

**Cour
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**International
Criminal
Court**



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No.: ICC-01/04-01/06
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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. LUBANGA DYILO***

Public

Observations of V01 Group of Victims on the “Filing on Reparations and Draft Implementation Plan” filed by the Trust Fund for Victims, ICC-01/04-01/06-3177

Source: Legal representatives of victims V01

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

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**Unrepresented Applicants for
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**Victims Participation and Reparations
Section**

Other

1. Noting the filing on reparations and the draft implementation plan filed by the Trust Fund for Victims on 3 November 2015.¹
2. Noting the orders of 12 November 2015² and 20 November 2015³ fixing the schedule for observations on the draft implementation plan submitted by the Trust Fund for Victims.
3. Noting the observations of the Prosecution and the *Ligue pour la Paix, les Droits de l'Homme et la Justice* filed on 18 December 2015.⁴
4. Noting Trial Chamber II's decision on the request of the Office of Public Counsel for Victims and the request of the Legal Representatives of Victims V02⁵ directing the Legal Representatives of Victims, the OPCV and the Defence to file their observations by 1 February 2016.

I. TFFV'S INTERVENTION IN THE REPARATIONS

5. In the amended order for reparations of 3 March 2015,⁶ the Appeals Chamber invited the Trust Fund for Victims to include, in the amount necessary for the reparations, the amount that its Board of Directors will make available in order to advance the funds of the reparations programme, which, in principle, are payable by the sentenced person: "The Trust Fund should also include the monetary amount, if its Board of Directors so decides, that it will complement as an advance in order that the awards can be implemented."⁷
6. The victims note the TFFV's announcement that, in principle, it is willing to allocate an amount of EUR 1 million for funding a reparations programme in

¹ ICC-01/04-01/06-3177-Conf. ("the Filing on Reparations").

² ICC-01/04-01/06-3179-tENG.

³ ICC-01/04-01/06-3183.

⁴ ICC-01/04-01/06-3186 and 3187.

⁵ ICC-01/04-01/06-3190-tENG.

⁶ "Amended Order for Reparations", ICC-01/04-01/06-3129-AnxA, 3 March 2015, ("Order for Reparations").

⁷ Order for Reparations, para. 78.

the present case, subject to confirmation of Mr Lubanga's indigence and endorsement by the Court of the draft reparations plan.⁸

7. In the view of the TFV, however, the Appeals Chamber's suggestion that the TFV should "advance" (part) of the amount which Mr Lubanga will be liable to pay in reparations was "unfortunate";⁹ the TFV argued that its contribution should be considered only as a "complement" to the programme to be implemented using the funds of the sentenced person.
8. In proposing to discard the notion of "advance" in favour of "complement", the TFV also noted that it is the Registry's responsibility to monitor Mr Lubanga's assets and future income and to recover, if need be, the amounts needed to fund the reparations. It also argued that the funds used as a "complement" must retain their status as "matching funds" which it may have at its disposal under its assistance mandate.¹⁰
9. While it is true that the Registry and the Presidency have a role to play in recovering funds from a sentenced person, the victims do not share the TFV's view that the programme that it will implement will merely be a "complement" to the reparations for which Mr Lubanga should, in theory, be responsible.
10. The Chamber recently decided that Mr Lubanga will remain in detention for at least a further two years.¹¹ It is therefore unlikely that funds acquired from the sentenced person will be available in the immediate future. The TFV's intervention in the reparations programme (as distinct from its assistance programmes) will necessarily and primarily be concerned with the (pre-)funding of reparations for the harm caused by the crimes for which Mr Lubanga was sentenced. Nothing is changed by the fact that the Appeals Chamber has left open the possibility of also using matching funds for

⁸ Filing on Reparations, para. 120.

⁹ *Ibid.*, para. 124.

¹⁰ *Ibid.*, paras. 157-159.

¹¹ "Decision on the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo", 22 September 2015, ICC-01/04-01/06-3173.

interventions redressing harm not covered by the sentencing of the interested party.

