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Date: **10 April 2017**

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
with three confidential annexes**

**Observations of the Defence for Mr Lubanga on the
First Transmission of Redacted Applications for Reparations of 8 March 2017**

Source: Defence for Mr Thomas Lubanga

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

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CLASSIFICATION

1. The three annexes to this filing of the Defence for Mr Lubanga are classified as confidential because they contain information that could be used to identify applicants for victim status.

BACKGROUND

2. On 22 February 2017, Trial Chamber II (“Chamber”) issued an order setting deadlines for the transmission to the Defence for Mr Lubanga of the application files of victims who may be eligible for reparations and for the submission of the Defence’s observations (“Order”).¹
3. On 8 March 2017, the Registry transmitted 31 redacted application files for reparations to the Defence (“First Transmission”).²
4. The Defence submits these observations in response to the First Transmission of 8 March 2017.

GENERAL OBSERVATIONS

1- Standard of proof

5. The granting of victim-beneficiary status has the effect not only of creating an entitlement to measures of redress, but also – insofar as it defines the number of victims of the crimes charged – of determining the scope of the convicted person’s liability. For both of those reasons, it is subject to a standard of proof higher than that required for mere participation in the criminal trial.

¹ “Order for the Transmission of the Application Files of Victims who may be Eligible for Reparations to the Defence Team of Thomas Lubanga Dyilo”, 22 February 2017, ICC-01/04-01/06-3275-tENG.

² “First Transmission to the Defence of Redacted Applications for Reparations pursuant to Trial Chamber II Order ICC-01/04-01/06-3275 of 22 February 2017”, 8 March 2017, ICC-01/04-01/06-3276.

6. The Appeals Chamber has held that eligibility for victim-beneficiary status with respect to collective reparations must be determined on a balance of probabilities and in the light of relevant and reliable evidence.³
7. By order of 24 March 2017 in *The Prosecutor v. Germain Katanga*,⁴ this Chamber gave specific instructions on proving eligibility⁵ in accordance with the principles laid down by the Appeals Chamber.
8. An applicant's own incomplete, unverified statements cannot be held to establish victim standing, especially when contradictory or inconsistent.
9. Likewise, proof of the harms alleged – with regard to their nature, gravity and causal link with the crimes charged – cannot be held to consist solely in applicants' statements, nor in medical or financial "expert reports" devoid of any safeguards of reliability or impartiality.
10. The Chamber has recalled that, in accordance with rule 94 of the Rules of Procedure and Evidence, applications for reparations must be supported by proof of the extent of the harm suffered and of the causal nexus between the alleged harm and the crime committed.⁶ Accordingly, in its decision of 24 March 2017, the Chamber noted that applicants in *Katanga* had finalized their applications with statements from witnesses and other documentation supporting the harm suffered and the connection to the crimes charged.⁷

³ "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012", 3 March 2015, ICC-01/01-01/06-3129, paras. 22 and 81-84; ICC-01/04-01/06-3129-AnxA, para. 65.

⁴ "Order for Reparations pursuant to Article 75 of the Statute", 24 March 2017, ICC-01/04-01/07-3728-tENG.

⁵ *Ibid.*, paras. 50 and 52.

⁶ "Order for Reparations pursuant to Article 75 of the Statute", 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 45.

⁷ *Ibid.*, paras. 55 and 104.

11. In the case at bar, each applicant's right to reparations, whether as a direct or indirect victim, is predicated on the adduction of proof that children under the age of 15 were enlisted into the armed forces of the UPC between September 2002 and August 2003.
12. Such proof may proceed only from consistent, precise and detailed statements by the applicants, corroborated by relevant and reliable documentation and testimony. The parties and participants responsible for producing that evidence before the Chamber (Legal Representatives, Office of Public Counsel for Victims and Trust Fund for Victims) have a duty to verify its reliability.
13. As the Defence has already pointed out, the offices in charge of assisting victims have had the time and the means, over the past several years, to collect and verify the necessary evidence to produce applications for reparations that satisfy the standard of proof described above.⁸
14. Any vague or incomplete applications, therefore, can only be seen as throwing the merit of the underlying claims into serious doubt.
15. Nevertheless the applications for reparations presented in this case are devoid (save in exceptional instances) of precise and detailed statements by the applicants – and of documents and testimony capable of corroborating them. On the contrary, many are plagued by inconsistencies that compel doubt as to their accuracy and even their sincerity. The documents that have been transmitted do not appear to have been vetted.

