

**Cour
Pénale
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**International
Criminal
Court**

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TRIAL CHAMBER II

Before: Judge Marc Perrin de Brichambaut, Presiding
Judge Olga Herrera Carbuccion
Judge Péter Kovács

**SITUATION DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public

**Request for Leave to Appeal against the
"Ordonnance enjoignant au Fonds au profit des victimes de compléter le projet de
plan de mise en œuvre" (9 February 2016)**

Source: The Trust Fund for Victims

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

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I. Introduction

1. On 9 February 2016, the Chamber issued an Order (hereinafter “the Order”) directly addressed to the Trust Fund for Victims, requesting the Trust Fund to “complete” its draft implementation plan for reparations in the Lubanga case as submitted on 3 November 2015¹.
2. The Order contains five elements:

1) Deferral

The Chamber defers its approval of the draft implementation plan until the Trust Fund has complied with the order.

2) List of potential beneficiaries

The Chamber orders the Trust Fund to provide the Trial Chamber three “transmissions” by 31 March 2016, 15 July 2016, and 31 December 2016, listing victims that may be eligible to benefit from reparations in the present case. Each transmission is to contain individual files for each potentially eligible victim. Each file should contain the applicants name and identity, a copy of identification documents (or other documents enabling a determination of identity), an articulation of their injuries (harm assessment), the victim’s screening interview (presumably the Trust

¹ Ordonnance enjoignant au Fonds au profit des victimes de compléter le projet de plan de mise en œuvre.

Fund's process notes), and the conclusions of the Trust Fund regarding eligibility of the victims, and any other information upon which the Trust Fund bases its eligibility assessment. The Chamber also instructs the Trust Fund to obtain written consent from each potentially eligible victim so that their dossier may be scrutinized by the Defence. The Chamber further suggests that the Trust Fund may cooperate with the Registry's Victims Participation and Reparations Section (hereinafter "the VPRS") and the legal representatives of victims engaged in this case.

3) Further elaboration of the proposed reparations programme

The Chamber requests the Trust Fund to elaborate further on the draft implementation plan and to develop and submit to the Chamber by 7 May 2016 the precise terms of reference of each element of the proposed reparations so that the Chamber can be in a position to carry out its supervisory function.

4) Anticipated financial liability of Mr. Lubanga

The Chamber orders the Trust Fund to transmit to it by 31 December 2016 a complete evaluation of all harm caused to the victims of the case which will be the basis of assessing the anticipated monetary amount of Mr. Lubanga's liability for his crimes.

5) Revision of the proposed (monetary) “advance” by the Trust Fund

Finally, the Chamber requests the Trust Fund to submit, if it deems necessary, a revised monetary amount that the Trust Fund intends to “advance” towards implementing the draft implementation plan (i.e. presumably a revised sum that the Trust Fund is willing to complement towards reparations awards under Reg. 56 of the Regulations of the Trust Fund (hereinafter “the RTFV”).

II. Submissions

3. Pursuant to article 82(1)(d) of the Rome Statute, the Trust Fund seeks leave to appeal the decision of 9 February 2016 in its entirety, i.e. on all five elements of the order listed above. The Trust Fund considers the elements of the order to be closely interrelated and an appeal within the meaning of article 82 (1)(d) would necessarily address them jointly.

1. The Trust Fund’s legal standing

4. Article 82 (1)(d) of the Rome Statute gives legal standing to “the parties of proceedings”. The Trust Fund is conscious of the fact that, in the narrow sense of the term “parties”, the Trust Fund may not be considered a party to the proceedings. In a strict sense of the term, these are, on one side, the convicted person as represented by defence counsel and, on the other side, victims eligible for reparations as represented by their legal

representatives and the Office of the Public Counsel for Victims (hereinafter “the OPCV”).

