

**Cour  
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Internationale**



**International  
Criminal  
Court**

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Date: 1 July 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**

**Observations of the V02 team on filings ICC-01/04-01/06-3208 and  
ICC-01/04-01/06-3209 submitted by the Trust Fund for Victims**

**Source:** Team of Legal Representatives of the V02 Victims

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

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**Observations of the V02 team on filings ICC-01/04-01/06-3208 and  
ICC-01/04-01/06-3209 submitted by the Trust Fund for Victims**

**I. PROCEDURAL HISTORY**

1. On 3 November 2015, the TFV submitted to Trial Chamber II the “Filing on Reparations and Draft Implementation Plan”.<sup>1</sup>

2. On 2 February 2016, the Chamber issued the “Order instructing the Trust Fund for Victims to supplement the draft implementation plan” by 31 March 2016; the Chamber granted the TFV a deadline extension until 31 May 2016.<sup>2</sup>

3. With respect to paragraph 20 of the Chamber’s Order, which refers to a first list of victims to be provided by the TFV by 31 May 2016, the V02 team met 13 eligible victims in the field, who stated their views and concerns about the reparations programme.

4. These 13 victims also expressed their views on paragraphs 21 and 22 of the Chamber’s Order, which concern the reparations programmes and refer to three points:

- the terms of reference of each programme;
- an evaluation of costs for each programme; and
- the time limits for each programme.

5. With respect to paragraph 23 of the Chamber’s Order, which lays emphasis on “the needs expressed by the victims in connection with the harm they have suffered”, the needs expressed by the 13 victims were recorded by category (e.g. schoolchild, trader or farmer).

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<sup>1</sup> ICC-01/04-01/06-3277-Conf.

<sup>2</sup> ICC-01/04-01/06-3207-tENG.

6. The Chamber granted the TFV an extension of time for the submission of additional information on the reparations programmes.

7. Bearing in mind the dossiers of victims in filing 3208, paragraphs 8, 43-84 and paragraph 10, the V02 team fails to understand why the 13 dossiers of its clients were considered “incomplete” and requests the Chamber to define objective criteria for determining whether a file is “complete”.

8. Bearing in mind the dossiers of victims in filing 3209, paragraphs 30-42 (the original approach of the implementation plan) and paragraphs 43-54 (on the “precise evaluation of costs”), the 13 victims expressed their views on the mode of assessing the amount to be awarded for reparations.

## II. BACKGROUND

9. In May 2015 a conference of experts, to which the LRVs were invited, took place in Belfast, Ireland. The V02 team was represented at the conference by one of its members. The aim of the conference was to study the methodology to be adopted for the implementation of the Chamber’s Order on reparations. Following the proceedings a number of reference documents were published.

10. In 2015 the TFV began holding consultations in Ituri with local communities which had been affected by the crimes committed by the Accused. Following the consultations, the TFV drafted a number of resolutions.

11. In February and April 2016 a member of the V02 team undertook field trips to gather victims’ views and concerns about the collective reparations process to be approved by the Chamber and, where applicable, obtain their consent to participate in the reparations phase.

Only 13 victims were contacted; they were jointly interviewed by the Trust Fund and a V02 team counsel. They stated their views and concerns and agreed to participate in the reparations phase.

### **III. LEGAL AND FACTUAL ASPECTS OF FILINGS 3208 and 3209**

12. The Team of Legal Representatives of the V02 Victims notes five legal issues arising from the TFV's filings 3208 and 3209:

- the normative framework of reparations (the ICC and its reparations mandate);
- other international criminal tribunals and their reparations mandates;
- preparing for reparations before the ICC: preliminary steps and requisite information, the role of the Registry and of the legal representatives of victims;
- the TFV's implementation of orders for reparations: developing the standards from the victims' perspective; and
- the TFV's implementation of orders for reparations: the need for reparations hearings.

13. Article 75 of the Statute establishes the legal basis for awarding reparations to victims. It is a very basic conceptual framework, which leaves it to the Chamber to determine the fundamental principles. The Court establishes principles to be applied to the forms of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. The use of the expression "to, or in respect of, victims" is intended to refer to the victim's relatives.

In the instant case, Trial Chamber I and the Appeals Chamber issued decisions establishing principles to be applied with regard to reparations and settled on the principle of collective reparations, which must be implemented by the Trust Fund.<sup>3</sup>

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<sup>3</sup> "Decision establishing the principles and procedures to be applied to reparations", 7 August 2012, ICC-01/04-01/06.

