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**International
Criminal
Court**

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TRIAL CHAMBER II

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

**SITUATION: DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF**

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

First submission of victim dossiers

With

**Twelve confidential, *ex parte* annexes, available to the Registrar, and Legal
Representatives of Victims V01 only**

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 3 November 2015, the Trust Fund for Victims (hereinafter “Trust Fund”) submitted its “Filing on Reparations and Draft Implementation Plan”,¹ to which it annexed its draft implementation plan for collective reparations to victims (hereinafter “Trust Fund Reparations Filing” and “Draft Implementation Plan”).² In accordance with its understanding of the instructions of the Appeals Chamber in its judgment on the reparations appeals in the case and the annexed amended order for reparations (hereinafter “Appeals Chamber Reparations Judgment” and “Amended Order for Reparation”),³ the Trust Fund included in its Draft Implementation Plan the screening process to determine the eligibility of victims to benefit from the collective reparations awards that it proposed to follow once the draft implementation plan was approved.⁴

2. On 9 February 2016, the Trial Chamber issued the “Ordonnance enjoignant au Fonds au profit des victimes de compléter le projet de plan de mise en oeuvre” (hereinafter “Trial Chamber order”),⁵ in which it instructed the Trust Fund *inter alia* to submit a first transmission of potential victim dossiers to it by 31 March 2016. The Trial Chamber further instructed the Trust Fund to make subsequent submissions of potential victim dossiers on 15 July 2016 and 31 December 2016.

3. The Trial Chamber specified that the transmission should:

- a. List victims who may be eligible to benefit from reparations in the present case and to submit individual dossiers for each potentially eligible victim.⁶

¹ ICC-01/04-01/06-3177-Red.

² ICC-01/04-01/06-3177-AnxA.

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-01/04-01/06- 3129; AMENDED order for reparations, 3 March 2015, ICC-01/04-01/06- 3129-AnxA.

⁴ Draft Implementation Plan, paras 29-30, 41-64.

⁵ ICC-01/04-01/06-3198

⁶ Trial Chamber order, para. 17.

b. Each victim dossier must contain:

- i. the applicant's name and identity;
- ii. a copy of identification documents (or other documents enabling a determination of identity);
- iii. a harm assessment evaluating the extent of their injuries;
- iv. a description of the factual allegations;
- v. the interview and conclusions of the Trust Fund regarding eligibility of the victims and any other information upon which the Trust Fund bases its eligibility determination.⁷

c. The written consent from each potentially eligible victim so that their dossier may be scrutinized by the Defence.⁸

4. The Trial Chamber further suggested that the Trust Fund may cooperate with the Registry's Victims Participation and Reparations Section (hereinafter "VPRS") and the legal representatives of victims engaged in this case.

5. On 15 February 2016, the Trust Fund requested leave to appeal⁹ against the Trial Chamber order *inter alia* because it was concerned that the Trial Chamber order did not sufficiently consider the applicable legal framework as held by the Appeals Chamber, namely the Regulations of the Trust Fund for Victims, as well as the collective nature of reparations in the present proceedings and that it was in contravention to the precepts of the Appeals Chamber.¹⁰ On 4 March 2016, the Trial

⁷ *Ibid.*

⁸ *Ibid.*

⁹ 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), 15 February 2016, ICC-01/04-01/06-3200 (hereinafter "Request for Leave to Appeal").

¹⁰ See Request for Leave to Appeal, paras 21-22, 24, 26, 28-29.

Chamber dismissed the request for leave to appeal without addressing the merits of the Trust Fund's request.¹¹

6. On 23 March 2016, the Trust Fund requested an extension until 31 May 2016 to submit the first transmission of potential victim dossiers to the Trial Chamber, which the Trial Chamber granted on 29 March 2016.

7. In compliance with the Trial Chamber order, the Trust Fund transmits to the Trial Chamber a first set of completed potential victim dossiers as part of the present submission.

8. The Trust Fund wishes to assure the Trial Chamber that it embarked on the first round of missions¹² with the intention to do its utmost to give full effect to the Trial Chamber order. However, after conducting the first victims' identification and harm assessment process and carefully drawing evidence-based findings therefrom, the Trust Fund considers that this individual eligibility process damages and re-traumatizes victims. The Trust Fund considers it a matter of urgency to share these evidence-based findings, including on operational issues, from its first mission undertaken to compile the requested victim dossiers with the Trial Chamber.

9. The Trust Fund would respectfully recall that it is an independent body, working in a collaborative partnership with the Court, with its own mandate and duties, foremost of which is to interact with victims in accordance with the principle of "do no harm". The Trust Fund's evidence-based findings of the premature, harmful and re-traumatizing nature of the individual victim identification and harm assessment process, coupled with on-going serious legal concerns regarding the legal framework on which this process is based, lead the Trust Fund to feel compelled to

¹¹ "Decision relative à la requête du Fonds sollicitant l'autorisation d'interjeter appel de l'ordonnance du 9 février 2016", 4 March 2016, ICC-01/04-01/06-3202 04-03-2016 2/10.

¹² The Trust Fund considers that in April it undertook a round of several missions rather than just one mission because of the various sets of individual victims, represented by different legal teams, and the OPCV, and therefore will use this term in the plural throughout the text.

respectfully request that the Trial Chamber reconsider the individual victim eligibility and harm assessment process set out in its order of 9 February 2016.

10. The Trust Fund recalls that in the Trial Chamber order, it also instructed the Trust Fund to provide it with additional details of its proposed collective reparations programmes contained in the Draft Implementation Plan. This submission is due on 7 June. The Trust Fund wishes to inform the Trial Chamber that, after careful consideration, the Trust Fund considers that the individual victim identification and eligibility process directly impacts its ability to comply with that instruction. The Trust Fund will further elaborate on these issues in its filing of 7 June and respectively requests that the Trial Chamber take into account the information provided therein for purposes of deciding upon the present request for reconsideration.

II. Steps undertaken by the Trust Fund since the Trial Chamber order

11. In order to fulfil the Trial Court's proscribed procedure for potential victim identification and harm assessments, the Trust Fund enlisted outside technical support, engaging the services of a non-governmental organization, Association des Mamans Anti Bwaki (hereinafter "AMAB"). AMAB has been an assistance mandate implementing partner of the Trust Fund in Ituri Province for many years.

12. Following several weeks of negotiation with AMAB concerning the project terms of reference and modalities of implementation, a project proposal was developed and a reasonable budget agreed upon.

13. The Trust Fund enlisted the technical and operational support of AMAB as a reliable implementing partner to assist with the organizational, logistical, and expert assessor aspect of the process. As part of its responsibilities under the project, AMAB has hired three experts, a medical doctor, a clinical psychologist, and a socio-economist, to perform the harm assessments of each potential victim, whether direct

or indirect, and to prepare a written statement of harm for each potential victim evaluated.

14. Because of the short compliance period instituted by the Trial Chamber to initiate the victim identification and harm assessment process, the Trust Fund was obliged to invoke Regulation 71¹³ of the Regulations of the Trust Fund for Victims to streamline and quicken the Registry's procurement and grant approval mechanisms in order to meet the timeframe allotted by the Trial Chamber.

15. The grant contract issued to AMAB was promulgated at \$111,380 (USD) with resources from the Trust Fund reparations reserve. The initial cost of the Trial Chamber's individualized victim eligibility determination process has obliged the Trust Fund to expend nearly 10% of the Trust Fund's proposed complement toward Lubanga collective reparations on merely administrative processes, which, as is further explained below, the Trust Fund considers to be processes only potentially applicable at the pre-order for reparations stage of proceedings and thus the cost for which should be not be paid for from the Trust Fund's reparations reserve.

16. The cost thus far incurred has resulted in directing these Trust Fund resources away from reparative services for victims and towards the administrative costs associated with the Trial Chamber based victim eligibility process.

17. The Trust Fund is also in the process of having the three assessors recognized as experts before the ICC. The Trust Fund has assembled their credentials and is currently processing their applications in order to have them certified/recognized.

18. The first round of potential victim identification missions were designed to interview and assess victim participants, i.e. clients of Legal Representatives V01 and V02, who are located in and around Bunia. Several coordination meetings were held

¹³ Regulation 71 provides that "The Trust Fund may identify intermediaries or partners, or invite proposals for the implementation of the award".

between the Trust Fund and Legal Representatives V01 and V02 to plan and schedule the missions.

19. In the coordination meetings, the parties discussed the methodology of the interview and harm assessment process and established a schedule. The first missions occurred between 4-15 April in Bunia town, Ituri Province. Additional victim identification missions at present are scheduled for June and July in Ituri Province.

20. However, due to the Trust Fund's experience during the first missions and the concerns that it will detail herein, the Trust Fund informs the Trial Chamber that it has reconsidered the appropriateness of its participation in these future missions and has decided to suspend its participation in all future planned missions, pending the Trial Chamber's decision on the present request for reconsideration. The Trust Fund is in the process of notifying the legal representatives, Office of Public Counsel for Victims (hereinafter OPCV), the Registry, and its implementing partner, AMAB, of this decision.

21. Pending the Trial Chamber's response to the Trust Fund's request to reconsider the procedure, tentative planning of further victim identification and harm assessment missions is suspended. Due to budget constraints and the consequential limited availability of OPCV, joint missions would be conducted from August through December of 2016 between the Trust Fund, OPCV, VPRS, and entities of the DRC field office to identify new potential victims, i.e. individuals who were not victim participants, throughout Ituri Province.

22. New potential victims would also need to be interviewed by the Trust Fund and have their injuries assessed by the experts. VPRS would assist with the identification of new victims, after which OPCV would inform the potential victims of their rights and the representational perimeters as victims before the ICC. The potentially

eligible victims would then be referred to the Trust Fund to prepare the victim dossier through the interview and harm assessment process.

23. In association with VPRS, the Trust Fund developed a “Reparation Form” that is the core of the potential victim dossier. VPRS provided information concerning the crafting of a form that is compatible with entry of the form’s data into the Court’s victim application management system (VAMS), a database under the administration of the Registry/VPRS. OPCV and the Legal Representatives V01 and V02 contributed greatly to crafting the consent language within the reparation form.

