 4.

<sup>25</sup> “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009” (Appeals Chamber), ICC-02/04-01/05-408 OA3, 16 September 2009, para. 80. See also “Decision on ‘Defence Request for Leave to Appeal the “Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’” (Trial Chamber III), ICC-01/05-01/08-2925-Red, 20 December 2013, para. 30.

Appeals Chamber if and when the Chamber concerned has granted the leave to appeal.<sup>26</sup>

22. In accordance with this case law, applications for leave to appeal must not contain the details of the arguments which the party intends to raise before the Appeals Chamber, but only the appealable issue(s), “by indicating a specific factual and/or legal error”.<sup>27</sup>

23. In the light of the established case law, and by analysing whether an appealable issue would “materially affect” the fair and expeditious conduct of the proceedings, in accordance with article 82(1)(d) of the Rome Statute, the concept of “fairness” must be understood as characterizing situations in which

a party is provided with the genuine opportunity to present its case – under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent – and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision.<sup>28</sup>

“Expeditiousness” must be understood as being closely linked to the concept of proceedings held “within a reasonable time”, i.e. the speedy conduct of proceedings without prejudice to the rights of the parties or participants concerned.<sup>29</sup>

24. In order to determine whether an issue could materially affect the “outcome of the trial”, as set out in article 82(1)(d) of the Rome Statute, the Appeals Chamber established that “[t]he Pre-Trial Chamber or the Trial Chamber must ponder the

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<sup>26</sup> “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58” (Pre-Trial Chamber II), ICC-02/04-01/05-20, 19 August 2005, para. 22.

<sup>27</sup> “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), ICC-02/11-01/11-307, 30 November 2012 (dated 29 November 2012), para. 70.

<sup>28</sup> See, *inter alia*, “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), ICC-01/05-01/08-75, 25 August 2008, para. 14.

<sup>29</sup> *Ibid.*, para. 18.



possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequence of such an occurrence".<sup>30</sup>

## **B. Applicability of the criteria of article 82(1)(d) of the Rome Statute to the Application**

*In the main, the Application does not identify any appealable issues*

25. The legal representatives of the V01 group of victims submit 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.<sup>31</sup>

26. The Legal Representative notes that the legal representatives of the V01 group of victims merely conclude that the Application fulfils the criteria of article 82(1)(d),<sup>32</sup> without taking the trouble to provide a demonstration,<sup>33</sup> or for that matter, establish that there is any legal or factual error that may have undermined the Orders of 21 October.

27. The Legal Representative submits that the Application does not identify appealable issues arising from the impugned Orders. The Application enumerates two alleged and extremely vague errors which cannot, in any case, be considered to be appealable "issues".<sup>34</sup> Furthermore, the arguments advanced refer only to topics

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<sup>30</sup> "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (Appeals Chamber), ICC-01/04-168, 13 July 2006, para. 13.

<sup>31</sup> Application, footnote 1 above, para. 7.

<sup>32</sup> *Ibid.*, para. 39.

<sup>33</sup> In this regard, see "Decision on the Gbagbo Defence Request for leave to appeal the Chamber's Decision granting protective measures to P-0321 (ICC-02/11-01/15-561)" (Trial Chamber I), ICC-02/11-01/15-598, 23 June 2016, para. 8.

<sup>34</sup> Application, footnote 1 above, para. 7.

on which there are points of disagreement between the legal representatives of the V01 group of victims and the Chamber. These references are the visible evidence of a serious misunderstanding of the Orders of 21 October.<sup>35</sup>

28. The Application expresses the overall dissatisfaction of the legal representatives of the V01 group of victims with the approach of the Chamber in its Order of 9 February.<sup>36</sup> However, the Legal Representative notes that this decision, and a motion by the TFV rejected *in limine* for lack of *locus standi*,<sup>37</sup> was not the subject of any request for leave to appeal. Consequently, the arguments submitted on the basis of such dissatisfaction – characterized as disappointment in the Application<sup>38</sup> – cannot constitute grounds for a subsequent request for leave to appeal the orders issued thereafter by the Chamber.

29. The Legal Representative also submits that it is neither for the non-applicant parties nor the Bench<sup>39</sup> to attempt to identify an issue in a request of this nature. It is also not their duty to attempt to fill the gaps of a request which, moreover, is based only on mere disagreements expressed by its author, without further legal basis. In the instant case, the burden of proof falls on the applicants who must demonstrate –

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<sup>35</sup> See also below.

