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Date: **21 October 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

**Order relating to the request of the Office of Public Counsel for Victims
of 16 September 2016**

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

Office of the Prosecutor

Counsel for Thomas Lubanga Dyilo

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Legal Representatives of V01 Victims

Mr Luc Walley

Mr Franck Mulenda

Legal Representatives of V02 Victims

Ms Carine Bapita Buyangandu

Mr Paul Kabongo Tshibangu

Mr Joseph Keta Orwinyo

Office of Public Counsel for Victims

Ms Paolina Massidda

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms Isabelle Guibal

Trust Fund for Victims

Mr Pieter de Baan

TRIAL CHAMBER II (“the Chamber”) of the International Criminal Court, acting pursuant to article 75 of the Rome Statute (“the Statute”), issues the following order.

I. Procedural background

1. On 9 February 2016, the Chamber issued an order¹ (“the Order of 9 February 2016”) instructing the Trust Fund for Victims (“the TFV”) to supplement the draft implementation plan for collective reparations which the TFV had submitted on 3 November 2015.² In its order, the Chamber recalled the duties assigned to it by the Appeals Chamber,³ namely to monitor and oversee the implementation of the plan – once approved by the Chamber – for carrying out the collective reparations ordered by the Appeals Chamber, and to determine the amount of reparations for which Thomas Lubanga Dyilo (“Mr Lubanga”) is liable.⁴

2. With regard to the latter duty, the Chamber indicated that it:

will not be able to rule on the monetary amount of Mr Lubanga’s liability until the potential victims have been identified and it has examined both their status as victims eligible to benefit from the reparations and the extent of the harm they have suffered⁵ [...] once the Defence has had the opportunity to submit its observations on the eligibility of each victim.⁶

In this connection, the Chamber instructed the TFV “to begin the process of locating and identifying victims potentially eligible to benefit from the reparations and transmit the results of this process to the Chamber [...]”.⁷ The Chamber also instructed the TFV to prepare a file for each victim potentially eligible for reparations in the instant case (“Potentially Eligible Victims”) and to provide the

¹ “Order instructing the Trust Fund for Victims to supplement the draft implementation plan”, 9 February 2016, ICC-01/04-01/06-3198-tENG.

² Order of 9 February 2016, p. 12.

³ “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2”, 3 March 2015, ICC-01/04-01/06-3129; annex A, ICC-01/04-01/06-3129-AnxA; and the two public annexes, ICC-01/04-01/06-3129-Anx1 and ICC-01/04-01/06-3129-Anx2.

⁴ Order of 9 February 2016, para. 9.

⁵ Order of 9 February 2016, para. 14.

⁶ Order of 9 February 2016, para. 14.

⁷ Order of 9 February 2016, para. 15.

Chamber with a first batch of files by 31 March 2016, a second batch by 15 July and a third batch by 31 December 2016.⁸

3. On 31 May 2016, after being accorded further time,⁹ the TFV submitted a first batch of files of Potentially Eligible Victims¹⁰ (“the First Submission of Files”). In its submission, the TFV informed the Chamber of the challenges encountered during its first field missions to prepare files for Potentially Eligible Victims. It also raised concerns about the process for identifying Potentially Eligible Victims¹¹ (“the Identification Process”) and asked the Chamber to reconsider the Order of 9 February 2016.¹² Moreover, the TFV informed the Chamber that, pending the Chamber’s decision on its request for reconsideration, the TFV was suspending its own participation in any activity aimed at identifying Potentially Eligible Victims or assessing the harm suffered.¹³

4. On 7 June 2016, after again being accorded further time,¹⁴ the TFV filed a document relating to the reparations programmes, in which it reiterated its request for reconsideration¹⁵ (“the Document of 7 June 2016”).

5. On 1 July 2016, in accordance with the Chamber’s instructions,¹⁶ the Office of Public Counsel for Victims¹⁷ (“the OPCV”), the Legal Representatives of victim

⁸ Order of 9 February 2016, paras. 17-18 and p. 12.

⁹ “Decision on the request of the Trust Fund for Victims for an extension of the time limit for the submission of the first batch of files of potential victims”, 29 March 2016, ICC-01/04-01/06-3205-tENG.