24. The interview and harm assessment process requires 4 to 5 hours to perform for each individual victim. In this regard, the Trust Fund again points out that the April 2016 missions concerned only victim participants in the case, i.e. those victims that have been afforded legal representation and that have been associated with the process for nearly 10 years. The Trust Fund anticipates that the process will be considerably longer for new potential victims that are not already familiar with the Court and that have not completed a VPRS participation application previously.

25. Furthermore, the Trust Fund wishes to make clear that the above noted time required to perform an interview and harm assessment does not take into account the preparatory work necessary to establish a neutral venue in which to conduct the interview and assessments, nor the travel time of the victims and intermediaries to reach the venue. It also does not reflect the immense effort that must be expended to position relevant human resource assets of the Court in Bunia.

26. Regarding the specifics of the interview and assessment process, an interview is conducted between the potential victim (victim participant), the Legal Representative (or OPCV staff member for new victims), a Trust Fund staff member, and a translator. The interview begins with the Trust Fund providing an explanation

concerning the reason for the interview, a briefing about the Trust Fund, and how the assessment will proceed after the interview.

27. At the outset of the interview, the Trust Fund reviews the reparation form and discusses what will be done with the information collected with the potential victim. Importantly, that conversation addresses the various consent provisions in the reparation form and the probable consequences of each provision. Following this informed dialogue concerning the reparation form and the consequences of its usage, the potential victim expresses his or her consent.

28. During the two-week missions in Bunia during which 31 potential victims were interviewed and assessed, the following sections or entities participated on site in support of the process: 4 Trust Fund personnel, 2 VPRS personnel, 3 Legal Representatives, 4 legal representative intermediaries, 2 translators, 3 expert assessors, and at least 7 staffers of AMAB.

III. Findings of the first victim identification missions to Ituri

29. The April field missions to Bunia, undertaken to conduct the first round of potential victim interviews and harm assessments, resulted in a total of 31 victims being assessed. 29 of the 31 potential victims are already legally represented in the proceedings either by one of the two legal teams representing victims in this case, legal representatives V01 led by Luc Walleyne or legal representatives V02 led by Joseph Keta. The two new potential victims will be represented by OPCV as they have not previously been recognized by the Court.

30. The overwhelming majority of victims, namely 30 out of the 31 victims in this group, were male. Only one potential victim (indirect) interviewed, the mother of a former child soldier, was female.

31. Of the 31 victims assessed, 16 victims (14 direct and two indirect victims) were represented by legal representatives V01; 13 victims (all direct victims) were

represented by legal representatives V02; and two new potential victims, both claiming to be direct victims, are represented by OPCV.

32. While the Trust Fund conducted 31 assessments, it considers, after consultation with VPRS, only 13 of these dossiers to be “completed” for purposes of their transmission to the Trial Chamber. The Trust Fund will address below the serious issues it encountered in attempting to compile all of the requested information, but wishes to assure the Trial Chamber that it is endeavouring to complete these dossiers and hopes to be able to transmit them shortly, taking into account the ability of the legal representatives to clarify any inconsistencies of information and documentation as well as of VPRS to process the dossiers.

33. The results of the first field missions break down as follows:

- a. V01 victim participants – clients of Luc Walleyne and Evelyne Ombeni
 - i. 16 potential victims interviewed and assessed
 - ii. 14 direct victims
 - iii. 2 indirect victims
 - iv. 12 dossiers completed
 - v. 4 dossiers considered incomplete
 - vi. 16 consented to share information with the TFFV/Chambers
 - vii. 13 did not consent to share their identity or information with the convicted person
 - viii. 3 consented to share their identity and information with the convicted person
- b. V02 victim participants – clients of Joseph Keta
 - i. 13 potential victims interviewed and assessed
 - ii. 13 direct victim
 - iii. 0 dossiers completed

- iv. 13 dossiers considered incomplete¹⁴
- v. 13 consented to share information with the TFF/Chambers
- vi. 7 did not consent to share their identity or information with the convicted person¹⁵
- vii. 6 consented to share their identity and information with the convicted person

c. New Victims – clients of OPCV

- i. 2 new potential victims interviewed and assessed
- ii. 2 direct victims
- iii. 0 dossiers completed
- iv. 2 dossiers considered incomplete¹⁶
- v. 2 consented to share information with the TFF/Chambers
- vi. 2 did not consent to share their identity or information with the convicted person
- vii. 0 consented to share their identity and information with the convicted person

d. Total: 31 potential victims interviewed and assessed.

- i. 12 dossiers completed
- ii. 18 dossiers considered incomplete

¹⁴ Due to the short time frame combined with the amount of time that VPRS needed the dossiers in advance of the deadline in order to enter the information into the VAMS and the need to have comments and agreement from the legal representative before the dossiers could be given to VPRS, these dossiers were not able to be completed. Comments were received from the legal representatives after the VPRS deadline had already passed. The Trust Fund continues to work with the legal representative to ensure that all comments are taken into account before the dossiers are given to VPRS for entry into the VAMS and hopes to be able to complete these dossiers in the near future.

¹⁵ The Trust Fund considers as “non-consenting” those victims who checked the consent box, but in the comment section expressed fears for their safety and security.

¹⁶ Due to the short time frame combined with the amount of time that VPRS needed the dossiers in advance of the deadline in order to enter the information into the VAMS and the need to have comments and agreement from OPCV before the dossiers could be given to VPRS, these dossiers were not able to be completed. Comments were received from OPCV after the VPRS deadline had already passed. The Trust Fund continues to work with OPCV to ensure that all comments are taken into account before the dossiers are given to VPRS for entry into the VAMS and hopes to be able to complete these dossiers in the near future.

- iii. 9 consented to share their identity and information with the convicted person
- iv. 22 did not consent to share their identity or information with the convicted person
- v. All 31 want to participate in Trust Fund reparations

34. As has been observed before,¹⁷ the Court and the Trust Fund have entered uncharted terrain in the present case, which is the first case to reach the implementation stage in reparation proceedings. In this context, the Trust Fund respectfully notes the complex case history as well as the nature of crimes (i.e. child soldier crimes) for which Mr Lubanga was convicted and the corresponding harms for which he was sentenced that give rise to these reparations proceedings.

35. Based on the principle of the perpetrator's liability for reparations, the Appeals Chamber articulated a procedural model for reparations that responds to the collective quality of the awards ordered in the present case. It considered the issues at stake during a time period of over two and a half years and, on 3 March 2015, issued a judgment accompanied by a succinct order, amending the original Trial Chamber's order for reparations to victims issued on 12 August 2012. In doing so, the Appeals Chamber set out the framework guiding reparations in the present case.

36. Building on the foundations of the Appeals Chamber's jurisprudence, both the Trust Fund, in its carefully constructed filing and Draft Implementation Plan of November 2015, as well as the Trial Chamber through its judicial decisions issued since the Appeals Chamber judgment, have further addressed the implementation modalities, seeking to properly balance expeditiousness, eligibility, and liability issues, whilst taking into account the specific circumstances of the present case.

¹⁷ See *e.g.* Request for Leave to Appeal, para. 44.

37. This delicate balance between the various requirements at stake continues to warrant careful monitoring and, when necessary, calibration.

38. The Trust Fund therefore respectfully submits a number of evidence-based observations on issues that it encountered during its first victims' assessment missions in April 2016. It considers that these observations and new facts should induce the Trial Chamber to reconsider its current approach, as proceedings continue to advance.

39. First-hand experience during the initial victims' assessment missions shows that the current procedural approach puts a very high burden on victims.

40. In line with the Trial Chamber's order, each victim was asked to provide proof of his or her identity and to substantiate his/her personal injury at an individual level, including any personal details related to the harm experienced, including in many cases a medical history in a four to five-hour long interview and assessment. Victims were also asked to consent that this information be shared with the Trust Fund and the convicted person in order to reassert their claim to victim status.

41. Trust Fund Secretariat staff and implementing partner experts involved in the interviews noted that these stringent requirements created an adversarial and contentious dynamic at the stage of the interviews. This dynamic was exacerbated by the safety and security concerns expressed by the interviewees, as well as the persisting trauma that affects the majority of victims interviewed. These circumstances noticeably inhibited a significant number of victims when being asked to share the very intimate information requested by the Trial Chamber with Trust Fund personnel and experts previously unfamiliar to them.

42. As will be discussed in more detail below, most of the potential victims thus far interviewed have found the outlook of eventual participation in a currently unapproved and therefore uncertain collective reparations programme to be too much

of a risk when balanced against the potential repercussions of revealing their identity to the convicted person. Their wish to benefit from reparations could not overcome their regard for their security and accordingly declined to provide consent to reveal their identity to the convicted person.

IV. Challenges encountered during the victim identification missions

43. In the Trust Fund's view, the results of the mission clearly demonstrate the damaging effects that the current Trial Chamber individualised eligibility process has on victims of Mr. Lubanga's crimes.

44. Below, the Trust Fund will discuss its observations and findings under four headings: 1) the impact of the requirement to conduct an upfront harm assessment; 2) the impact of the present lack of approved collective reparations awards; 3) the impact of the inadequate consideration of the disruption to the victims' lives caused by the Trial Chamber's interview and harm assessment requirements; and 4) the impact of the requirement that potential victims must consent to share their identity and information with the Court and the parties, including the convicted person.

45. Before discussing the above four topics, the Trust Fund will first set out several general overall observations of problems that affected the first victims' identification and harm assessment missions.

46. The following factors directly affected the Trust Fund's first victims' identification and harm assessment missions:

- The time gap of more than a decade between injuries and present proceedings has a direct negative impact on the availability of evidence and makes the Trust Fund's harm assessment more difficult.
- As evidenced by the interviews, intimidation, fear and security concerns are still a reality today for the interviewees.