<sup>36</sup> “Order instructing the Trust Fund for Victims to supplement the draft implementation plan” (Trial Chamber I), ICC-01/04-01/06-3198-tENG, 9 February 2016.

<sup>37</sup> “Decision on the request of the Trust Fund for Victims for leave to appeal against the order of 9 February 2016” (Trial Chamber I), ICC-01/04-01/06-3202-tENG, 4 March 2016.

<sup>38</sup> Application, footnote 1 above, para. 10: “The V01 group of victims 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” [Emphasis added].

<sup>39</sup> “Decision on Defence Request for Reconsideration of or Leave to Appeal ‘Decision on “Defence Request for Disclosure and Judicial Assistance”” (Trial Chamber VII, Single Judge), ICC-01/05-01/13-1282, 22 September 2015, para. 10; see also “Decision on ‘Defence Request for Leave to Appeal the “Decision on Defence Request for Relief for Abuse of Process”” (Trial Chamber III), ICC-01/05-01/08-3273, 24 July 2015, para. 25; and “Decision on Defence request for leave to appeal the Chamber’s decisions overruling objections to certain questions put to Witness P-0017”, (Trial Chamber VI), ICC-01/04-02/06-1184, 19 February 2016, para. 12.

and thereby convince the Chamber – that the conditions set out in article 82(1)(d) of the Rome Statute are met.<sup>40</sup>

30. In that regard, the Legal Representative recalls that if an issue raised by a party refers inaccurately or incorrectly to the terms of a decision, thus reflecting a misunderstanding by that party, such issue cannot be understood as resulting from the impugned decision and must therefore be rejected.<sup>41</sup>

31. Consequently, given that the criteria of article 82(1)(d) are to be applied cumulatively, and because the Application does not identify any appealable issues in either of the impugned Orders, the Legal Representative submits that it is unnecessary to review the other criteria.<sup>42</sup> The Application must therefore be rejected.<sup>43</sup>

*In the alternative, the alleged issues arise from a disagreement with or a misunderstanding of the Chamber's orders*

32. In the alternative, in the unlikely event that the Chamber were to consider that the alleged issues are appealable, the Legal Representative submits that they cannot

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<sup>40</sup> "Decision on the Government of Kenya's Application for Leave to Appeal Pursuant to Article 82(1)(d) of the Rome Statute" (Pre-Trial Chamber II), ICC-01/09-86, 29 May 2012, para. 9. See also "Decision on Defence Request for Leave to Appeal the Decision on Article 56 Evidence" (Trial Chamber IX), ICC-02/04-01/15-535, 9 September 2016, para. 10, and "Decision rejecting the application of the Defence for Thomas Lubanga Dyilo for leave to appeal the Decision of 6 October 2016" (Trial Chamber I), ICC-01/04-01/06-3256-tENG, 1 November 2016 ("Decision on the Defence Application"), para. 11.

<sup>41</sup> "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'" (Trial Chamber I), ICC-02/11-01/15-117, 2 July 2015, para. 19.

<sup>42</sup> "Decision on the 'Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014'" (Pre-Trial Chamber II, Single Judge), ICC-01/04-02/06-322, 4 July 2014, paras. 14, 29 and 33. See also "Decision on 'Defence Request for Leave to Appeal the 'Decision on Defence Request for Relief for Abuse of Process'" (Trial Chamber III), ICC-01/05-01/08-3273, 24 July 2015, para. 8.

<sup>43</sup> "Decision on the request for leave to appeal the 'Decision on the 'Prosecution's application submitting material in written form in relation to Witnesses P-0414, P-0428, P-0501, P-0549 and P-0550'" (Trial Chamber I), ICC-02/11-01/15-685-Red, 27 September 2016, para. 6: "The Chamber emphasises that it is not obliged, under article 82(1)(d) of the Statute, to entertain applications for leave to appeal that do not present complete arguments under the requirements of said provision. As is clear from a previous decision of the Chamber, incomplete applications may be rejected for that reason alone."

significantly affect the outcome of the trial or the fair and expeditious conduct of the proceedings, and therefore do not require an immediate resolution by the Appeals Chamber to materially advance the proceedings.