14. Rules 105 and 106 of the Rules of Procedure and Evidence of the ICTY and the ICTR were meant to facilitate local applications for reparations. According to rule 106:

- A. The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.
- B. Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or another competent body to obtain compensation.
- C. For the purposes of a claim made under paragraph (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.

In the instant case, and in accordance with the principle of complementarity under the Rome Statute, the Team of Legal Representatives of the V02 Victims contends that, like the TFV, the Congolese State should be involved in the implementation of the order for reparations, as the convict is Congolese and was found to be indigent.

Under Congolese law, the concept of reparations is expressed as a right to restitution, compensation, or award of damages for loss or injury; international crimes fall under the jurisdiction *ratione materiae* of military courts and there is extensive case law on the subject.

15. In the reparations phase, the Registry as a whole – and two of its sections (VPRS and VWSS) in particular – plays an important role. While the VPRS is responsible for facilitating victims' applications for reparations through efficient processing and checking of proof of identity, the VWU is in charge of matters security and protection of victims resulting from their participation participate in proceedings. Both sections will have to cooperate closely with the LRVs so that complete applications are submitted to the Chamber.

16. Pursuant to rule 94(2) of the RPE, the Court asks the Registrar to provide notification of the request for reparation to the person or persons named in the request or identified in the charges, and to any interested persons or States.

The first time that the Registry filed requests for reparations was in *Lubanga*, on 26 January 2009.<sup>4</sup>

The Registry addressed the Chamber orally during the proceedings, stating that VPRS had made its redactions on the basis of the Chamber's usual guidelines.

The Registry added that any application for reparations received during the proceedings should be notified to the Defence and to persons concerned.<sup>5</sup>

17. According to rule 94 of the RPE, notifications of requests for reparations may be notified to the Defence at first in a redacted version but also in a non-redacted version.

At the trial phase, the Registry told the Chamber: "... [t]he proposal that we make is that in future applications for reparations are automatically communicated to the Defence once any necessary redactions have been implemented".<sup>6</sup>

Non-redacted application forms have been transmitted only where the Defence was already aware of the victim's identity and was in possession of the non-redacted application form for participation in proceedings.

During the field mission undertaken in April 2016 by a counsel for V02, some of the 13 victims met refused to allow their identities to be revealed to the Defence for security reasons (see the victims' numbers).

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<sup>4</sup> ICC-01/04-01/06-1652.

<sup>5</sup> ICC-01/04-01/06-T-105-FRA ET WT 22-01-2009 23/6, p. 8, line 8, to p. 9, line 21.

<sup>6</sup> ICC-01/04-01/06-T-224-ENG ET WT 08-01-2010.

18. Whereas the Chambers have given the Registry guidelines as to what constitutes a complete application for participation in proceedings, there is no similar instruction for processing applications for reparations.

With reference to regulation 86(2) of the Regulations of the Court, the Chamber lists the following requisites for an application to participate to be considered complete:

- proof of identity of the applicant;
- the location and date of the crimes alleged;
- description of the harm suffered resulting from the commission of any crime falling within the jurisdiction of the Court;
- the victim's express consent, where the application is being made on his or her behalf;
- where the victim is a minor, proof of kinship or legal guardianship; and
- a signature or thumbprint on the document and, at least, on the last page of the application.

19. The Legal Representatives of the V02 Victims contend that the Chamber's guidelines on reparations applications should, *inter alia*:

- cite earlier decisions on the types of documents admissible as proof of identity for the purpose of participation; the same documentation should be used for reparations applications;
- state the type of documentary evidence admissible for proving harm;
- state examples of situations where harm may be presumed on the basis of the prevalent circumstances on the ground and the types of evidence that may be obtained;
- state the degree of precision required for the form of reparations stated in the application;
- offer victims the opportunity to specify types of collective reparations;
- given that the Court may award collective reparations, consider allowing victims to make collective reparations applications (by group or category): see rule 97 of the RPE; and



- set appropriate protective measures for victims with respect to reparations applications.

20. The 13 victims met expressed the view that, although the conditions for victim participation in proceedings leading up to conviction may, to some extent, continue to apply to reparations procedures, many issues still needed to be clarified with respect to article 75 of the Statute, in particular the fact that, since applications to participate in proceedings were made by individuals, reparations should, as a result, be awarded collectively and on the basis of the individual harm suffered.