- The overall security situation in Ituri remains volatile and tense, which not only affects the victims and their communities, but also the conduct of the assessment missions, which required prior security clearance. UNICEF reports that recruitment of child soldiers remains an ongoing problem in the region.¹⁸
- The interviews confirmed that having been a child soldier carries elements of shame and stigma which may negatively affect the victim's social standing in their respective community. The Trust Fund is therefore concerned that when it moves on to the next step of reaching out to previously unidentified victims this may in the future hinder victims to come forward as required by the Trial Chamber, and may in particular affect female victims for whom the association with these crimes are even more stigmatizing.
- Certain communities with a nexus to the case are still particularly close to the UPC and continue to revere Mr. Lubanga. This circumstance results in social pressure on victims in those communities not to participate in the Court's reparation proceedings. It directly affects whether a victim may be able and willing to consent to sharing information with the legal team of Mr. Lubanga.
- The interviews confirmed that many victims have suffered from severe mental trauma resulting from the 2002-2003 crimes - the Trust Fund considers an upfront evaluation of their injuries without prior psycho-social counseling is a) re-traumatizing and b) affects the reliability of

¹⁸ <http://reliefweb.int/report/democratic-republic-congo/democratic-republic-congo-humanitarian-report-january-february-2016>

results because traumatized victim may exercise clouded judgment and are often incapable of expressing needs, feelings, and describing the harm they have experienced in an assessment situation.

47. The Trust Fund considers that these general observations, as well as the more detailed observations discussed immediately below, contain important information that it considers to be relevant to informing the Trial Chamber's decision of whether to reconsider the current individual eligibility process as proscribed in its 9 February 2016 order and respectfully requests that the Trial Chamber take them into account.

A. The impact of the requirement to conduct an upfront harm assessment

48. The Trust Fund recalls that in its Draft Implementation Plan, based on expert advice received during the May 2015 expert consultation, the Trust Fund proposed that, after an initial screening to determine eligibility (without a detailed harm assessment) as a first step all victims should receive counselling. This in turn would then enable a more careful and in-depth evaluation of their harm and needs. At the same time, such an approach would seek to minimize re-traumatization. Once needs have been established in a context of mutual trust, victims with specific needs resulting from the harm that they have suffered would then have been referred to parts of the reparations program, e.g. medical support, training, etc.

49. In the Trust Fund's view, the Trial Chamber's requirement to assess harm upfront is contrary to the philosophy of first addressing trauma and then, once the victim is enabled to communicate about his or her harm, to refer him or her to the required services.

50. The Trust Fund considers that an upfront harm assessment without counselling services puts it in conflict with its own independent duty to "do no harm" in its

interactions with victims because of the re-traumatizing effect that it has on victims. While the Trust Fund tried to conduct the victim harm assessment in a sensitive way, it is concerned that the current approach may have led already to re-traumatization. In this regard, Trust Fund staff present at the interviews expressed deep discomfort at the reactions that they observed from victims as the interviews progressed. For example, staff reported that potential victims began to shield their faces, began to fidget nervously and display other physical indications of emotional distress, began to cry, and at certain moments stopped speaking and responding to enquiries. Trust Fund staff also observed that certain victims began to give less detail as the interviews progressed, some asserting that it was too painful for them to recall the events in detail. In the experience of the Trust Fund staff, often a lack of detail can be associated with an attempt by the person to avoid recalling traumatic events.

51. The Trust Fund notes in this context that the first assessments were carried out with victim participants, who have some degree of familiarity with the Court. Given the apparent significant level of emotional harm and re-traumatization caused to these victims, the Trust Fund is deeply concerned that the potential harm to newly identified victims, who are not familiar with the Court, will be even more significant.

52. The Trust Fund respectfully requests that the Trial Chamber acknowledge its long expertise in dealing directly with victims under its assistance mandate. The Trust Fund understands that the Trial Chamber wishes to conduct the present proceedings as expeditiously as possible and shares its wish to realize reparations for victims as quickly as possible. However, the Trust Fund cannot agree to sacrificing and putting at risk the emotional and mental well-being of victims for reasons of expediency. The Trust Fund is deeply concerned that the traumatizing effect already suffered by these victims and their current well-being is being lost in the priorities reflected in the Trial Chamber order.

53. This situation places the Trust Fund in an untenable situation, whereby its own staff is participating in a process that it finds fundamentally harmful to the victims it is engaging with.

B. The impact of the present lack of approved collective reparations awards

54. A major limiting factor of the proscribed victim identification process is the absence of Court approved collective reparations programmes that can be shared with and explained to potential victims wanting to benefit from reparations and rehabilitative services to redress their injuries.

55. During interviews with potential victims, the Trust Fund explained the circumstances in which the interviews occurred and inquired whether the victim would like to participate in collective reparations. Invariably, all 31 of the potential victims expressed interest in benefiting from collective reparations and asked about the plan for reparation and what projects may be available to them. At that point, the Trust Fund was unable to offer a sound answer to their logical query because the Trust Fund is uncertain unsure at this stage whether, when and in in what form the Trial Chamber will approve the Trust Fund's proposed Draft Implementation Plan.

56. The Trust Fund also notes with concern that several victims expressed their unwillingness to participate in collective reparations due to security concerns.¹⁹ The Trust Fund understands these victims to have the mistaken belief that collective reparations are more public than individual reparations. Due to the current unapproved status of its proposed collective reparations programmes laid out in its Draft Implementation Plan, the Trust Fund was unable to address these

¹⁹ These concerns were expressed by the victims participants represented by legal representatives V02. These victims dossiers are considered incomplete due to *inter alia* the amount of time required to properly understand whether the victims had consented to disclosure to the convicted person, for which it was necessary for the legal representative to seek clarification from each victim participant.

misperceptions or provide any explanation of how a victim's participation in a collective reparations programme could remain confidential.

57. The Trust Fund would like to recall the principle established by the original Trial Chamber and confirmed by the Appeals Chamber in its Reparations Judgment that: "Reparations are entirely voluntary and the informed consent of the recipient is necessary prior to any award of reparations, *including participation in any reparations programme*".²⁰ In its Judgment, the Appeals Chamber held that

"The Appeals Chamber notes that, at the time of making applications for reparations, the victims either applied for individual awards or applied for a collective award, *without knowledge of the kind of a collective programme that would be ultimately adopted*. The Appeals Chamber therefore finds that it is necessary to seek the victims' consent *when a collective award is made*, consistent with the principle, identified by the Trial Chamber, that "[r]eparations are entirely voluntary".²¹

58. The Trust Fund submits that it is contrary to the above Appeals Chamber finding and to the rights of victims that they are required to participate in the eligibility process prior to being informed of the available collective reparations programmes. The Trust Fund submits that victims should not be required to expose themselves in their communities and re-open the trauma they have suffered until they have the necessary information to make an informed decision that they want to participate in the available collective reparations.

59. Under the current process, all that could be offered by the Trust Fund to a victim at the time of the assessment mission was that he or she may possibly be deemed eligible to benefit from a yet to be approved collective award after the victim had

²⁰ Para. 159.

²¹ Appeals Chamber Reparations Judgment, para. 160.

participated in an adversarial procedure with the convicted person to determine his or her eligibility. This circumstance stands in contrast with the trauma-sensitive approach developed in the Trust Fund's draft implementation plan, in which the screening of victims takes place within the context of an approved plan, allowing for a secure setting and for informed decision making by victims.

C. The impact of the inadequate consideration of the disruption to the victims' lives caused by the interview and assessment requirements

60. The Trust Fund considers that the amount of time required to complete all of the Trial Chamber requirements during the interview and assessments unduly burdens victims and has led to several victim dossiers being incomplete due to the victim's inability to attend the entirety of the session. The Trust recalls that the entire process takes typically at least between 4 to 5 hours, but can also span two days to complete. In this regard, the Trust Fund notes that the victims participate in the interviews and assessments without any compensation for their time. Most of the victims interviewed in April are self-employed, for instance many work as taxi drivers. However, they will not be compensated if they cannot earn any income due to time spent completing the victim eligibility process.

61. The Trust Fund notes that, for the victims of the subsequent (currently suspended²²) mission, 58 victims are expected to be coming from Mahagi and other communities to Bunia. This means that up to 3 to 4 days of income will be lost to participate in this process. The Trust Fund may reimburse costs of transportation, food and accommodation, but is not in a position to compensate for loss of income.

²² See *supra* para. 20.

62. In the Trust Fund's view, the disruptive consequences, psychological as well as material, of this eligibility process on victims plays a significant role in increasing the level of frustration and confusion regarding the role of the Court and Trust Fund.

63. The Trust Fund observes that several victims whose interview and assessment process extended into a second day did not return the following day. These dossiers are therefore considered incomplete and the victim is currently ineligible to receive reparations. The Trust Fund is attempting to reschedule the remaining assessments for these victims, but strongly suspects that many will simply find the process too time-consuming and burdensome to complete.

64. As only one illustrative example, one indirect female victim who is ill was unable to finish the entire assessment process in one day and did not return the following day. The Trust Fund's field staff believe that her current ineligible status due to not completing the assessment process is attributable to the inadequate and insufficient consideration of the vulnerabilities of the potential victims in the Lubanga case, in her case her advanced age and poor health.

65. Furthermore, in the Trust Fund's view, the timetable and substantive requirements of the Trial Chamber's individual victim eligibility process do not adequately take into account the realities of the DRC and the daily lives of the victims that are meant to be at the core of the Court's reparations system. The Trust Fund notes that there are presently outbreaks of conflict in the areas surrounding Bunia and that poverty is rampant. Many victims cannot afford to forego a day's pay. These same concerns have a direct impact on the eligibility status of those victims from whom additional documentation is needed. The Trust Fund wishes to emphasize that "following up" with a victim who has completed the interview and assessment process, but from whom additional identification documents are needed, is not a simple or fast process. The Trust Fund considers that the incomplete status of

several victim dossiers is directly attributable to the cumbersome and overly disruptive eligibility process and is not in any way reflective of the actual victim status of these individuals.²³

66. Based on its experience during this mission, it is the Trust Fund's view that the current eligibility process operates in practice to actively inhibit victims' access to reparations, rather than serving to facilitate this right. The Trust Fund considers this process to be contrary to its mandate to respect the rights of victims, in particular their statutory right to reparation for the harm they have suffered.

D. Impact of the requirement that victims must consent to share their identity and information with the Court and the parties, including the convicted person

67. As mentioned above, all 31 potentially eligible victims expressed their interest to participate in collective reparations. However, of the overall pool of 31 potential victims interviewed, a significant portion, namely 22 did not consent to have their identities (and further information) shared with the convicted person because of an expressed concern for their personal safety.