5. The Trust Fund submits, that it is appropriate for the Court to adopt a wider reading of Article 82 (1)(d) so as to consider, in the present context, the Trust Fund to be a party within the meaning of Article 82 (1)(d).
6. The order of 9 February 2016 is directed solely against the Trust Fund.
7. The order has significant consequences for the functioning of the Trust Fund and its role vis-à-vis the Court in administering reparation proceedings. The various elements of the order, and in particular the instruction to compile a list of all potentially eligible victims with detailed supporting documentation, have a substantial resource implication. Consequently, this element would directly affect the financial and personnel resources available to the Trust Fund, not only in the present instance, but in its overall ability to carry out its two mandates to implement reparations and provide assistance to victims in situations.
8. The Assembly of States Parties created the Trust Fund as an independent, non-judicial entity within the Rome Statute system, supervised by a Board of Directors and directly accountable to the Assembly of States Parties. The Trust Fund has a fundamental role to play in the implementation of Court ordered reparations. Furthermore, according to regulation 56 of the RTFV,

the Trust Fund may also have an important (complement) role in financing the implementation of reparation awards, utilizing its “other resources”. The Appeals Chamber decision confirming the discretionary authority of the Trust Fund Board of Directors in this regard is illustrative of the important administrative role and responsibility of the Board in the implementation phase of Court-ordered reparations².

9. The Trust Fund Board of Directors has a fiduciary obligation to effectively manage the capacity and the resources of the Trust Fund in accordance with its regulatory structure and in a manner consistent with qualified donor contributions.
10. The order of 9 February 2016 directly impacts on these roles and infringes upon the discretion of the Trust Fund’s Board of Directors to manage Trust Fund resources. Accordingly, the Trust Fund submits that it should be given a standing to request leave to file an appeal against the order of 9 November.
11. To grant the Trust Fund standing is consistent with the spirit of Article 82 to which all entities that maybe adversely affected by a proceeding may launch an interlocutory appeal: Article 82(2) allows States to apply in pre-trial proceeding. Article 82 (4) underscores that in reparation proceedings

² See e.g. Appeals’ Chamber’s amended „Order For Reparations“ of 3 March 2015, ICC-01/04-01/06-3129-AnxA ,at paragraph 62.

the parties with legal standing to appeal are different from those in a criminal trial, including those potentially adversely directly affected by the order for reparations, such as *bona fide* owners of property adversely affected. The Trust Fund's position is directly comparable to that of a bona fide owner of property because the financial resources out of which it would have to fund the implementation of the present order and the "complement" that it may eventually decide to offer are adversely affected by the order.

2. The Chamber's order of 9 February 2016 constitutes an issue that would significantly affect the fair and expeditious conduct of proceedings and for which an immediate resolution of the Appeals Chamber may materially advance the proceedings.

i. the requirement of appealing an "issue"

12. According to the jurisprudence of the Court, under Article 82 (1)(d) any "issue" may be appealed through an interlocutory appeal, the resolution of which is essential for the determination of matters arising in the judicial cause under examination. Such issues may be legal or factual or both³.

13. The Trust Fund submits, that the Chamber's order of 9 February contains two distinct legal and/or factual issues that significantly affect the fair and

³ See e.g. Situation in the Democratic Republic of the Congo, Judgment on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, para 9.

expeditious conduct of the present reparations proceedings. The Trust Fund further contends that an immediate resolution by the Appeals Chamber will materially advance the proceedings, whilst implementing the order will result in irreversible consequences for the victims and the Trust Fund, as explained below.

14. The order of 9 February 2015 misapplies the applicable law. The Trust Fund recalls that Appeals Chamber clearly decided that only **collective reparations** are to be considered in the present case. The Appeals Chamber addressed the substantive and procedural differences between individual and collective awards. However, instead of acknowledging this clear differentiation between individual and collective reparations awards, the Chamber adopted an individualised approach, resulting in a judicial person-by-person determination of eligibility of individual victims as a precondition for adoption of the implementation plan. This approach in the Trust Fund's view is in conflict with the Appeals Chamber judgment on reparations as well as the letter and spirit of the applicable law, including the Statute, the Rules of Procedure and Evidence and the RTFV.
15. This misinterpretation of law has a direct impact on the ability of the Trust Fund to act as a non-judicial entity administering reparations on behalf of the Court as articulated in the RTFV. In addition, the order has negative repercussion on the Trust Fund Board's prerogative to determine the best

use of its resources for the benefit of victims. (first issue)