¹⁰ “First submission of victim dossiers With Twelve confidential, *ex parte* annexes, available to the Registrar, and Legal Representatives of Victims V01 only”, 31 May 2016, ICC-01/04-01/06-3208, and 12 confidential *ex parte* annexes.

¹¹ First Submission of Files, paras. 8 and 43-84.

¹² First Submission of Files, paras. 9, 85-192 and 199; p. 68.

¹³ First Submission of Files, paras. 20-21.

¹⁴ “*Décision prorogeant le délai pour le dépôt de l’information additionnelle relative aux programmes de réparation*”, 4 May 2016, ICC-01/04-01/06-3207.

¹⁵ “Additional Programme Information Filing”, 7 June 2016, ICC-01/04-01/06-3209, para. 97.

¹⁶ “Order setting the time limit for observations on the latest documents filed by the Trust Fund for Victims”, 14 June 2016, ICC-01/04-01/06-3210-tENG.

¹⁷ “*Réponse consolidée aux soumissions déposées le 31 mai et le 7 juin 2016 par le Fonds au profit des victimes*”, 1 July 2016, ICC-01/04-01/06-3212 and one confidential *ex parte* annex available only to the OPCV (“the OPCV Observations”).

groups V01¹⁸ and V02¹⁹ (“the Legal Representatives of V01 and V02 Victims”) and the Defence team for Mr Lubanga²⁰ (“the Defence”) tendered consolidated observations on the First Submission of Files and the Document of 7 June 2016. The OPCV’s observations included proposals on the arrangements for implementing the Order of 9 February 2016.²¹

6. On 14 July 2016, the TFV submitted a second batch of files of Potentially Eligible Victims.²²

7. On 15 July 2016, the Chamber ordered the Registry to provide the Legal Representatives of victims and the TFV with all the necessary and appropriate aid and assistance for the purpose of locating and identifying Potentially Eligible Victims.²³

8. On 16 September 2016, the OPCV filed a request informing the Chamber of developments since the Order of 15 July 2016 and seeking its guidance on matters including the arrangements for identifying potential beneficiaries of reparations²⁴ (“the OPCV Request”).

¹⁸ “Observations consolidées du groupe de victimes V01 sur les documents ‘First submission of victim dossiers’ et ‘Additional Programme Information Filing’ déposés par le Fonds au profit des victimes respectivement les 31 mai et 1^{er} Juin”, 1 July 2016, ICC-01/04-01/06-3213.

¹⁹ “Observations de l’équipe V02 sur les écritures ICC-01/04-01/06-3208 et ICC-01/04-01/06-3209 du Fonds au profit des victimes”, 1 July 2016, ICC-01/04-01/06-3214.

²⁰ “Corrigendum - 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 (30 juin 2016, ICC-01/04-01/06-3211)”, 1 July 2016, ICC-01/04-01/06-3211-Corr and one public annex, ICC-01/04-01/06-3211-Corr-AnxA.

²¹ OPCV Observations, paras. 28-51.

²² “Second submission of victim dossiers With Eleven confidential, *ex parte* annexes, available to the Registrar, and Legal Representatives of Victims V02 and OPCV only”, 14 July 2016, ICC-01/04-01/06-3216 and 11 confidential *ex parte* annexes.

²³ “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”, 15 July 2016, ICC-01/04-01/06-3218-tENG.

²⁴ “Requête afin de solliciter des lignes directrices de la Chambre suite à l’Ordonnance émise le 15 juillet 2016”, 16 September 2016, ICC-01/04-01/06-3222.

9. On 3 October 2016, in accordance with the Chamber's instructions and after being accorded further time,²⁵ the TFV²⁶ and the Registry²⁷ filed observations on the OPCV Request.

10. On 6 October 2016, in accordance with the Chamber's instructions and after also being accorded further time,²⁸ the Legal Representatives of V01²⁹ and V02³⁰ Victims, as well as the Defence,³¹ filed observations on the OPCV Request and in response to the observations of the TFV and the Registry.