68. Those victims that did not consent to revealing their identity with the convicted person expressed deeply felt safety and security concerns as the reason for their reluctance. Victims mentioned the popularity of the UPC and the fact that Mr. Lubanga continues to be revered as a figure of authority within their respective communities. Victims interviewed also stated that, as a consequence, asserting to have been a victim of a violation committed by Mr. Lubanga would go against

²³ See in this respect Amended Order for Reparations, Reparations Principles, para. 9 on **Beneficiaries** of reparations: "A decision of the Court on reparations should not operate to prejudice the rights of victims under national and international law, as article 75 (6) of the Statute prescribes. Equally, decisions by other bodies, whether national or international, do not affect the rights of victims to receive reparations pursuant to article 75 of the Statute."

community sentiment and could result in negative repercussions and retaliation against themselves or their family.

69. Specific reasons cited by potential victims as to why they could not consent to have their identity revealed to the convicted person as a prerequisite for being considered eligible for reparations pertain to genuine and well-founded concerns about their self-preservation. Victims noted that to reveal their identity to the convicted person's legal team would "put their life in danger", that we (read ICC/Trust Fund) can't guarantee their safety, that they would be considered a traitor, that they would lose their job, and that they fear reprisal from former commanders, family, and the UPC.²⁴ One former child soldier victim noted that he thought it was the Trust Fund that dealt with victims and not the convicted person's legal team. One victim pointed out that the people in Ituri remain divided.²⁵ These statements illustrate the tenuous context in which the victim identification process occurs.

70. The Trust Fund recalls that the Trial Chamber order proscribes that victims seeking reparations are to articulate their allegations against Mr. Lubanga and assert their claim to victim status. The Trust Fund also recalls that the Appeals Chamber affirmed the original Trial Chamber's holding that one of the important objectives of reparations at the Court is to pursue reconciliation between the victims and the convicted person.²⁶ However, in the view of the Trust Fund, the Trial Chamber's proscribed process establishing an adversarial eligibility proceeding for reparations between the convicted person and the victims is contradictory to the goal of reconciliation between the parties. The present process undermines the objective of achieving reconciliation. One victim pointed out in his interview that Mr. Lubanga

²⁴ See in this respect Amended Order for Reparations, Reparations Principles, para. 17: "Equally, the Court should avoid further stigmatisation of the victims and discrimination by their families and communities."

²⁵ See in this respect Amended Order for Reparations, Reparations Principles, para. 46 ("Reparations should aim at reconciling the victims with their families and the affected communities.").

²⁶ Amended Order for Reparations, paras 71-72.

has not sought forgiveness for the harm he caused and there is no reconciliation with the community. The dynamics of the current approach may further strengthen such views and perceptions.

71. The Trust Fund is well aware of the fact that the sample of a mere 31 victims thus far interviewed does not allow for far-reaching conclusions. Moreover, the assessed victims are particular in that all victims in this group are already known to the Court, and as a consequence are also familiar with the Court themselves and thus may have more trust and familiarity with it. The interviewed victims are therefore a particular rather than a random sample and it remains to be seen how representative their cases are to those of the much larger victim population of yet to be identified potential victims.

72. That being said, unfortunately, the results of the April 2016 interview and harm assessment missions have further confirmed concerns already held by the Trust Fund. What gives particular weight to the findings is the fact that they are consistent with the outcomes of the large-scale community and victims' consultations carried out by the Trust Fund in 2015 that informed the preparation for the draft implementation plan, which considered the views of over 2,000 people.

73. Furthermore, victim's related accounts that following Mr. Lubanga's transfer to serve the remainder of his sentence in Democratic Republic of the Congo on 19 December 2015 he may have further increased the reach and respect that he continues to enjoy in certain communities in Ituri, a view discussed and expressed to the Trust Fund Secretariat staff based in Bunia jointly by the victims and their legal representatives during and following²⁷ the April 2016 mission.

²⁷ "The members of the Hema community but also others believe that, given the local influence of the convicted person and his supporters and their negative attitude toward reparations, disclosure to the defense could entail security risks, exclusion from their community, neighborhood and/or family, or at least marginalization and forms of ostracism. [...]" Email message of Mr Luc Walley to Trust Fund for Victims, 24 May 2016.

E. Conclusion regarding the first victim identification missions

74. The first round of victim assessments provides evidence substantiating the concern that many victims will be unable or unwilling to take on considerable personal risk for an undefined possibility of eventually receiving some form of redress. Should this trend be confirmed in future assessment missions, a significant number of victims, if not the majority, will effectively lose access to reparations despite having suffered harm as a result of the crimes committed by Mr. Lubanga.

75. Moreover, based on the initial findings, it seems probably that those victims most affected by trauma, stigma, shame, and vulnerability will be the least likely to come forward in this process and thus they will be the ones who lose out on the redress and rehabilitation that they so urgently deserve.

76. The former child soldiers that were victimized by Mr. Lubanga's crimes were indelibly damaged. To paraphrase Dr. Schauer's expert commentary²⁸ from the case, the long-term consequences of victims' experiences can hamper their developmental abilities long after the violence has ceased.

77. In light of this, the Trust Fund is concerned that the current procedural approach will prove unresponsive to the stated purpose of reparations in the Appeals Chamber's reparations order, namely to

“relieve the suffering caused by the serious crimes committed; afford justice to the victims by alleviating the consequences of the wrongful acts; deter future violations; and contribute to the effective reintegration of former child soldiers”(…) and to “secure, whenever possible,

²⁸ See Trial Chamber I, “Decision on Sentence pursuant to Article 76 of the Statute”, 10 July 2012, ICC-01/04-01-06-2901 (hereinafter “Trial Sentencing Judgment”), paras 39-42.

reconciliation between the convicted person, the victims of the crimes and the affected communities.²⁹”

V. Observations related to resources

78. An additional dimension of the current approach of considerable concern to the Trust Fund is the fact that this approach is very resource intensive in terms of financial cost, time, and effort of the Trust Fund, the Court and other actors.

79. As mentioned above, the April 2016 missions assessed a limited number of prior-known victim participants, 31 potential victims. However, the missions still took eleven full working days and involved the full-time participation of Trust Fund Secretariat staff, staff of the two legal teams and their intermediaries, VPRS, translators, experts of the Trust Fund’s implementing partner, AMAB staff, and of course, the victims.

80. Moreover, significant time and effort was also spent for the preparation of the missions. The development of the consent form, used during the assessment missions took several weeks. The form was developed under the guidance of the Trust Fund Secretariat with the involvement of the two victims’ legal representatives, OPCV and VPRS with a view to complying with the Trial Chamber’s requirements as well as taking into account technical requirements of VPRS’s VAMS database. Furthermore, logistical efforts for the preparation of the mission included travel and security arrangements, as well as the contracting of the implementing partner through the Court’s procurement system which must be carried out in accordance with the Court’s financial rules and regulations.

81. The key component of the assessment, the victim evaluation as such, took on average about four-five hours per individual victim (without accounting for the

²⁹ See e.g. Amended Order for Reparations, paras 71- 72.

travel time for the assessment team and the victims to get to Bunia). However, the Trust Fund does not think that an alternative, less time-consuming approach for gathering the required information can be found. It considers that an assessment interview about the severe and complex forms of harm that former child soldiers and indirect victims may have experienced necessarily takes time.

82. It is important to note that the events that gave rise to the harm dates back to more than a decade ago, 13-14 years in the past, when eligible victims were under the age of 15 years old. The manner and the age at which the harm was inflicted upon these children at the time caused deep and complex injuries to their psyche, physiology, socialization skills, coping mechanisms, relationships, educational development, and inhibits their developmental capacity.

83. Based on the considerations above, the Trust Fund is very concerned that the time required to properly perform a harm assessment at the individual level may prove too expensive and administratively disproportionate to the eventual benefit if the process needs to be applied for potentially several hundreds or thousands of victims before the end of this calendar year.

84. Furthermore, the Trust Fund considers the resource implications may turn out to be even greater once the interview and assessment process is extended to include previously unidentified victims. Substantial outreach efforts will need to be undertaken as a first step so that victims who likely will have limited prior knowledge of the Court and the reparation proceedings will be enabled to make an informed choice of whether or not they would like to come forward and participate in this process. In addition, once potential victims decide to come forward and participate in an assessment exercise, all information will have to be verified “from the start” (i.e. there exists no prior verification by the Court of identity/documents etc.). Furthermore, rolling out the assessment and identification program to reach

victims who live at a considerable travelling distance from Bunia will involve additional logistical costs in terms of travel distances, time, and security arrangements.

VI. Legal discussion, including on issues submitted for reconsideration

A. Request for reconsideration

85. Finding a balance between expeditiousness, rights of the parties, eligibility, and liability can only be achieved in a joint and collaborative effort between the Court and the Trust Fund. The Trust Fund would like to assure the Trial Chamber that it is fully committed to play its part in this endeavour by offering technical guidance and its expertise in interacting with victims of crimes within the Court's jurisdiction. It also strives to uphold the rights of all parties to the proceedings, including the victims and the convicted person. Accordingly, the Trust Fund shares the Trial Chamber's commitment towards safeguarding the rights of the convicted person.

86. However, as will be explained in the following, the Trust Fund respectfully submits that, in its informed judgement, the current approach does not provide the most appropriate method to achieve fair and effective reparation to the victims of the crimes for which Mr. Lubanga was convicted.

87. In particular, the Trust Fund is convinced that Mr Lubanga's liability can be assessed consistent with the rights of the convicted person and the victims, without prior evaluation of the merits of each victim's eligibility for reparations and scope of injury by the Trial Chamber.³⁰ The Trust Fund is also convinced that such a revised approach would be in accordance with the Appeals Chamber holdings applicable to the present case, noting that the Appeals Chamber in its Reparations Judgment and

³⁰ Amended Order for Reparations, under the heading "Objectives of reparations", paras 151, 152, 154, and 156.

Amended Order for Reparations has considered these very issues, including process and consequences, in considerable depth and detail.

