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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

Observations of Team V02 on the draft implementation plan for reparations  
submitted by the Trust Fund for Victims (TFV) to Trial Chamber II on  
3 November 2015

Source:      Legal Representatives of Victims Team V02

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

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**Observations of Team V02 on the draft implementation plan for reparations  
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## **I. INTRODUCTION**

1. Team V02 Counsel for victims would like to underscore the fact that their observations are based on factual information contained in the TFV's submission, that they were unable to collect their clients' views and concerns because they lacked the logistical resources to meet with them, and that the purpose of their request for an extension of time to file their observations was to obtain from the ad hoc section of the Registry the logistical resources required to facilitate a trip to the field (ICC-01/04-01/06-3184-Conf-Anxs).
2. Team V02 Counsel for victims takes note of the observations submitted to this Chamber by the NGO Ligue pour la Paix, les Droits de l'Homme et la Justice (LIPADHOJ) on 17 December 2015.

## **II. PROCEDURAL HISTORY**

3. 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 directed the TFV to submit, within six months, a draft implementation plan for reparations.
4. On 13 August 2015, the TFV filed a request for an extension of time to submit the draft, which the Chamber granted.
5. On 3 November 2015, the TFV filed with the Chamber its implementation plan for reparations in the case of *The Prosecutor v. Thomas Lubanga*.
6. On 3 November 2015, the Office of Public Counsel for Victims (OPCV) requested an extension of time to respond to the submission filed by the TFV (ICC-01/04-01/06-3178-tENG).

7. The Chamber issued an order (ICC-01/04-01/06-3179-tENG) fixing the schedule for the submission of observations on the draft implementation plan submitted by the TFV.
8. The Prosecution filed a request for an extension of time to respond to the draft implementation plan for reparations submitted by the TFV (ICC-01/04-01/06-3180).
9. The Chamber issued a decision on the Prosecution's request for an extension of time to file observations, granting the Prosecution and the parties an extension of time, until 18 January 2016, to file observations on the TFV's draft plan for reparations.
10. In response to Team V02's request, the Chamber issued a decision (ICC-01/04-01/06-3190-tENG) granting all parties an extension of time, until 1 February 2016, to present their observations on the TFV's draft plan for reparations.
11. In view of the above, the signatories, as the legal representatives of their clients, who are parties to the reparations proceedings, submit the following observations to the Chamber.

### **III. THE TFV'S SUBMISSION AND ANNEX A CONTAINING THE IMPLEMENTATION PLAN FOR REPARATIONS**

#### **➤ Submission of the Trust Fund for Victims**

12. The TFV's submission addresses several points, including the six below:
  - (a) The liability and indigence of Mr Lubanga;
  - (b) The list of victims;
  - (c) The connection between the reparations and the TFV's assistance mandate;
  - (d) The notion of collective reparations;
  - (e) The modalities of reparations (restitution, compensation and rehabilitation); and
  - (f) Mr Lubanga's financial liability.

- Annex A containing the implementation plan for collective reparations
13. The annex containing the implementation plan for collective reparations addresses nine main points:
- (a) Issues relating to victim eligibility;
  - (b) Operational issues (number of victims, selection of victims, criteria for prioritisation, etc.);
  - (c) Issues relating to the identification and intake of victims;
  - (d) The modalities and forms of the reparations proposed;
  - (e) The duration of the programme;
  - (f) The financial complement provided by the TFV;
  - (g) Management (collaboration and partnership, grant amounts, etc.);
  - (h) Communication and outreach strategy vis-à-vis communities and victims throughout the process; and
  - (i) Monitoring and evaluation and the reporting mechanism of the reparations programme.
14. Legal Representatives of Victims Team V02 will review the factual and legal issues addressed in the TFV's submission and Annex A of the implementation plan for reparations and, as necessary, will propose possible amendments in the interests of their clients.

#### **IV. SUBMISSION OF TEAM V02**

- REGARDING THE TFV'S SUBMISSION

15. As indicated in paragraph 11 of the TFV's submission, it is true that three cases before the Court concern the 2002–2003 conflict in Ituri. However, the charges in question are specific to each case. For this reason, it is important to proceed by way of inductive reasoning, i.e. to progress from a generalisation to individual instances, applying the principle of *specialis generalibus derogant*. The relevant cases are:
- (a) *The Prosecutor v. Thomas Lubanga* (ICC-01/04-01/06);
  - (b) *The Prosecutor v. Germain Katanga* (ICC-01/04-01/07);
  - (c) *The Prosecutor v. Bosco Ntaganda* (ICC-01/04-02/06).