16. Secondly, the Trust Fund considers it inappropriate that the Chamber adopted an approach to calculate the total monetary liability of Mr. Lubanga for reparations in the present case by suggesting that such a calculation should only be based on the cumulative sum of individual harm, without taking into consideration the Appeals Chamber determination that there should be collective reparations in the case. This questionable assumption that all potentially eligible victims will either be capable of stepping forward and consenting and/or will be able to benefit from collective awards. Moreover, the method of calculation adopted by the Trial Chamber is incompatible with costing methods applied in programmatic design befitting collective awards (second issue).

- 1) First issue

17. The Trust Fund's filing of 3 November 2015⁴ contains a discussion of the Trust Fund's interpretation of the Appeals Chamber reparations judgment, as well as the applicable law. In particular, the Trust Fund considers it both legally inappropriate and operationally impractical, prior to commencing the actual implementation of any collective awards, to compile a detailed list of potentially eligible victims who may benefit from

⁴ See Trust Fund for Victims, Filing on Reparations and Draft Implementation Plan, 3 November 2015, ICC-01/04-01/06-3177-Red at paragraphs 130-150.

reparations in the present case.

18. In its order of 9 February 2016, the Chamber acknowledged in passing the difficulties related to the identification of potential victims without, however, engaging in a more detailed argument and without basing the various elements of its order on either the Appeals Chambers judgement on reparations or on relevant provisions in the applicable law.
19. Rather, the Chamber provides only limited arguments on which to base its order upon. In particular, it makes repeated reference to its trial level jurisprudence in the Katanga case. However, the Chamber fails to acknowledge that the Katanga case and the present case are at a different stage of proceedings. Significantly, in the present case, the Appeals Chamber clearly stated that **only collective reparations** have been ordered whereas a determination of whether there will be individual, collective or both forms of reparations in the Katanga case is outstanding.
20. Given the serious and far-reaching implications of the Chamber's order concerning the rights of victims to have effective access to reparations, the functioning of the Trust Fund, and the overall function and credibility of the Rome Statute reparations system, the Trust Fund submits that a more thoughtful consideration of the applicable legal framework and the implications of the order is warranted.

21. The Trust Fund proposes to discuss the Appeals Chamber judgment as well as applicable legal framework (RTFV) in greater detail in the appeal itself, while limiting itself here to a brief discussion of the RTFV.
22. The Trust Fund reiterates that the Appeals Chamber had explicitly found in its judgment on reparations in the present case that “the Regulations of the Trust Fund are an instrument to the Rome Statute for purposes of interpreting provisions related to reparations awarded through the Trust Fund”. The Trust Fund observes however, that the Trial Chamber order fails to acknowledge this important part of the legal framework.
23. The Trust Fund Regulations do not require a mandatory individualized verification mechanism with regard to collective reparations pursuant to rule 98 (3) of the RPE.
24. When collective reparations are ordered, the Trust Fund is merely required to set out “the precise nature of the collective award(s), where not already specified by the Court, as well as methods for its/their implementation”. According to regulation 72 of the RTFV, it is the mandate of the Trust Fund the Secretariat to put in place procedures to monitor the implementation of a collective award.
25. In fact, under the RTFV delineating the individual names of victims benefitting from reparations is only foreseen in cases of individual

reparations according to rule 98 (1) of the RPE, where the Court identifies each individual victim. In cases of individual reparations in the sense of rule 98 (2) of the RPE, i.e. where the court does not identify the beneficiaries because the names and locations of victims are unknown, or where the number of victims is such that it is impossible or impractical for the Secretariat to determine these with precision, the Secretariat is merely required to “set out all relevant demographic/statistical data about the group of victims, as defined in the order of the Court, and shall list options for determining any missing details for approval by the Board of Directors” (Reg. 60 of the RTFV). It is the Board’s role to eventually conduct a verification process (Reg. 62-65) and to approve the list of beneficiaries (Reg. 64). The RTFV do not delineate any role for the Defence (or the Court) in this context.