21. According to the Legal Representatives of the V02 Victims, the Chamber should set out clear modalities for reparations from the perspective of victims.

The 1985 United Nations Declaration concerning victims sets out cross-cutting normative concepts derived from the local contexts; the Declaration affirms the need for national recognition of the victims' right to State compensation and support for rehabilitation. The United Nations Basic Principles of 1985 focus on norms with respect to international crimes (Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the United Nations General Assembly, A/RES/40/34, 29 November 1985).

22. The Legal Representatives of V02 Victims submit that, if reparations orders are to be properly implemented, hearings – both *ex parte* (Registry-LRVs-TFV) and with the Defence – will have to be held. This is necessary above all for determining the award of reparations, and for individualised and collective assessment of damage, loss or injury.

#### IV. CONCLUSION

##### 23. Identification of eligible victims

Victims admitted to participate at the trial phase who filled out the application form for the reparations phase are eligible and should be awarded reparations.

In accordance with rule 94 of the RPE, which requires claimants to provide proof of identity and their address, the previous decisions of various Chambers on proof of identity for participation may be useful. With regard to the situation in the DRC, Pre-Trial Chamber I noted that “in regions which are or have been ravaged by conflict, not all civil status records may be available, and if available, may be difficult or too expensive to obtain.”<sup>7</sup>

Pre-Trial Chamber I listed documents admissible as proof of identity, kinship and legal guardianship. In subsequent decisions the list of admissible documents has been reiterated and expanded, taking into account specific local contexts. The Chambers have been sensitive to the specific environment in which the victims live, in particular the security situation, and the prevailing political, social and personal circumstances that affect their ability to obtain such documents.

##### 24. Assessment of damage, loss or injury

Where victims are identified, individualised reparations may be awarded pursuant to rule 98(2) of the RPE; however, unidentified victims must fit into a category defined by the Chamber and will receive specific treatment.

The assessment of damage, loss or injury to the identified victims will be made on the basis of their application forms for participation, whereas for unidentified victims the assessment will be made on the basis of a less stringent standard of proof similar to that applied in the case of mass applications.

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<sup>7</sup> Pre-Trial Chamber I, ICC-01/04-374, 17 August 2007, para. 14.

Pursuant to article 75 of the Statute, the Court may “[...] determine the scope and extent of any damage, loss and injury”, and to rule 97(1) of the RPE, “[t]aking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.”

In the instant case, therefore, the two forms of reparations (individualised and collective) set out in the TFV’s three-year reparations plan do not seem incompatible.

#### 25. International criminal tribunals and reparations

In a judgment on reparations, the Inter-American Court of Human Rights considered that: “[...] it is appropriate to fix the payment of ‘fair compensation’ in sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered.” The existence of a large number of victims is not sufficient reason not to consider compensation to be an appropriate form of reparation.

There have been large numbers of victims in numerous cases before the Inter-American Court of Human Rights, e.g. the *Plan de Sánchez Massacre*, which involved 317 victims awarded individual compensation.<sup>8</sup>

#### 26. Need for reparations hearings

In the light of various issues concerning the identification of victims, assessment of injury and review of the relevant case-law of the various international criminal tribunals, both *ex parte* and public hearings with the parties will need to be held.

The case-law of the criminal courts of the DRC with regard to international crimes will also be reviewed, especially with respect to the type of awards to be made to the victims.

FOR THESE REASONS,

MAY IT PLEASE THE TRIAL CHAMBER

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<sup>8</sup> *Plan de Sánchez Massacre v. Guatemala*, Inter-American Court of Human Rights, 19 November 2004.

- To take note of the observations of the Team of Legal Representatives of the V02 Victims.

- In the alternative, to order hearings – *ex parte* the Registry, the TFV and the Legal Representatives of Victims, on the one hand, and public, including the Defence, on the other.

JUSTICE SHALL BE DONE.

Dated this 1 July 2016

At Kinshasa, Democratic Republic of the Congo, and  
at The Hague, Netherlands

[signed]

Joseph Keta Orwinyo

[signed]

Paul Kabongo Tshibangu

[signed]

Carine Bapita Buyangandu

**Legal Representatives of Victims**