88. Accordingly, the Trust Fund respectfully requests that the Trial Chamber reconsider its procedural approach.

89. In this regard, the Trust Fund understands the Trial Chamber to be of the view that its ordered individual eligibility procedure is required by the Appeals Chamber's remand to it of the discrete element of establishing Mr. Lubanga's liability. In the Trust Fund's understanding the Trial Chamber's approach is also based on the consideration that, in remanding the element of liability determination, this permits or possibly requires the Trial Chamber to 're-open' the Appeals Chamber's determinations in relation to the other elements of the amended order for reparations. However, as the Trust Fund will explain in detail the following, it strongly disagrees with this conclusion – the Trust Fund respectfully submits that the Appeals Chamber already determined four out of five of the elements that constitute a reparations order, including a determination of the type of harm and the eligibility criteria for beneficiaries to a sufficiently precise degree for the requirements of a collective reparations order, and that this is binding on the Trial Chamber.

90. The Trust Fund respectfully requests that the Trial Chamber reconsider its understanding of the Appeals Chamber's instructions regarding the imposition of liability in light of the following:

- 1) the Appeals Chamber's legal holdings regarding the two distinct phases of reparations proceedings and the corresponding applicable legal framework;
- 2) the division of authority between the Trial Chamber and the Trust Fund under the Regulations of the Trust Fund;

3) the Appeals Chamber's holdings that rule 94 is applicable to individual application-based request proceedings; and

4) the applicable principle for purposes of imposing liability on a convicted person, as articulated by the Appeals Chamber.

1. The two phases of reparations proceedings

a) Legal discussion

91. In its "Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings" of 12 December 2012,³¹ the Appeals Chamber made the following findings of the Court's legal framework with respect to reparations:

"53. The Appeals Chamber considers that, under the statutory framework for reparations, [...] reparations proceedings can be divided into two distinct parts: 1) the proceedings leading to the issuance of an order for reparations; and 2) the implementation of the order for reparations, which the Trust Fund may be tasked with carrying out.

54. *The proceedings before the Trial Chamber leading to the issuance of an order for reparations are regulated in particular by articles 75 and 76 (3) of the Statute and by rules 94, 95, 97, and 143 of the Rules of Procedure and Evidence. [...] This first part of the reparations proceedings concludes with the issuance of an order for reparations under article 75 (2) of the Statute or a decision not to award reparations.*

³¹ ICC-01/04-01/06-2953 (hereinafter "Appeals Chamber decision of December 2012")

55. *The second part of the reparations proceedings consists of the implementation phase, which is regulated primarily by article 75 (2) of the Statute and rule 98 of the Rules of Procedure and Evidence. If the Trial Chamber has ordered that reparations be made through the Trust Fund pursuant to rules 98 (3) and 98 (4) of the Rules of Procedure and Evidence, or that the award for reparations be deposited with the Trust Fund pursuant to rule 98 (2) of the Rules of Procedure and Evidence, the Trust Fund plays an important role in this phase and the Regulations of the Trust Fund apply.* In this respect, the Appeals Chamber notes that, *under the Regulations of the Trust Fund*, an order for reparations has to be issued in order to seize the Trust Fund and allow it to undertake implementation activities in relation to reparations.

[...]

57. *In the view of the Appeals Chamber, the judicial "approval" of the draft implementation plan, pursuant to regulations 57 and 69, if applicable, of the Regulations of the Trust Fund is not an initial order for reparations. Rather, as stated above, pursuant to regulation 50 (b) of the Regulations of the Trust Fund, an "order for reparations" in terms of article 82 (4) of the Statute must be issued under article 75 of the Statute prior to any implementation activities by the Trust Fund. [Footnotes omitted, emphasis added.]*"

92. In the Trust Fund's view, several important observations on the applicable legal framework at the present stage of proceedings arise from the above.

93. First, in its decision of December 2012, the Appeals Chamber unambiguously held that the Regulations of the Trust Fund apply during the implementation stage of proceedings.

94. The Trust Fund wishes to highlight an important aspect of the Appeals Chamber's above holding that it considers may be a source of confusion or dispute. Regarding the meaning of "implementation stage", the Trust Fund submits that the Appeals Chamber has clarified that the "implementation stage" encompasses the time period following the issuance of an order for reparations under article 75.³² It submits that this becomes clear from its above holding that the first phase ends with the issuance of the order for reparations, at which moment the Trust Fund is "seized" pursuant to regulation 50 (b) of the Regulations of the Trust Fund and its Regulations apply.³³ This is further clarified in that same decision, wherein the Appeals Chamber, in holding that the impugned decision was deemed a reparations order within the meaning of article 75 of the Statute, observed that the original Trial Chamber had inter alia required the Trust Fund to "present[] proposals for collective reparations to a differently composed Trial Chamber for approval", which the Appeals Chamber found meant that "the Trial Chamber mandated the Trust Fund to take steps in relation to the implementation phase" (emphasis added).³⁴

95. The Appeals Chamber further observed that:

"The contemplated role for the newly composed Trial Chamber therefore appears to be that of monitoring and oversight, *which corresponds to a Trial Chamber's role under the Regulations of the Trust Fund during the implementation stage*" (emphasis added).³⁵

96. The Trust Fund submits that this is also clear from a review of the Regulations of the Trust Fund, which specifically regulate how a draft implementation plan is to be prepared, including the required content and victim eligibility process, depending

³² Appeals Chamber decision of December 2012, para. 54.

³³ Appeals Chamber decision of December 2012, para. 69.

³⁴ Appeals Chamber decision of December 2012, para. 60.

³⁵ Appeals Chamber decision of December 2012, para. 62.

on whether the order for reparations of which the Trust Fund has been seized was issued pursuant to rules 98 (1) or (2) of the Rules for individual reparation awards or 98 (3) of the Rules for collective reparation awards.³⁶

97. Put simply, the Trust Fund considers that these above considerations definitively clarify that the “implementation stage” does not begin at the moment when the Trust Fund begins implementing the awards approved from its draft implementation plan. Rather, one of the first activities undertaken *at the implementation stage* is the preparation and submission of a draft implementation plan, the required details of which are spelled out in the Regulations of the Trust Fund.

98. In short, in the Trust Fund’s legal understanding, the order by Trial Chamber I, as amended by the Appeals Chamber, has triggered the implementation phase. The Trust Fund would also like to note that the actual implementation of the awards is but one part of the reparations implementation phase and as such should not be confused with the entire implementation phase.

99. In its draft implementation plan, the Trust Fund presents a plan for approval, including how victims *will be* screened after the collective reparations awards proposed in the draft implementation plan are approved and the Trust Fund has begun implementing the awards.

100. Moreover, when the Appeals Chamber’s holdings are read with the Regulations of the Trust Fund, the Trust Fund respectfully submits that the time period between the issuance of an order for reparations and the approval of the draft implementation plan does not represent a “gap” period that is unregulated by the Regulations of the

³⁶ Cf. regulations 59 and 60-65 with regulations 69-72.

Trust Fund and therefore may be filled reference to pre-reparations order provisions in the Court's legal texts.

101. The Trust Fund submits that, from the moment it is seized pursuant to regulation 50 (b) of its Regulations, the proceedings are in the implementation stage and the Regulations of the Trust Fund comprise the applicable legal framework under which both the Court and the Trust Fund carry out their respective functions.

102. The second observation that the Trust Fund would like to respectfully submit for the Trial Chamber's consideration is the Appeals Chamber's determination in its decision of December 2012³⁷ and reaffirmed in its Reparations Judgment³⁸ that individual reparations requests under rule 94 of the Rules are only relevant to the first stage of proceedings, i.e. only prior to the issuance of the order for reparations. The Trust Fund observes that the Trial Chamber has not, in the body of the main text of its order, stated that it is applying rule 94 of the Rules.

103. However, the Trust Fund wishes to express its concern and request clarification from the Trial Chamber regarding the fact that, in determining that the individual eligibility process requires the compilation of individual victim dossiers including an individualized assessment of the harm suffered and most importantly also requires that the convicted person has a right to review and challenge the information in the dossiers, the Trial Chamber order cites as a legal basis its decisions issued pursuant to rule 94 in the Katanga case.³⁹

³⁷ Para. 54.

³⁸ *See e.g.* paras 178-179 (rejecting as moot the ground of appeal relevant to the Trial Chamber's delegation of its rule 97 authority because "the Trial Chamber did not avail itself of expert assistance prior to issuing the [order for reparations]"). In its decision of December 2012, the Appeals Chamber stated in relevant part that "The proceedings before the Trial Chamber leading to the issuance of an order for reparations are regulated in particular by articles 75 and 76 (3) of the Statute and by rules 94, 95, 97, and 143 of the Rules of Procedure and Evidence".

³⁹ The Trust Fund refers to Trial Chamber order, footnote 20 (upon which it based its finding that it "it is responsible for deciding on the status of eligible victims once the Defence has had the opportunity to submit its observations on the eligibility of each victim"), 31 (applying the redaction regime used in the Katanga case to the victim dossiers). *See* in a similar regard footnote 25.

104. In this regard, the Trust Fund notes that the current procedures, while not named as such, are clearly derived from the procedures set out under rule 94.

105. The Trust Fund also wishes to highlight that the Katanga reparations proceedings are currently in the first stage of proceedings, which is to say “the proceedings leading to the issuance of an order for reparations”, whereas the Lubanga proceedings are in the implementation stage.⁴⁰

106. In the Trust Fund’s view, the Trial Chamber reliance on provisions applicable to the pre-order stage of reparations creates a degree of uncertainty regarding whether it intends to in fact issue a new “order for reparations” pursuant to the procedures of rule 94 of the Rules, which the Trust Fund fears will lead to disputes regarding the need for appellate review, seriously further delaying the proceedings and also fundamentally calling into question whether the Trust Fund is properly seized of an order for reparations pursuant to regulation 50 (b) of its Regulations.

107. The Trust Fund wishes to highlight two critical aspects relevant to this procedural uncertainty.

108. First, in the Appeals Chamber Reparations Judgment, the Appeals Chamber rejected the grounds of appeal raised by the legal representatives V01 and the legal representatives V02 jointly with OPCV in which they alleged an error in the original Trial Chamber not ruling on the individual requests for reparations filed pursuant to rule 94 in its order for reparations.⁴¹

109. The Trust respectfully submits that the Trial Chamber order creates a situation that risk prejudicing the victims should their application under the Trial Chamber based individual claims-based eligibility process be rejected. The question of whether the Trial Chamber’s procedural approach creates a right of appeal to any

⁴⁰ See Appeals Chamber Reparations Judgment, para. 240.