II. Chamber's analysis and conclusions

(a) Conduct of the Identification Process

11. The Chamber recalls that, in the First Submission of Files, the TFV informed the Chamber that it was unilaterally suspending its own ongoing Identification Process activities, pending the Chamber's decision on its request for reconsideration.³²

12. The Chamber considers that the TFV has a duty to continue identifying Potentially Eligible Victims as instructed in the Chamber's Order of 9 February 2016.

²⁵ "Order setting time limits for observations on the motion of the Office of Public Counsel for Victims of 16 September 2016", 20 September 2016, ICC-01/04-01/06-3224-tENG; "Decision granting an extension of time limit to submit observations on the request of the Office of Public Counsel for Victims of 16 September 2016", 23 September 2016, ICC-01/04-01/06-3228-tENG.

²⁶ "Observations on the 'Requête afin de solliciter des lignes directrices de la Chambre suite à l'Ordonnance émise le 15 juillet 2016', 3 October 2016, ICC-01/04-01/06-3237.

²⁷ "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", 3 October 2016, ICC-01/04-01/06-3238.

²⁸ "Order setting time limits for observations on the motion of the Office of Public Counsel for Victims of 16 September 2016", 20 September 2016, ICC-01/04-01/06-3224-tENG; "Decision granting an extension of time limit to submit observations on the request of the Office of Public Counsel for Victims of 16 September 2016", 23 September 2016, ICC-01/04-01/06-3228-tENG.

²⁹ "Observations du groupe de victimes V01 sur la requête du BCPV du 16 septembre 2016 et les réponses du Fonds au Profit des Victimes et du Greffe déposées le 3 octobre 2016", 6 October 2016, ICC-01/04-01/06-3242.

³⁰ "Observations de l'équipe V02 de représentants légaux sur les écritures ICC-01/0401/06-3222 du Bureau du conseil public pour les victimes et ICC-01/04-01/06-3223-Conf (+ annexe confidentielle) du Fonds au profit des victimes", 6 October 2016, ICC-01/04-01/06-3244-Conf.

³¹ "Observations de la Défense de M. Thomas Lubanga à la 'Requête afin de solliciter des lignes directrices de la Chambre suite à l'Ordonnance émise le 15 juillet 2016' déposée par le Bureau du conseil public pour les victimes le 16 septembre 2016", 6 October 2016, ICC-01/04-01/06-3241.

³² First Submission of Files, paras. 20-21.

Indeed, the Chamber notes that an entity which is instructed to execute an order of the Court cannot, on its own motion, suspend such execution. The Chamber observes, moreover, that the only explicit reference in the Statute to the possibility of suspension applies to cases in which the Appeals Chamber may issue an order suspending the effect of a decision that has been the subject of an interlocutory appeal.³³

(b) Continuation of the Identification Process

13. The OPCV has informed the Chamber that it now has the additional resources to discharge its mandate in the instant case.³⁴ To that end, the OPCV submits that it is prepared to make a tangible and active contribution to these proceedings in the future but that, without clear instructions from the Chamber as to the OPCV's role, it is unable to contribute effectively.³⁵

14. The OPCV also requests clarification on the issue of the arrangements for identifying Potentially Eligible Victims.³⁶ In this connection, the OPCV contends that the suspension of the TFV's efforts to identify Potentially Eligible Victims and prepare their files is contrary to the interests of the victims whom the OPCV represents.³⁷ In order to move the proceedings forward, the OPCV proposes that it interview Potentially Eligible Victims itself, with support from the Registry.³⁸

15. As set out in its Order of 15 July 2016, the Chamber considers that the search for Potentially Eligible Victims should continue in order "to supplement the sample already available and to better assess to what extent the list of victims identified is representative of all potential[ly eligible] victims"³⁹ and to inform the Chamber's decision as to the amount of Mr Lubanga's liability for reparations.⁴⁰

³³ Article 82(3) of the Rome Statute; rule 156(5) of the Rules of Procedure and Evidence.

³⁴ OPCV Request, para. 12.

³⁵ OPCV Request, para. 15.

³⁶ OPCV Request, para. 15.

³⁷ OPCV Request, para. 16.

³⁸ OPCV Request, para. 20.