26. The RTFV clearly illustrate that in contrast to the Chamber’s approach to collective reparations, the defence does not have the right to access a detailed list of victim identification information as part of the approval process of the draft implementation plan. A determination of eligibility is not required at the present stage⁵.

27. Furthermore, the Chamber’s order not only misapplies the law but, as a

⁵ See Appeals Chamber’s judgment on reparations of 3 March 2015, at para. 167, stating: “...the Regulations of the Trust Fund provide for the inclusion of unidentified beneficiaries into a reparations programme and for their identification only **at the implementation stage**, without providing for a specific role for the convicted at this implementation stage. (...)”.

consequence, also fails to appreciate the different roles and responsibilities of the Court from that of the Trust Fund in administering reparations.

28. While trial proceedings up until the reparations order are within the judicial control of the Court, the implementation of reparations is clearly designed as an administrative exercise. This is demonstrated by Regulation 64 of the RTFV, which stipulates that it is the Trust Fund Board of Directors that decides the eligibility of victims that may benefit from *nota bene* individual reparations awards.
29. The Trust Fund submits that the Chamber's order is denying the Trust Fund its proper administrative role and authority over the collective reparations process as articulated in the RTFV and, consequently, it may jeopardize the division of labour between the judicial and non-judicial functions and institutions of the Rome Statute reparation regime.

2) Second issue

30. The establishment of liability in cases of international crimes is a very complex and multidimensional undertaking, including a strongly symbolic dimension. However, the order appears to take an overly simplistic approach to the task. As demonstrated through the numerous

examples provided in the Trust Fund's filing of 3 November 2015⁶, judicial discretion and multiple factors are required in the determination of a perpetrators liability beyond that of a "simple" quasi mathematical equation of multiplying the number of identified and eligible victims with the cost that may redress a particular form of injury suffered is both legally and factually insufficient, particularly in cases of collective reparations. This equation ignores the collective character of reparations ordered in the present case. Moreover, there is no appropriate "price-tag" for injuries such as a stolen childhood, the loss of a child, severe trauma (mental or physical), disability or maiming, or the societal consequences of the crimes. Finally, based on Trust Fund experience under the assistance mandate and initial consultations with victims of the case, the Trust Fund submits that in the proposed process a significant number of victims will very likely refrain from coming forward to vindicate their right to reparation. Victims may refrain from telling their full story and the true extent of their suffering would not be captured and may directly implicate the calculation of the amount of Mr Lubaga's liability, if a narrow approach is taken.

⁶ See Section X. Elements for consideration to assess Mr. Lubanga's financial liability. Trust Fund Filing on Reparations and Draft Implementation Plan. 3 November 2015.

ii. effect on the fair and expeditious conduct of proceedings

31. The two issues have a direct bearing on fairness and expeditiousness.
 - *Expediency*
32. The Chamber's order of 9 February 2016 explicitly defers any decision on the draft implementation plan until further notice. The time line given to the Trust Fund extends in part until 31 December 2016. Furthermore, following the submission by the Trust Fund of the requested information the Chamber intends to engage in an adversarial person-by-person examination of eligibility for each and every victim that may benefit from a collective reparation award. Such a process will further delay implementation.
33. This delay in the implementation of actual reparation awards is particularly worrying against the backdrop that the events, giving rise to the present reparations proceedings, took place from 2002-2003, more than a decade ago. In the intervening period, the former child soldiers have grown into adolescents and now adulthood.
34. An immediate determination by the Appeals Chamber would therefore not only provide legal certainty as to the legally applicable procedure in collective reparations, it might also significantly expedite proceedings and conserve resources urgently needed elsewhere.