⁴¹ See paras 144-145, 147-152.

negative eligibility determinations should be carefully considered, as well as the fact that the Appeals Chamber has already ruled on this aspect of the original Trial Chamber's reparations order, affirming the Trial Chamber's determination not to decide on any individual requests⁴² and finding that this determination also resulted in dismissing as moot Mr. Lubanga's ground of appeal relevant to his right to make observations on the rule 94 reparations requests, as well as his arguments related to his right to "verify" the identities and eligibility of the individual reparations applicants.⁴³ The Trust Fund submits that resolving this potential legal question that is caused by the Trial Chamber order could substantially delay further implementation of a reparation programme.

110. Second, the Trust Fund wishes to point out that, when considering the remand of the imposition of liability with the Appeals Chamber's corresponding rejection of these grounds of appeal, it would seem to follow logically that the Appeals Chamber did not intend for the new Trial Chamber to re-open the third element (the determination that reparation awards in the present case are to be of a collective nature only, rather than of a mixed or individual nature) of the amended order for reparations. This is because, had the Appeals Chamber considered that such an individual procedure was necessary to impose liability, the Appeals Chamber would have also remanded this element of the order or deferred deciding upon it until liability had been imposed.

111. The Trust Fund respectfully suggests that the reasonable conclusion to be drawn is that the Appeals Chamber, in remanding the element of the imposition of liability, did not view liability as being linked to the third element of the amended order for reparations or necessitate beginning an individual claims-based process at the implementation stage.

⁴² See paras 152, 156-157.

⁴³ See paras 163-164.

*b) Request for reconsideration and the Trust Fund's
proposed way forward*

112. The Trust Fund accordingly requests that the Trial Chamber clarify in which stage of proceedings it considers the proceedings to presently be. To the extent that the Trial Chamber has been operating under a different understanding of the legal framework from the above Trust Fund's legal analysis, the Trust Fund respectfully requests that the Trial Chamber reconsider its understanding.

113. The Trust Fund respectfully requests that the Trial Chamber declare that the present reparations proceedings are at the implementation stage.

114. In the case that the Trial Chamber grants the Trust Fund's request, the Trust Fund proposes to the Trial Chamber as a way forward that the Regulations of the Trust Fund be applied in full with respect to the future conduct of proceedings. The Trust Fund assures the Trial Chamber of its willingness to constructively engage with it and the parties with regard to any questions regarding the proper interpretation of the Regulations of the Trust Fund.

115. Should the Trial Chamber instead clarify that it does not consider that the proceedings have reached the implementation stage, the Trust Fund wishes to point out that a consequence of such a determination is that the Trust Fund, bound by its own Regulations, would need to consider whether it was properly seized under regulation 50 (b) of its Regulations.

116. In the absence of the proceedings being found to be at the implementation stage, the Trust Fund informs the Trial Chamber that it has serious concerns regarding the Trial Chamber's authority to mandate it to carry out and more specifically pay for the costs of its proscribed rule 94 based eligibility process. In this regard, the Trust Fund observes that it is currently expending considerable financial and staff resources on a procedure, which is based on the process being carried out by VPRS

in the context of the Katanga proceedings in the pre-order reparations phase. The Trust Fund notes that in the Katanga proceedings, these associated costs are borne fully by the Court. As such, the Trust Fund informs the Trial Chamber that the USD 111,000 euro already obligated by the Trust Fund may be seen as an impermissible shifting of cost from the Court onto the Trust Fund and may necessitate further action in order to remedy this financial loss to the Trust Fund's reparations reserves.

2. The division of authority between the Trial Chamber and the Trust Fund under the Regulations of the Trust Fund

a) Legal discussion

117. As submitted above, it is the Trust Fund's position that the present proceedings are in the implementation stage and that the Regulations of the Trust Fund apply. In this regard, the Trust Fund would first like to clarify a matter that it considers arises from the Trial Chamber order.

118. In its order, the Trial Chamber recalled that, once approved, it is responsible for monitoring and overseeing the implementation of the reparations plan.⁴⁴ It concluded that "[h]aving examined the [Draft Implementation Plan], the Chamber notes that it is incomplete and therefore does not comply with the instructions of the Chamber and the Appeals Chamber".⁴⁵ It therefore "defer[red] its approval". According to the Trial Chamber, it is undertaking this responsibility with regards to the Draft Implementation Plan "in accordance with the instructions of the Appeals Chamber".⁴⁶

119. The Trust Fund respectfully submits that this assertion is inaccurate. The Trust Fund observes that the Trial Chamber's current exercise of authority in issuing

⁴⁴ Trial Chamber order, para. 9.

⁴⁵ Trial Chamber order, para. 10.

⁴⁶ Trial Chamber order, para. 9.

decisions and orders relevant to its Draft Implementation Plan does not derive from the Appeals Chamber, but rather directly from regulation 69 the Regulations of the Trust Fund, which are, as held by the Appeals Chamber, an instrument of the Rome Statute.⁴⁷

120. The Trust Fund notes that the Appeals Chamber has repeatedly framed the Trial Chamber's exercise of authority in this same manner. For example, in its decision of December 2012, the Appeals Chamber noted that "the Regulations of the Trust Fund contemplate oversight and a certain degree of intervention by the Trial Chamber during the implementation phase of reparations"⁴⁸ and, on that basis, went on to determine that

62. The contemplated role for the newly composed Trial Chamber therefore appears to be that of monitoring and oversight, which corresponds to a Trial Chamber's role *under the Regulations of the Trust Fund during the implementation phase*.

63. [...] [The original Trial Chamber's 2012 reparations order] represents the final judicial decision in respect of reparations, apart from such monitoring and oversight required of the Trial Chamber under the Regulations of the Trust Fund after an order for reparations has been issued, *such as the "approval" of the draft implementation plan under regulations 57 or 69 of the Regulations of the Trust Fund.*" [Emphasis added.]

121. The Trust Fund submits that regulation 69 of the Regulations of the Trust Fund also demonstrates, by a plain reading of its text, that it is the source for the Trial

⁴⁷ Appeals Chamber decision of December 2012, para. 52. *See also e.g.* Appeals Chamber Reparations Judgment, paras 73, 106 (determining a matter based on "the plain language of the Court's legal texts, most particularly the Regulations of the Trust Fund").

⁴⁸ Appeals Chamber decision of December 2012, para. 56.

Chamber's authority with respect to any decisions or orders in relation to its approval of the Draft Implementation Plan. Regulation 69 provides that

“Where the Court orders that an award for against a convicted person be made through the Trust Fund where the number of victims and the scope, forms and modalities of reparations make a collective award more appropriate, in accordance with [Rule 98 (3) of the Rules], *the draft implementation plan shall set out the precise nature of the collective award(s), where not already specified by the Court, as well as the methods of its/their implementation. Determinations made in this regard should be approved by the Court.*” [Emphasis added.]

122. The Trust Fund respectfully submits that the above references support its position that the legal basis for the Trial Chamber order in relation to deciding whether to approve the Draft Implementation Plan is solely the Regulations of the Trust Fund. The Trust Fund further submits that, in exercising that authority, the Trial Chamber itself has implicitly acknowledged the applicability and in fact *is applying* the Regulations of the Trust Fund.

123. Yet, the Trust Fund observes that, in so doing, the Trial Chamber has thus far declined to acknowledge the authority that is equally provided by those same Regulations to the Trust Fund's Board of Directors and Secretariat staff. The Trust Fund submits that the Regulations of the Trust Fund must be applied in full and that they should not be applied selectively so as to grant authority to a Trial Chamber while simultaneously denying the authority granted therein to the Trust Fund's Board of Directors.

124. In this regard, the Trust Fund respectfully submits that the Trial Chamber order goes beyond the authority granted to it and impedes on the authority vested with the Trust Fund Board of Directors. The Regulations of the Trust Fund unambiguously

provide for the determination of the eligibility of victims to be determined solely by the Trust Fund Board of Directors with respect to both individual and collective reparations awards under regulations 60 to 65 and 69 to 72, respectively.

125. The Trust Fund submits that this issue, beyond being explicitly provided in the Regulations of the Trust Fund, has also already been finally determined by the Appeals Chamber, including with regard to the rights of the convicted person. In its Reparations Judgment, the Appeals Chamber held that

*“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 person at this stage. However, the Appeals Chamber notes that the Trust Fund expressly stated that it would not be opposed to Mr Lubanga having the opportunity to review the screening process of victims at the implementation stage, subject to any protective measures, and to comment on the draft implementation plan and have his observations considered. The Appeals Chamber considers it appropriate to include the Trust Fund’s suggestion in this respect in the amended order for reparations. The Appeals Chamber therefore considers that the procedures under rule 98 of the Rules of Procedure and Evidence and the Regulations of the Trust Fund do not infringe on Mr Lubanga’s rights and that any concerns thereto are adequately addressed by the further instructions included in the amended order for reparations identified in the paragraph above”.*⁴⁹ [Emphasis added.]

⁴⁹ See Appeals Chamber Reparations Judgment, para. 167.

*b) Request for reconsideration and the Trust Fund's
proposed way forward*

126. The Trust Fund respectfully requests that the Trial Chamber acknowledge that the Regulations of the Trust Fund are the source of its authority to issue decisions and orders with respect to the Draft Implementation Plan, as well as acknowledge the authority vested in the Board of Directors in those same Regulations. In this respect, the Trust Fund respectfully requests that the Trial Chamber reconsider the legal basis for its asserted authority to decide on the eligibility of individual victims in the collective reparations awards and its orders to the Trust Fund in this regard.

127. In the case that the Trial Chamber grants the Trust Fund's request, the Trust Fund proposes to the Trial Chamber as a way forward that Mr Lubanga be permitted to comment on the proposed screening process of victims contained in the Trust Fund's Draft Implementation Plan submitted on 3 November 2015. The Trust Fund recalls to the Trial Chamber that in its Draft Implementation Plan it proposed *inter alia* that:

47. Victims seeking reparations can have their identity verified through multiple methods that may include: identification card, voter registration cards/electoral cards, lists obtained from former commanders, demobilization card for those that passed through a formal DDR process, health clinic card, school identification card, or a statement signed by two credible witnesses denoting identity.