33. With respect to the arguments put forward concerning the possibility that “this partial programme of symbolic reparations [...] could [...] replace [the effective reparations] programme altogether”,<sup>44</sup> and a potential two-year delay of the decision for their implementation,<sup>45</sup> they are speculation with no basis in law.

34. The Legal Representative also emphasizes the incoherency of the arguments in the Application in relation to the Chamber’s approval of the symbolic reparations programme and not of the wider collective reparations projects at the same time. In that respect, the Legal Representative points out that the Chamber was able to approve the symbolic reparations project submitted by the TFV because the project was adequately detailed, unlike the collective reparations projects for which the Chamber still currently does not have enough specific information. However, following the example of the legal representatives of the V01 group of victims, the Legal Representative hopes that the victims’ concerns, expressed during the hearings held in October, will soon be taken into account by the Chamber and the TFV, given that symbolic and collective reparations need to be implemented.

35. As for the arguments with regard to the Order relating to the OPCV’s request, the terms used in the Application reveal a significant disagreement with a previous Chamber decision which appoints the OPCV as the legal representative of unrepresented victims and potential beneficiaries of reparations, as well as of victims who will benefit from the broader collective reparations.<sup>46</sup>

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<sup>44</sup> Application, footnote 1 above, para. 15.

<sup>45</sup> *Ibid.*, para. 18.

<sup>46</sup> *Ibid.*, para. 29: “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 [...]” [Emphasis added]. See also para. 32: “The result of the impugned decision is that the OPCV, which considers itself to be the

36. On that matter, the Legal Representative once again points out that in addition to the Defence request for leave to appeal against the Chamber's Decision of 5 April 2012,<sup>47</sup> which was rejected,<sup>48</sup> no other request of the same nature was filed. Moreover, this Trial Chamber I decision was confirmed on a number of occasions by the present Chamber, without ever being the subject of a request for leave to appeal.<sup>49</sup> The Legal Representative also finds it difficult to fathom why the legal representatives of the V01 group of victims harbour such opposition, since this has no bearing on their role with respect to their clients, whom they have represented for many years. On the matter of the role assigned to the OPCV, the Legal Representative recalls that there is nothing novel about assigning the legal representation of the applicants to the OPCV. Indeed, aside from the fact that this mandate is now expressly established in regulation 81(4)(c) of the Regulations of the Court, the OPCV had been assigned this role – even before the amended Regulations of the Court entered into force – by numerous Chambers of the Court, including in the case of *Lubanga Dyilo* and the situation in the Democratic Republic of the Congo, in which the legal representatives of the V01 group of victims have been involved for many years.<sup>50</sup> Whatever the circumstances, the Legal Representative respectfully

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'legal representative' of the potential victims, even those who have not submitted a request for participation in the reparations proceedings [...]. Indeed, it is not for counsel to seek potential clients and to convince them to be represented [...]" [Emphasis added].

<sup>47</sup> "Decision on the OPCV's request to participate in the reparations proceedings" (Trial Chamber I), ICC-01/04-01/06-2858, 5 April 2012.

<sup>48</sup> "Decision on the defence request for leave to appeal" (Trial Chamber), ICC-01/04-01/06-2874, 3 May 2012.

<sup>49</sup> See, *inter alia*, "Order fixing the schedule for the submission of observations on the draft implementation plan submitted by the Trust Fund for Victims" (Trial Chamber II), ICC-01/04-01/06-3179-tENG, 12 November 2015 and the "Decision on the request of the Office of Public Counsel for Victims and the request of the Legal Representatives of Victims V02" (Trial Chamber II), ICC-01/04-01/06-3190-tENG, 13 January 2016. On the contrary, the Legal Representative notes, for example, that during the TFV's previous missions in the presence of the V01 legal representation team, the latter had referred two unrepresented applicants to the OPCV, under of the mandate given to the OPCV by the Chamber.

<sup>50</sup> See, *inter alia*, "Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation" (Trial Chamber I), ICC-01/04-374, 17 August 2007, paras. 41, 43-44 and 49-50. See also "Decision on the role of the Office of Public Counsel for Victims and its request for access to documents" (Trial Chamber I), ICC-01/04-01/06-1211,

notes that, after more than nine years of proceedings and 14 years after the commission of the crimes which caused the harm suffered by the victims, each party should concentrate its energy on effectively and efficiently implementing the reparations process in favour of all the victims.