³⁹ Order of 15 July 2016, para. 8.

⁴⁰ Order of 9 February 2016, para. 14.

16. The Chamber recalls the role delineated for the OPCV in the proceedings against Mr Lubanga, namely: (1) to act as the legal representative of unrepresented applicants for reparations and (2) to represent the interests of victims who may benefit from an award for reparations under rules 97 and 98 of the Rules of Procedure and Evidence.⁴¹ The Chamber also notes that the OPCV currently appears to have 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.

17. Furthermore, the Chamber recalls that, pursuant to its Order of 9 February 2016, the TFV may request assistance in the Identification Process from the Victims Participation and Reparations Section (“VPRS”), the Legal Representatives of V01 and V02 Victims, and the OPCV.⁴² On 15 July 2016, the Chamber instructed “the Registry to provide the Legal Representatives of victims and the Trust Fund for Victims with all the necessary and appropriate aid and assistance for the purpose of locating and identifying [Potentially Eligible Victims]”.⁴³

18. Having considered the foregoing, the Chamber authorises the OPCV to continue the Identification Process, with support from the relevant Sections of the Registry, according to the specifications set out below.

(c) Guidelines for the Identification Process

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.⁴⁴ Nevertheless, the OPCV suggests that the form used by the TFV during its initial missions be adopted.⁴⁵ The Chamber considers that it is for the OPCV to decide, on the basis of its own

⁴¹ Trial Chamber I, “Decision on the OPCV’s request to participate in the reparations proceedings”, 5 April 2012, ICC-01/04-01/06-2858, paras. 11-12.

⁴² Order of 9 February 2016, para. 16.

⁴³ Order of 15 July 2016, p. 7.

⁴⁴ OPCV Request, para. 20.

⁴⁵ OPCV Request, para. 21.

expertise, what approach it deems suitable for the conduct of interviews with Potentially Eligible Victims. Nonetheless, for the sake of consistency, the Chamber considers that it is appropriate to use the form previously employed by the TFV.

20. The OPCV maintains that its field counsel's participation⁴⁶ in the outreach missions organised by the Registry would help accelerate the process of identifying Potentially Eligible Victims and preparing their files.⁴⁷ The Chamber takes note of the Registry's recommendations⁴⁸ and does not object to the presence of OPCV counsel during outreach missions, but considers that it is up to the competent, mandated units of the Registry to decide on the arrangements for those missions. In this connection, the Chamber instructs the Registry to begin outreach missions as soon as possible.

21. Lastly, the OPCV proposes that the files of all Potentially Eligible Victims, including those who have not consented to their identities being disclosed to the Defence, be transmitted to the Chamber.⁴⁹ The Chamber considers it appropriate that it should receive, through VPRS, the files of Potentially Eligible Victims who have consented to the disclosure of their identities to the Defence, as well as the files of those who have refused such disclosure.⁵⁰ The OPCV is instructed to transmit the files as they become ready and within the time limit of 31 December 2016 prescribed in the Order of 9 February 2016.⁵¹ The Chamber will consider in due course what action to take with the files it receives.

⁴⁶ OPCV Request, para. 13.

⁴⁷ OPCV Request, para. 14.

⁴⁸ Registry Observations, paras. 12-14.

⁴⁹ OPCV Request, para. 24.

⁵⁰ Registry Observations, para. 15.

⁵¹ Order of 9 February 2016, p. 12.

FOR THESE REASONS, the Chamber

INSTRUCTS the TFV to continue the Identification Process;

INSTRUCTS the Registry to begin outreach missions as soon as possible with support from the OPCV field counsel;

AUTHORISES the OPCV to continue the Identification Process; and

INSTRUCTS the OPCV to transmit to it, through VPRS, the files of Potentially Eligible Victims as they become ready and by 31 December 2016.

Judge Olga Herrera Carbuccion will append a dissenting opinion to this order in due course.

Done in both English and French, the French version being authoritative.

[signed]

Judge Marc Perrin de Brichambaut
Presiding Judge

[signed]

Judge Olga Herrera Carbuccion

[signed]

Judge Péter Kovács

Dated this 21 October 2016

At The Hague, the Netherlands