[...]

49. To establish the interviewees status as a former child soldier, the interviewer may elicit their knowledge, understanding, and familiarity of the structure of the armed group that would illustrate tenure in the UPC/FPLC.

[...]

51. Should information collected in the framework of previous Demobilization, Disarmament, and Reintegration (DDR) programmes be received from either United Nations agencies, non-governmental organisations, and governmental sources, the Trust Fund proposes to use this information for purposes of corroborating victim status. In other words, it would be used as an additional piece, not a prerequisite, of information to cross-check statements by prospective victims or their reference persons.

128. As instructed by the Appeals Chamber, the Trust Fund reaffirms its commitment and agreement to take into account any observations Mr. Lubanga may have regarding the screening process proposed in its Draft Implementation Plan and assures the Trial Chamber of its willingness to make any adjustments, provided they are reasonable and operationally feasible, in that regard. The Trust Fund also wishes to express its willingness to make any adjustments that the Trial Chamber considers are necessary at the operational level to its screening process.

129. The Trust Fund equally reaffirms its commitment, as stated in the Draft Implementation Plan, to “perform its due diligence in the screening process”⁵⁰ and furthermore reiterates its position that “[c]areful application of the eligibility criteria will ensure that the beneficiaries of the collective reparations initiative comport with the legal strictures of the Reparations Order”.⁵¹ The Trust Fund submits that there exists no reason to call into question either its competence to comply with the legal parameters and criteria for eligible victims set out in the Amended Order for Reparations, nor its good faith willingness to do so.

⁵⁰ Draft Implementation Plan, para. 30.

⁵¹ *Ibid.*

3. The applicability of rule 94 is limited to individual application-based reparations request proceedings

a) Legal discussion

130. As set out above, in the view of the Trust Fund, the Trial Chamber order introduces an individual claims-based procedure, in the sense of rule 94 of the Rules of Procedure and Evidence, albeit without being named as such. In addition to the Appeals Chamber's determination that rule 94 is applicable only at the pre-order for reparations stage, the Trust Fund would also call to the Trial Chamber's attention the Appeals Chamber's repeated holdings in its Reparations Judgment that rule 94 of the Rules is applicable with respect to individual reparations awards and is not relevant to the procedure in the present case which involves collective awards under regulation 69 of the Regulations of the Trust Fund.

131. In this regard, the Trust Fund recalls that the Appeals Chamber stated the following:

"148. In relation to the above provisions, the Appeals Chamber makes the following observations:

[...]

b. The Trial Chamber is not required in all circumstances (the Court "may") to decide upon the scope and extent of any damage, loss or injury *in relation to individual requests filed under rule 94* or those commenced on its own motion pursuant to rule 95 of the Rules of Procedure and Evidence.

[...]

149. Based on the above, the Appeals Chamber considers that the Court's legal texts provide for two distinct procedures for awards for reparations. *The first, which relates to individual reparation awards, is primarily application*

("request") based and is mainly regulated by rules 94 and 95 of the Rules of Procedure and Evidence. The second relates to collective reparation awards and is regulated in relevant part by rules 97 (1) and 98 (3) of the Rules of Procedure and Evidence.

132. The Trust Fund finds particularly instructive for the present proceedings what the Appeals Chamber then held on the basis of the above quoted text:

151. The Appeals Chamber also considers that this second procedure, relevant to collective reparations, corresponds with the principles discussed above, namely that reparations "oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Chamber to ensure that offenders account for their acts". In this respect, the Appeals Chamber recalls that it has already held above that "reparation orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence", decisions which are based on the evidence and factual findings relevant to the entire trial proceedings. The Appeals Chamber considers that it would contravene this principle to require that collective reparations can only be awarded on the basis of the individual requests for reparations received." (footnotes omitted).

133. The Trust Fund respectfully recalls that the Appeals Chamber, in setting the legal parameters for further proceedings in this case, explicitly ordered collective reparations only. Trust Fund wishes to express its deep concern that imposition in the Trial Chamber order of an individualized rule 94 modeled eligibility process appears to provide a strong indication that the Trial Chamber is of the opinion that proceedings in the present case have still not advanced to the implementation stage.

134. In addition to what is argued in the above section relevant to the distinct stages of reparations proceedings, the Trust Fund respectfully submits that in the present case there exists a reparations order in the sense of Article 75 of the Statute, which was then confirmed subject to specific amendments by the Appeals Chamber. In this regard, the Trust Fund recalls that the Appeals Chamber only remanded one discrete element, namely the liability assessment, to the newly composed Trial Chamber. The Appeals Chamber did not remand, but rather, the Trust Fund strongly suggests, finally determined the other four constitutive elements of the reparations order which are as such binding on the Trust Fund for purposes of designing its draft implementation plan and are the point of reference for the newly composed Trial Chamber in deciding whether to approve that draft implementation plan.

*b) Request for reconsideration and the Trust Fund's
proposed way forward*

135. On the basis of the above, the Trust Fund respectfully requests that the Trial Chamber take into account the binding nature of the type of reparations ordered by the original Trial Chamber and confirmed by the Appeals Chamber and reconsider its determination that the rule 94 procedures of the Katanga proceedings are an appropriate procedural basis in this case.

136. In the case that the Trial Chamber grants the Trust Fund's request, the Trust Fund proposes as a way forward that the appropriate legal basis for collective reparations awards, including the determination of victim eligibility, is regulation 69 of the Regulations of the Court and respectfully suggest that the Trial Chamber should consider the Trust Fund's Draft Implementation Plan within that context and for purposes of deciding whether to approve the Draft Implementation Plan.

4. The principle relevant to establishing a convicted person's liability

a) Legal discussion

137. The Trust Fund is concerned that one of the main motivations for the Trial Chamber's order of 9 February 2016, in particular the request for further programme information (to be responded to on 7 June 2016) as well as the individualized eligibility and harm assessment approach, was its concern that it had been tasked by the Appeals Chamber to establish Mr Lubanga's liability. In other words, the Trial Chamber (also) directed its order to the Trust Fund with a view to obtaining information that it deems necessary with regards to the establishment of Mr Lubanga's liability.

138. However, as will be discussed in the following, in the Trust Fund's view, this avenue towards establishing liability of the convicted person is neither producing the desired information, nor is it supported by the legal framework, as it has been interpreted in the Appeals Chamber Reparation Judgment. Furthermore, the information that may be collected as a result of the procedural approach outlined in the order of 9 February 2016, is actually neither necessary nor particularly useful for assessing liability of the convicted person.

- **Severing the determination of liability from the findings as established in the criminal trial**

139. The Trust Fund's most fundamental concern against the current procedural approach as a basis for establishing liability is that it risks distorting the picture to an extent that the determination of liability for reparations is in effect severed from the findings as established in criminal trial, i.e. the verdict and the sentencing decision and subsequently upheld by the Appeals Chamber.

140. The Appeals Chamber Reparations Judgment articulated the following principle relevant to imposing liability: “A convicted person’s liability must be proportionate to the harm caused and, inter alia, his or participation in the commission of the crimes for which he or she was found guilty” (emphasis added).

141. In consequence, liability directly flows from and corresponds to the harm caused by the crimes for which the person was convicted and sentenced.

142. In the context of the sentencing decision appeal, the Trust Fund notes that Mr. Lubanga raised as a ground of appeal alleged errors relevant to “large-scale and widespread” nature of the crimes,⁵² arguing inter alia as an error of fact that the evidence at trial did not demonstrate the widespread nature of the crimes. In rejecting Mr. Lubanga’s ground of appeal and confirming the Trial Chamber’s determinations, the Appeals Chamber noted that the Trial Chamber based its determinations in the sentencing decision on its conclusions as to the widespread recruitment of child soldiers and the “significant number” of children used actively to participate in hostilities “that the evidence established beyond a reasonable doubt [...] during the period of the charges”.⁵³

143. The Trust Fund also notes that the Appeals Chamber dismissed the alleged errors of fact in the sentencing appeal on the grounds that these findings had already been affirmed in the context of Mr. Lubanga’s appeal against the conviction decision.⁵⁴ Further, in the context of Mr. Lubanga’s appeal against his conviction, Mr. Lubanga raised fair trial arguments in relation to his alleged inability to “verify” the identity and age of the anonymous individuals that the Trial Chamber found

⁵² See Appeals Chamber, “Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the Decision on Sentence pursuant to Article 76 of the Statute”, 1 December 2014, ICC-01/04-01/06-3122 (hereinafter “Appeals Chamber Sentencing Judgment”), paras 95-96.

⁵³ See Appeals Chamber Sentencing Judgment, para. 99, 101-103.

⁵⁴ Appeals Chamber Sentencing Judgment, para. 103, referring to para. 49, footnote 79.

beyond reasonable doubt to be victims and upon whom his conviction is based.⁵⁵ He also raised arguments alleging that findings beyond reasonable doubt could not, as a matter of law, be entered absent the ability to “verify” the individuals at issue.⁵⁶ The Appeals Chamber rejected these alleged errors and affirmed the Trial Chamber’s findings.⁵⁷

144. With this context in mind, the Trust Fund would like to recall the following findings made by the Appeals Chamber in the Reparations Judgment, namely:

The factor of the number of “victims” under rule 98 (3) of the Rules of Procedure and Evidence [...] encompasses the findings thereon in the decisions on conviction and sentence. In this respect, the Appeals Chamber notes that, pursuant to rule 145 (1) (c) of the Rules of Procedure and Evidence, a convicted person’s sentence is based, *inter alia*, on the extent of the damage and the harm caused to victims and their families, which is determined by reference to the evidence presented at trial and the factual findings made thereon.⁵⁸

145. With regard to the harms identified by the Appeals Chamber in its Reparations Judgment, it held that:

186. In the present case, the Trial Chamber did not elicit any evidence specific to harm caused by the crimes for which Mr Lubanga was convicted specifically for the purpose of reparations. *Accordingly, the Appeals Chamber considers that, in amending the Impugned Decision, the Appeals Chamber is limited by the Trial Chamber’s findings regarding the harm to*

⁵⁵ See e.g. Appeals Chamber, “Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction”, 1 December 2014, ICC-01/04-01/06-3121-Red (hereinafter “Appeals Chamber Conviction Judgment”), paras 115, 208.