37. The Legal Representative notes that the Application is based solely on a misunderstanding of the process ordered by the Chamber and develops hereunder her observations on the arguments in the Application in support of the request for leave to appeal, such as they seem to emerge from the incoherent formulation provided.

38. The legal representatives of the V01 group of victims rightly lay emphasis on the exorbitant costs incurred in the identification process conducted by the TFV thus far, and are concerned about the high risk that the amounts still available will be absorbed in part by resuming this process, thereby restricting the available resources that are supposed to be dedicated to the collective reparations to be implemented.<sup>51</sup> Yet, in the same filing, the legal representatives seem to consider that the TFV could not have acted differently.<sup>52</sup> The Legal Representative recalls, however, that the Chamber, in its Order relating to the OPCV's request, took account of the fact that the OPCV has the "additional resources to discharge its mandate in the instant case", as well as the "logistical and financial resources to travel to the field and continue the Identification Process initiated by the TFV and to identify more Potentially Eligible Victims".<sup>53</sup> The Legal Representative therefore draws the attention of the legal representatives of the V01 group of victims to the fact that these resources are an

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6 March 2008, para. 34; "Order on the request by the OPCV for access to certain documents regarding applications a/0026/06, a/0145/06, a/0203/06 and a/0220/06" (Pre-Trial Chamber I, Single Judge), ICC-01/04-395, 17 September 2007, pp. 3 and 4; and "Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants" (Trial Chamber III), ICC-01/05-01/08-699, 22 February 2010, para. 23.

<sup>51</sup> Application, footnote 1 above, paras. 16 and 27.

<sup>52</sup> *Ibid.*, para. 27.

<sup>53</sup> Order relating to the OPCV's request, footnote 16 above, paras. 13 and 16.

integral part of the OPCV's own budget; as a result, these resources cannot be subtracted from the amount planned at this stage, by the TFV, for the reparations. Ultimately, the procedure thus approved by the Chamber protects the interests of all the future victim beneficiaries of the reparations, including the clients of the legal representatives of the V01 group of victims.

39. Moreover, the legal representatives of the V01 group of victims seem to conflate the process of identification with that of eligibility.<sup>54</sup> The mandate given to the OPCV by the Chamber, pursuant to the role that both Trial Chambers decided to assign it, does not differ from that of the other legal representatives involved in the process. In that connection, the Legal Representative stresses that the forms of the new applicants, to be collected by the OPCV team, will be transmitted to the Registry, which will transmit them to the Chamber. The Chamber must then rule on their eligibility. In this sense, the procedure regarding the eligibility of new applicants does not in any way deviate from the procedure applied thus far.

40. Even more paradoxically, with regard to the points made in the Application about possibly eliminating the opportunity for the Defence to challenge the completeness of applications once they are submitted to the Chamber,<sup>55</sup> it is difficult to comprehend how there can be hypothetical discrimination since the legal representatives of the V01 group of victims repeatedly stress that most of their clients refuse "to disclose their identity to the Defence".<sup>56</sup> In any case, the Chamber must still decide on the fate of these applications.<sup>57</sup>

41. The Legal Representative also struggles to grasp the argument in the Application that the fact that the members of its team will be present to assist potentially eligible victims will lead to discrimination vis-à-vis the victims already in

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<sup>54</sup> Application, footnote 1 above, paras. 29-33.

<sup>55</sup> *Ibid.*, para. 31.

<sup>56</sup> *Ibid.*, paras. 12 and 36.

<sup>57</sup> Order relating to the OPCV's request, footnote 16 above, para. 21.

contact with the Court and whom the TFV recently met with in the presence of their legal representatives.<sup>58</sup> On that matter, the Legal Representative submits that if the victims not yet identified were not being represented or receiving legal assistance on an equal basis with the victims already identified, such a situation would, on the contrary, be even more discriminatory. The Legal Representative again finds it surprising that the legal representatives of the V01 group of victims have taken a view that is plainly detrimental to the interests of all the victims.