11. The TFV itself underscored that the amount intended to fund the reparations programme forms part of a reserve that has been explicitly set aside for reparations programmes (and not assistance programmes).
12. In view of all these factors, there are grounds for considering that the amount allocated to reparations by the TFV's Board of Administrators in this case will constitute an advance on the reparations which will be ordered against Mr Lubanga and which may be recovered from him if the opportunity arises, either on the Registry's initiative or on that of the TFV.
13. A further consequence of this is that the use of this amount to implement the reparations plan must be supervised by the Chamber and not by the TFV alone.

II. THE BENEFICIARIES OF THE REPARATIONS PROGRAMME

14. The TFV stated that, at this stage, it is unable to draw up a list of victims, describe the harm suffered by each of them, and determine the amount required to redress it. The victims concur with this position. Indeed, acquiring all this information would involve considerable effort and expense and would oblige the victims (a) to reveal themselves as such, (b) to provide evidence and (c) to subject themselves to a screening process without knowing what the prospective collective reparations programme may be able to offer them.
15. Only after the reparations plan has been approved will they be able (a) to decide whether one of the modalities proposed by the plan (medical care, psychological support, vocational training, etc.) may prove useful to them and (b) to ask to participate in a particular part of the programme, if the need arises.

16. Aside from the fact that any participation in the reparations programme (which Mr Lubanga and his supporters continue to oppose) will involve a security risk, thousands of victims cannot be expected to obtain proof of their identity, to recount their stories once again, to gather evidence of the harm that they suffered, in short, to devote time and energy to a collective reparations programme in difficult circumstances when the content of the programme is not yet established and they do not even know where or when it will be implemented.
17. It must be borne in mind that the victims have been awaiting reparations since the start of the case, i.e., for almost 10 years, leading some of them to feel discouraged and to lose confidence in the Court. Undergoing such an inventory process could raise people's hopes again only to have them dashed.
18. Furthermore, it would be difficult to reconcile a process of this kind with the notion of collective reparations. A programme of collective reparations is not created by adding together individual requests. Rather, it constitutes a coherent offer to which individuals may subscribe. Logically, therefore, it is during the execution stage that it will be possible to identify the beneficiaries who make themselves known and to examine their individual situations.
19. It is also preferable to avoid any disparity between the funds allocated to preparing the programme and those available for its implementation.
20. In proposing to draw up a programme of collective reparations without having previously created an exhaustive list of victims and/or potential beneficiaries, the TFV violates neither the Defence's rights nor the rights of victims, provided that these parties are able to express their views and concerns about the way in which the programme will be designed and organised.
21. The final amount which the Court will order against Mr Lubanga as a contribution to reparations may easily be determined on the basis of overall estimates of the expected cost of the reparations programme, especially since the Court does not yet have existing case law by which to assess the amount of reparations due for the harm suffered by an individual victim, in particular in

cases of emotional harm. Harm can be redressed not only on an objective basis but also by including an element of punitive damages. Compensation can aim to provide full reparations but can also involve the granting of a fixed amount. In this regard, national systems are as varied as are the amounts awarded for similar types of harm.

22. As a general rule, victims can recognise themselves in the descriptions of the various kinds of physical, psychological and emotional harm mentioned in the filing.
23. A non-negligible form of harm, which in particular affects raped girls, as well as boys who become violent and marginalised, involves victims being stigmatised and rejected by the community. For some victims, this stigmatisation is compounded by that arising from their participation in the proceedings and from the fact that victims connected with the proceedings may be portrayed as cheats and opportunists.
24. In future, unless Mr Lubanga changes his point of view on the matter, this stigmatisation could also affect victims who wish to benefit from the reparations programme. Indeed, he could play a decisive (positive or negative) role in the reparations process and an indirect role in reconciling his former child soldiers with their communities.