- *Fairness*

35. Furthermore, the fairness of proceedings is affected by the order. As discussed above, in reparation proceedings, the rights of the victims must be balanced against the rights of the convicted person.
36. The order of 9 February seeks to safeguard the rights of the defence. The Trust Fund acknowledges that this is an important aim. However, the Chamber diminishes the right of victims to reparations and ultimately the right of the Trust Fund Board of Directors to determine the best use of their voluntary contributions for the benefit of victims.
37. Neither the applicable law nor the Appeals Chamber's judgment on reparations contain the requirement that, in a case of collective reparations, the convicted person must be able to review upfront, before the implementation plan for reparations is even adopted, detailed case files containing the identity and information of the harm to each potential victim that may benefit from such collective awards.
38. As elaborated in the Trust Fund's filing⁷, this requirement of the order risks subjecting the victims to re-traumatization, in particular because the shame and stigma associated with having been a child soldier remains a strong force in the communities.

⁷See Trust Fund for Victims, *ibid*, at para. 145.

39. Furthermore, to come forward and divulge such detailed information may impact the safety, security, and well-being of the victims to an extent that violates their fundamental human rights⁸.
40. Accordingly, the Trust Fund anticipates that a significant number of victims will not come forward in an exercise to compile a detailed list of identities with injury and trauma information that is required to be subjected to scrutiny by the defence. Consequently, victims will be denied access to reparations. In addition, any calculation of monetary liability of the perpetrator based on an incomplete or partial list of victims will present a distorted view of the actual consequences of his crimes.
41. Furthermore, the financial resources of the Trust Fund to complement reparations are limited and will unfortunately be insufficient to redress all forms of harm caused to every victim (direct or indirect). If a list of all potentially eligible victims would be compiled at the present stage, the fact that later some of these victims may not be able to receive redress for the harm that they have suffered and reported, would further exacerbate their plight and frustration.
42. The Trust Fund has limited financial resources at its disposal and a very small Secretariat. The exercise of complying with the Chamber's order would stretch the Trust Fund's resources to the absolute limit. Compiling

⁸ See International Convention on the Rights of the Child, Articles 39 and 40 vii.

the requested information will be expensive and consequently the Trust Fund will have fewer financial resources at its disposal not only for funding reparation awards in the case but also for its obligations in other cases as well as for its assistance mandate in other situations.

iii. an immediate resolution by the Appeals Chamber may materially advance the proceedings

43. The Trust Fund respectfully submits that the resolution of the above mentioned issues will materially advance the present proceedings.
44. The present case concerns the first ever reparation proceedings reaching such an advanced stage at the ICC. Therefore this case necessarily enters into uncharted terrain in international law. Legal clarity is required concerning the applicable procedures in administering collective reparations, including how to determine monetary liability of the convicted perpetrator, the rights and roles of victims to claim collective reparations, and the proper role and authority of the Trust Fund concerning the administration of collective reparations is of the utmost importance for this case, as well as for subsequent cases.
45. If these issues are not decided at this juncture, the questions will persist and eventually will be raised on appeal after the Chamber has approved an implementation, at a point when significant resources will have been

expended and trauma and frustration created for many victims.

46. Finally, the Trust Fund would like to remind the Chamber that while this request for leave to appeal concerns the present case only, these proceedings will establish a precedent with far-reaching implications.
47. It is important to note that subsequent cases are likely to involve much larger number of victims, and the Chamber's proffered procedural approach to collective reparations would in those cases completely overwhelm not only the Trust Fund, but also the Court as the joint guardians of the victims' right to reparations.

RELIEF SOUGHT

For the foregoing reasons, the Board of Directors respectfully submits its request for leave to appeal in accordance with article 82 (1)(d) of the Statute against the Chamber's decision of 9 February 2016.



Pieter W.I. de Baan, Executive Director of the Secretariat,
on behalf of the Board of Directors of the Trust Fund for Victims
Dated, this day 15 February 2016 at The Hague, The Netherlands