16. Although it is true that the Lubanga and Ntaganda cases are similar in that they concern crimes of enlistment and conscription of child soldiers under the age of 15 years, the victims in the Lubanga case are those of the armed group FPLC/UPC: children belonging to a number of ethnic groups in Ituri and even in neighbouring regions, including North Kivu, South Kivu and others. There are also indirect victims, which include schools. Therefore, it is incorrect to state that "...the same communities and victims may be affected by either one or both of these cases...".
17. Consequently, the Legal Representatives of Victims are of the view that, during the reparations process, the Chamber should take into account the particularities associated with the liability and indigence of Mr Lubanga, as well as the list of the 129 victims participating in the Lubanga case, in order to (collectively) redress the harm they have suffered. For the victims who are entitled to collective reparations because they belong to a particular group (e.g. child soldiers/schoolchildren, or traders/farmers), these reparations must entail and include individual reparations, as they must take into account the physical suffering experienced by each victim.
18. A distinction must be drawn between the notion of collective reparations and the notion of community reparations. In the Lubanga case, victims can be categorised into groups to benefit from collective reparations (for example, the "schoolchildren" and "street vendors" groups of former child soldiers, etc.). It should be noted that forced recruitment generally took place either at schools or marketplaces, or in the fields or on roads, as the region is essentially rural. In view of this, the modalities of reparations should be determined on a case-by-case basis (restitution, compensation and rehabilitation).
19. The notion of community reparations is essentially based on the idea of *reconciliation* between the different communities in Ituri, against the backdrop of the ethnic conflicts of 2002–2003, and the modalities of *reparations/reconciliation* could be limited to reconciliation commemorations (apologies and/or requests for forgiveness made by people involved in the conflicts, customary rites, etc.). This scenario would bring into play the assistance mandate of the TFV. In this framework, it would also be necessary to assess Mr Lubanga's liability and the concern for genuine and effective reconciliation between the different communities in Ituri.

20. In paragraph 12 of its submission, the TFV does not rule out the possibility of examining whether domestic reparations schemes could be applied to the case at hand: "...considerations from relevant domestic compensation schemas that are a permanent feature of many justice systems...".

21. In paragraph 15, the TFV acknowledges that the reparations process is a procedure that must take into account the realities of the harm suffered by the victims of the crimes for which the accused was convicted:

...The Trust Fund would respectfully like to underline that the implementation of reparations is not a legal proceeding taking place in a courtroom. The real challenge will be to deliver meaningful redress to the victims in the contexts in which they live in eastern DRC and/or beyond. Accordingly, reparations need to be responsive to the operational reality in which they take place and the realities of the harm suffered by victims of the crimes for which the individual was convicted...

22. The TFV's submission can be summarised in four points:

- (a) The liability and indigence of Mr Lubanga: Mr Lubanga has been convicted of crimes of enlistment and conscription of child soldiers under the age of 15 years. No formal judgment has been issued with regard to his indigence. The reparations plan is only for the portion of the harm for which the TFV will be able to provide funding, not for what is required to redress all of the harm suffered. The TFV is prepared to contribute one million euros, and it will give priority to the most vulnerable victims.
- (b) The list and identification of victims: in the case at hand, the principal victims (129) have been identified along with the specific harm they have suffered. The TFV has taken into account a gender-based approach and has taken steps to avoid historical stereotypes relating to male and female identification of harm.
- (c) The notions of "collective reparations" and "community reparations": The TFV notes that there is no definition of "collective reparations" under international law. Collective reparations may result in individual benefits and apply to collective beneficiaries. Reconciliation requires community involvement.
- (d) The modalities of reparations could involve **restitution** (unlike the TFV, the Legal Representatives for Victims think this is possible in the present

case), **compensation** (reparations in cash and/or kind – this is also possible in this case), or **rehabilitation** (transformative reparations that may be psychological and/or symbolic, seeking conciliation and non-repetition).