III. THE IMPLEMENTATION PLAN FOR COLLECTIVE REPARATIONS

25. The TFV issued an implementation plan for collective reparations as an annex to its filing.¹²
26. The victims agree with the TFV's suggestion to include, where possible, a maximum number of direct and indirect victims of the crimes for which Mr Lubanga is responsible, regardless of where the victims were when they

¹² Draft Implementation Plan for collective reparations to victims, ICC-01/04-01/06-3177-AnxA, ("the Implementation Plan").

were recruited into the FPLC, the localities where they stayed as members of this militia, or the location of the sites where they took part in hostilities.¹³

27. The victims also support the assumption that psychological and emotional harm will have been suffered by any child under 15 years of age who participated in military activities. Moreover, this assumption forms the basis on which this conduct is criminalised.
28. However, the victims are astonished by the TFV's proposal that victims who have been relocated (either voluntarily or as part of the Court's protection programme) should be excluded from its reparations programme as a matter of principle.¹⁴ This proposal is in fact shocking for victims who have been forced to leave their region and families because they cooperated with the Prosecution or because their participation in the proceedings has come to light.
29. Rather, the TFV should examine the extent to which initiatives could also be carried out in regions to which several victims have been relocated and the extent to which victims living in other regions or countries could participate in the programmes that have been implemented. Moreover, some of the activities mentioned by the TFV can easily be carried out in other regions (medical care, psychological support, the fitting of artificial limbs, surgery, financial support, vocational training, etc.).

IV. THE ROLE OF LEGAL REPRESENTATIVES

30. The implementation plan proposes, logically enough, that victims' representatives be present at that stage of their clients' interviews when they are screened to determine their eligibility as beneficiaries of the programme.
31. The TFV, on the other hand, proposes to exclude all legal assistance during the procedure to determine the most appropriate form of reparations in

¹³ Implementation Plan, paras. 10-13.

¹⁴ Implementation Plan, para. 26.

accordance with the harm suffered by victims and their personal circumstances. Yet this process is not of a technical nature and may involve important choices for victims that shape their future lives and require them to make commitments, including financial ones,¹⁵ such as the decision to undertake psychological counselling or vocational training or to become professionally active with the financial support of the reparations programme.

32. There is no justification for excluding legal assistance or trusted persons from this phase, in particular since the interview to determine a victim's eligibility and the discussion concerning the most appropriate form of reparations will probably take place in a single session.

V. THE PROCEDURE FOR REACHING INDIVIDUAL DECISIONS

33. Decisions on victims' eligibility and/or the appropriate mode of reparations will probably be made by the partners whom the TFV makes responsible for implementing the programme.
34. The TFV has accepted that a negative decision on eligibility as a victim should be "explained" to victims without specifying whether this explanation would be given in writing or they would just be told at the end of the interview.
35. In the legal representatives' view, this does not suffice. The consequences of decisions on both eligibility and modes of reparations are of great importance to the persons concerned and negative decisions could result in victims losing any right to the reparations enshrined in article 75 of the Statute.
36. This implies that negative decisions should be reasoned and communicated in writing to interested parties and, if need be, to their counsel. They should also be authenticated by a TFV staff member.
37. Negative decisions should also be subject to appeal. Such appeals need not be of a legal nature or be entrusted to the Chamber but, if they are not, the TFV

¹⁵ This point was also correctly made by LIPADHOJ, ICC-01/04-01/06-3187, para. 7.

should at least institute an internal forum which “rejected” victims can address so that the decision may be reviewed and any arguments that they have may be put forward.

38. Since the reparations process is monitored by the Chamber, the victims’ representatives must also have the opportunity to address it in order to highlight any anomalies or problems in the implementation, either with regard to the TFV or to the partners who implement the reparations plan.

FOR THESE REASONS,

MAY IT PLEASE THE TRIAL CHAMBER TO:

Take note of the observations of the legal representatives.

On behalf of the V01 group of victims

[signed] [signed]

Luc Walley and Franck Mulenda, Legal Representatives.

Done on 1 February 2016 at Brussels, Belgium, and Kinshasa, D.R.C.