⁸ “Réponse consolidée de la Défense de M. Thomas Lubanga relative à la ‘First submission of victim dossiers’, datée du 31 mai 2016, et au ‘Additional Programme Information Filing’, daté du 7 juin 2016 ”, 1 July 2016, ICC-01/04-01/06-3211-Corr, para. 28.

2- Adversarial approach to evidence

16. As previously highlighted by the Defence, the Chamber cannot legally consider any evidence until that evidence has been fully subjected to the adversarial process required by the judicial framework of the reparations proceedings.⁹
17. This requirement means that the Defence must effectively be afforded the opportunity to test every aspect of every item of evidence, and therefore that the evidence must be disclosed to the Defence in its entirety. Only full disclosure can guarantee the effectiveness of the Defence's rights to investigate the reliability of the evidence submitted to the Chamber and to make any relevant submissions on the basis of its investigations.
18. In the instant case, the redactions in the applications for reparations disclosed to the Defence thwart the effective exercise of those basic rights.
19. The non-disclosure to the Defence of the identities of most of the applicants for victim status, and accordingly of any factual details that might directly or indirectly lead to their identification, precludes any serious investigation or analysis of the merits of the applications for reparations so redacted.
20. The non-disclosure of identities – solely in accordance with the wishes of the applicants in question – is not based on any demonstration of specific needs for protection. The fact that a significant number of applicants consented to disclose their identities,¹⁰ with some reporting no particular apprehensions,¹¹ demonstrates that the current situation in Ituri fails to justify any such

⁹ "Order for Reparations pursuant to Article 75 of the Statute", 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 16.

¹⁰ "First Transmission to the Defence of Redacted Applications for Reparations pursuant to Trial Chamber II Order ICC-01/04-01/06-3275 of 22 February 2017", 8 March 2017, ICC-01/04-01/06-3276; "Third Transmission and Report on Applications for Reparations", 31 March 2017, ICC-01/04-01/06-3287, para. 12.

¹¹ ICC-01/04-01/06-3208-Anx2-Red; ICC-01/04-01/06-3208-Anx8-Red; ICC-01/04-01/06-3216-Conf-Anx1-Red; ICC-01/04-01/06-3216-Conf-Anx2-Red; ICC-01/04-01/06-3216-Conf-Anx4-Red; ICC-01/04-01/06-3216-Conf-Anx5-Red; ICC-01/04-01/06-3216-Conf-Anx8-Red; ICC-01/04-01/06-3216-Conf-Anx9-Red; ICC-01/04-01/06-3268-Conf-Anx5-Red; ICC-01/04-01/06-3268-Conf-Anx8-Red.

protective measure, the likes of which should be ordered only exceptionally and for pressing reasons specific to the applicants concerned.

21. Under the circumstances, a refusal to disclose one's identity to the Defence may reasonably be interpreted as an attempt to obstruct the required verifications, raising serious doubts as to the sincerity of an applicant's claims.
22. As these applications for reparations have not been subjected to genuine adversarial scrutiny, they cannot be taken into consideration by the Chamber. They certainly cannot be used against Mr Thomas Lubanga to determine the scope of his liability.
23. The same is true of applications for reparations that disclose the applicant's name but conceal from the Defence any information known to the Chamber and the other parties about the applicant's place of residence. Such non-disclosure obstructs lawful enquiries by the Defence and frustrates the genuinely adversarial process required for a fair trial. These applications, therefore, cannot be used in Mr Thomas Lubanga's case.

SPECIFIC OBSERVATIONS

24. The Defence has specific observations to make on each of the applications for reparations, in particular as regards the proof of applicants' identities, enlistment in the UPC/FPLC between September 2002 and August 2003, the harms alleged and the link between those harms and the crime committed.
25. Those observations are presented in three confidential annexes.¹²

¹² Annex 1, "Observations de la Défense de M. Lubanga sur la première transmission de dossiers de victime du Fonds au Profit des Victimes ICC-01/04-01/06-3208"; Annex 2, "Observations de la Défense de M. Lubanga sur la deuxième transmission de dossiers de victime du Fonds au Profit des Victimes ICC-01/04-01/06-3216"; Annex 3, "Observations de la Défense de M. Lubanga sur la troisième transmission de dossiers de victime du Fonds au Profit des Victimes ICC-01/04-01/06-3268".

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER II TO:

FIND that none of the 31 applications for reparations cited here, as they stand, satisfy the conditions laid down by the Appeals Chamber; and

Consequently, REJECT the 31 applications for reparations transmitted to the Defence.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 10 April 2017

At The Hague