42. The Application also puts forth an argument, which seems pivotal, concerning discrimination that might result from the procedure established by the Chamber. On this point, the Legal Representative submits that the Application reflects a flawed understanding of the impugned Order, given the contradictory positions taken by the legal representatives of the V01 group of victims. The legal representatives seem to agree with the assessment of the identification process conducted thus far by the TFV, and of the negative repercussions this had on the victims who were met.<sup>59</sup> Yet, it is in fact because of this observation that the TFV itself made, that the Chamber changed the course of the methodology in order to acknowledge and protect the welfare of the victims to the fullest extent.<sup>60</sup> Considering this viewpoint, the Legal Representative points out that when prejudice is observed in the implementation of a process – to the detriment of the victims – it is the responsibility of the Chamber and the others involved to make the necessary adjustments to ensure that proceedings are fair and considerate of the interest of the parties, and in particular, those of the victims. Prolonging and keeping all the victims in a process which blatantly

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<sup>58</sup> Application, footnote 1 above, para. 32.

<sup>59</sup> *Ibid.*, para. 12: “The V01 group of victims nevertheless suffered a painful process [of having their militia background] checked”; para. 24; para. 27: “the OPCV rightfully argued that the current process [...] seems to be detrimental to the victims”; and para. 34: “despite the negative experience of the initial attempt at implementing this order”.

<sup>60</sup> Order relating to the OPCV’s request, footnote 16 above, para. 19: “The OPCV submits that the methodology adopted for the TFV’s conduct of individual interviews with Potentially Eligible Victims is unsuitable and recommends, *inter alia*, the presence of fewer interviewers. [...] The Chamber considers that it is for the OPCV to decide, on the basis of its own expertise, what approach it deems suitable for the conduct of interviews with Potentially Eligible Victims.”



compromises their security and well-being, and which – by its essence – has a traumatic effect on them, would on the contrary constitute a decision that is highly prejudicial to them.

43. Lastly, as regards the matter raised by the TFV, the V01 and V02 legal representation teams and the OPCV, concerning the obligation placed on victims to agree to disclose their identities to the Defence team of the convicted person, without first having any information on the reparations programmes from which they could potentially benefit, the Legal Representative notes that the Application once again reflects a poor understanding of the Chamber's Order.<sup>61</sup>

44. Indeed, in its Order relating to the OPCV's request, the Chamber agreed that all the files of those victims who might have agreed to disclose their identities, as well as those who might not have agreed, should be transmitted to it, and stated that it would consider in due course what action to take.<sup>62</sup> This decision clearly seems to respect the interests of all the victims who may be concerned by the reparations and is advantageous to both the V01 and V02 legal representation teams and the victims not yet identified.

45. Consequently, the incoherent and contradictory aspects raised by the legal representatives of the V01 group of victims not only do not demonstrate the need for the Appeals Chamber to immediately resolve an issue significantly affecting the proceedings, but on the contrary, themselves obstruct the expeditiousness and fairness of the proceedings.

46. On that point, the Legal Representative notes the contradictory argument in the Application which states that the primary ground for the request for appeals proceedings is to ensure expeditious reparations proceedings, even though, in any case, this Application – which, moreover, is unfounded – only serves to delay this

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<sup>61</sup> Application, footnote 1 above, paras. 12, 35 and 36.

<sup>62</sup> Order relating to the OPCV's request, footnote 16 above, para. 21.

process. Furthermore, the Legal Representative notes that the Order relating to the OPCV's request partially remedies the harmful effects of the TFV's unilateral decision – taken without prior authorization – to suspend its missions in the field to identify the victims.<sup>63</sup>

47. Because the criteria set out in article 82(1)(d) of the Rome Statute – as interpreted in the consistent case law of various Chambers of the Court,<sup>64</sup> including very recently by this Chamber<sup>65</sup> – are not met, the Application must be rejected.

#### IV. CONCLUSION

48. As a result, the Legal Representative respectfully calls on the Chamber to reject the Application for leave to appeal filed by the legal representatives of the V01 group of victims.

[signed]

**Paolina Massidda**  
**Principal Counsel**

Dated this 3 November 2016

At The Hague, Netherlands

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<sup>63</sup> Order relating to the OPCV's request, paras. 11 and 12.

<sup>64</sup> See paras. 16-24 above.

<sup>65</sup> Decision on Defence Request, footnote 40 above.