23. The Legal Representatives of Victims V02 are of the view that some of their clients are vulnerable and must be given priority:

- (a) Nearly 20 female child soldiers, some of whom suffered sexual violence and/or unwanted pregnancies resulting in the birth of children: for these individuals (including the children born out of sexual violence), compensation and rehabilitation are necessary measures.
- (b) Some 40 child soldiers who were schoolchildren in 2002–2003 but are now adult men and women with families: for them, compensation for the interruption of their studies – restitution – could come in the form of continuing vocational training, while rehabilitation could consist in rebuilding the schools that were destroyed. For female child soldiers, rehabilitation must take into account the property that the girls' parents could have received as a bride price when the girls were married. In their culture and customs, when a young girl gets married, her bride price includes animals that are intended to be bred in order to establish a supply of livestock from which the family can draw to marry their sons.
- (c) Child soldiers who had been students will need continuing vocational training coupled with financial support so that they can start their own businesses once they receive the tools and materials they need.

#### ➤ REGARDING ANNEX A

24. *Victim eligibility:* The TFV correctly points out that victims can be direct, indirect or institutional. Team V02 represents all three categories of victims, including one institutional victim in particular: a/0188/06, a school destroyed by the UPC/FPLC. The Legal Representatives of Victims V02 do not agree with the TFV's statement that institutional victims will be considered only as a sub-form of indirect victims.

25. *Selection of victims and criteria for prioritisation:* The TFV points out that, owing to the limited funds available and the high number of potential victims, it

is likely that not all victims will be able to benefit from the plan for collective reparations, and that it will consequently be necessary to prioritise the potentially eligible victims. With regard to the present case, the Legal Representatives of Victims V02 are of the view that the victims who should be given priority are the 129 victims participating in the proceedings, who will need to be ranked by order of necessity, starting with the most vulnerable victims.

26. ***Identification and admission of victims:*** The TFV points out the fact that the Appeals Chamber specified that collective reparations would apply not only to the victims who have submitted their participation forms to the Court. Consequently, the TFV and its partners will hear direct victims so as to ensure that they meet the criteria for eligibility. If they so desire, victims will be able to meet with the TFV and their legal representatives. The Legal Representatives of Victims V02 are of the view that, considering the particularities of the harm, their clients' applications should be handled on a case-by-case basis.
  
27. ***Modalities and forms of reparations proposed:*** The TFV considers that, in conjunction with its partners, it will have to collect information in order to determine whether the harm suffered by a victim is a result of the crimes committed by Mr Lubanga. The modalities and forms of the reparations will depend on this preliminary assessment work. The Legal Representatives of Victims V02 are of the view that the participation forms of their clients, coupled with one-on-one interviews with them, could be used as a basis for this work.
  
28. ***Management and TFV complement:*** The TFV states that the funds available are limited and that it is prepared to contribute 1 million euros to fund collective reparations in the present case. The TFV has also decided that an open tender procurement process is appropriate to solicit competent and experienced partners to implement the plan. The Legal Representatives of Victims V02 are of the view that the funds available must first be allocated to the 129 victims participating in the present case. Moreover, the TFV should select its partners from the NGOs that have acted as intermediaries throughout the case since 2006, bearing in mind that there will not necessarily be conflicts of interests as mentioned by the TFV in paragraph 184 of Annex A.

**29. Duration of the programme:** The TFV states that the reparations programme should be implemented over a period of three years, commencing on completion of the *procurement* process. The Legal Representatives of Victims V02 are of the opinion that, during the first year, the 129 participating victims must be awarded compensation in view of their courage and patience in the present case. The following two years could be devoted to community reparations, through the outreach, monitoring and evaluation programmes with the partners selected and contracted by the TFV.

## FOR THESE REASONS

Legal Representatives of Victims Team V02 respectfully requests the Chamber to:

- take note of these observations; and
- order the Trust Fund for Victims to give priority consideration, during the collective reparations, to the interests of the 129 victims participating in these proceedings, and to then proceed with community reparations.

**JUSTICE SHALL BE DONE.**

[signed]

[signed]

[signed]

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Joseph Keta Orwinyo      Carine Bapita Buyangandu      Paul Kabongo Tshibangu

Legal Representatives of Victims Team V02

Dated this 1 February 2016 at Kinshasa, Democratic Republic of the Congo