⁵⁶ See e.g. Appeals Chamber Conviction Judgment, para. 195.

⁵⁷ See e.g. Appeals Chamber Conviction Judgment, paras 123, 196-198, 208.

⁵⁸ Appeals Chamber Reparations Judgment, p. 56.

direct and indirect victims caused by the crimes for which Mr Lubanga was convicted that were made in the context of the trial proceedings. Thus, the Appeals Chamber takes into account decisions relevant to victim participation and findings in the Conviction Decision insofar as they relate to defining the harm caused by the crimes for which Mr Lubanga was convicted.

187. Furthermore, the Appeals Chamber again recalls that rule 145 (1) (c) of the Rules of Procedure and Evidence, which contains mandatory factors that must be taken into account *in determining a convicted person's sentence, provides that one of those mandatory factors is "the extent of the damage caused, and in particular 'the harm caused to the victims and their families'".* The Appeals Chamber therefore considers that the Sentencing Decision is also of relevance in terms of defining the harm caused by the crimes for which Mr Lubanga was convicted. [...] *Finally, the Appeals Chamber notes that Mr Lubanga appealed the Conviction and Sentencing Decisions and that it confirmed both decisions.* [Footnotes omitted, emphasis added].

146. The Trust Fund reiterates that, in its understanding of the Appeals Chamber's ruling, both of these findings, firstly, the finding that only reparations of a collective nature were ordered by the Trial Chamber, which was confirmed in appellate proceedings, and, secondly, the Appeals Chamber's definition of the harm caused by Mr. Lubanga's crimes, which it made based on the findings of the original Trial Chamber in its conviction and sentencing decision, are final and binding on the Trial Chamber.

147. The Trust Fund is therefore concerned that the Trial Chamber's procedural approach may ultimately undermine the conviction and sentence itself.

148. The Trust Fund respectfully recalls that the Appeals Chamber found that it was “established beyond reasonable doubt, in the Conviction Decision, which was also relied upon in the Sentencing Decision, that the crime of recruitment of individuals under the age of fifteen was “widespread” and that “a significant number of [individuals below the age of fifteen]” were used to participate actively in hostilities” and “that the finding relevant to the widespread nature of the involvement of individuals under the age of fifteen was challenged on appeal and confirmed by the Appeals Chamber in that judgment”.

149. In this respect, to the extent that the Trial Chamber intends to set Mr. Lubanga’s liability on the basis of the number of individual victims that it ultimately approves following Mr. Lubanga’s right to investigate and challenge these individuals, the Trust Fund submits that this arguably risks rendering the amount of his liability disproportionate to the extent of the harm caused by the crimes for which he was convicted, which is the applicable standard and point of reference stipulated by the Appeals Chamber in its Reparations Judgment.

150. The Trust Fund observes that in this vein the Appeals Chamber has made repeated reference to the fact that Mr. Lubanga’s sentence of 14 years is based on the factor of the “extent of the damage caused, in particular the harm to victims and their families [...]” (emphasis added) laid out in rule 145 (c) of the Rules.

151. The Trust Fund also notes in this regard that the standard of review applied by the Appeals Chamber, as stipulated in article 83 (2) of the Statute, is whether the sentence imposed is disproportionate to the crime for which the person was convicted.⁵⁹

Recalling the “intrinsic link” between the conviction, the sentence and the order for reparations, the Trust Fund submits that Mr. Lubanga’s liability should be

⁵⁹ See Appeals Chamber Sentencing Judgment, paras 38-39.

understood as merely a different manifestation of the harm relevant for sentence and thus should be determined on the basis of no less than the findings regarding the extent of damage and harm to victims and their families used for purposes of imposing a sentence. In short, the Trust Fund respectfully submits that the extent of the harm for which Mr. Lubanga is liable is the same extent of damage and harm that formed the basis of his sentence.

However, the Trust Fund recalls⁶⁰ its initial experiences from the April 2016 assessment mission, which indicate that the current approach puts a high burden on each victim at an individual level and as a direct consequence, considerably narrows the scope of reparations: as explained in detail above, the mission's initial findings indicate that a mere two of those who suffered harm as a results of the crimes for which Mr Lubanga was convicted may ultimately be able to benefit from reparations, in particular if the Trial Chamber views consent by the victims to share their identity and information with the convicted as a necessary requirement for eligibility to participate in collective reparation proceedings. Thus, the evidence-based findings from the Trust Fund's experience of the Trial Chamber's individual claims-based eligibility process demonstrates that the legal concerns are not merely theoretical, but also appear to be the result of the Trial Chamber process when put into practice.⁶¹

152. In short, in light of the first victim assessments, it seems that the Trial Chamber has put the bar for victims to participate in this process so high that likely only very few, if any, victims will be able to benefit from reparations in direct contradiction to the findings made beyond reasonable doubt, challenged and confirmed on appeal, in the conviction and sentencing decisions.

⁶⁰ *Supra* Section IV A – E.

⁶¹ See Appeals Chamber Reparations Judgment, para. 153, containing further references.

153. In conclusion, the Trust Fund respectfully suggests that the Trial Chamber's determinations in the conviction and sentencing decisions, as confirmed by the Appeals Chamber after Mr. Lubanga fully exercised his right of appeal, are the appropriate key source, for establishing Mr. Lubanga's liability regarding the harm caused by the crimes for which he was convicted.

154. In fact, these already existing determinations of the Appeals Chamber render unnecessary the individual claims-based eligibility process currently mandated by the Trial Chamber order as a tool to establish liability. Moreover, and as will be elaborated in the following, the Trust Fund is convinced that the individual claims based eligibility process, not least because it is fundamentally at odds with the collective nature of the awards ordered in this case, is also inept to provide a meaningful basis for establishing liability.

155. The Trust Fund Trust respectfully reiterates and underlines the Appeals Chamber's statement that "reparation orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence".⁶² This intrinsic link requires the eventual scope of reparations awards to victims to be proportionate to the nature and intent of the convicted crimes as well as to the corresponding severity of the sentence.

- **A failure to achieve representative sampling**

156. As has been noted above, the individual claims based eligibility process is also inept to provide a meaningful basis for establishing liability because it does not provide representative information on the harm suffered by the totality of victims. The Trust Fund submits that liability should be determined based on all relevant harm caused to all victims rather than only on that (limited) harm to a select

⁶² Appeals Chamber Reparations Judgment, paras 65, 151.

(limited) number of victims that are successful in a burdensome and protracted legal proceeding.

157. In this context, the Trust Fund notes that the Trial Chamber states that, with regard to the Trust Fund's proposed collective reparations programmes, the Trial Chamber "reserves the right to approve the proposed programmes that "best match [...] the needs expressed by the victims in connection with the harm they have suffered".⁶³ The Trust Fund understands this to mean that the Trial Chamber considers that the fourth element of the amended order for reparations (definition of relevant harm) has not yet been finally determined by the Appeals Chamber, but is instead subject to being re-opened by the Trial Chamber.

158. The Trust Fund is concerned that this may result in limiting the harms as identified by the Appeals Chamber to only those harms that the individual claims based process establishes, with all the inherent limitations of a victim-insensitive harm assessment.

159. Furthermore, the problem is compounded by the fact that if one bases the harm determination only on those select victims deemed eligible through the individual claims-based process, these persons will likely be only a limited and potentially unrepresentative sub-set of victims, when compared to the totality of all those victims who have suffered harm as a result of the crimes for which Mr Lubanga was convicted.⁶⁴

⁶³ Trial Chamber order, para. 23.

⁶⁴ In this respect, the Trust Fund recalls its statistics relevant to the first batch of victim dossiers, of which only two are indirect victims. The Trust Fund notes in this regard that these are also only *potential* eligible victims and thus the first batch could, depending on the Trial Chamber's determination, not contain any indirect victims and thus the harm would not be reflective at all with regard to that suffered by such victims. Moreover, the Trust Fund also recalls that female victims were significantly underrepresented amongst those victims who formally participate in the reparations process and it can be assumed that they are also less likely to come forward under the current procedural approach.

160. Furthermore, the Trust Fund is deeply concerned that the individual claims based process results in the exclusion of vulnerable victims, and in particular victims who suffer from shame and stigma. The sample of victims artificially created through this process will likely also suffer from a gender bias - from participation in this case so far, it seems fair to assume that disproportionately few potentially eligible female victims will dare to come forward in such an exposed way, as required by the Trial Chamber at present.⁶⁵

- **Problems related to application of the regulatory legal framework (Rules of Procedure and Evidence and the Regulations of the Trust Fund)**

161. The Trust Fund would request that the Trial Chamber consider the following points:

162. First, the Trust Fund notes that one of the principles of statutory interpretation, known in some jurisdictions as the rule against surplusage, is that provisions should be interpreted in a harmonious manner, giving effect to each provision, and not in a manner that places one provision in conflict with the other or renders null the applicability of the other provision.

163. In this regard, the Trust Fund recalls that, as reiterated by the Appeals Chamber, the Assembly of States Parties, the Court's legislative body, oversees the activities of the Trust Fund by determining criteria that the Trust Fund must follow which were established by way of the adoption of resolutions.⁶⁶ The Trust Fund recalls the Appeals Chamber statement in this regard that "article 79 (3) of the Statute stipulates that the Trust Fund is to be managed according to determinations made by the

⁶⁵ See in this respect Amended Order for Reparations, Reparations Principles, para. 18: "A gender-inclusive approach should guide the design of the principles and procedures to be applied to reparations, ensuring that they are accessible to all victims in their implementation."

⁶⁶ Appeals Chamber Reparations Judgment, paras 44-46.

Assembly of States Parties”.⁶⁷ The Trust Fund further recalls that the Regulations of the Trust Fund were adopted by way of an Assembly resolution.⁶⁸

164. The Trust Fund acknowledges that the Trial Chamber has been tasked with two distinct responsibilities, establishing the amount of Mr. Lubanga’s liability and also approving the draft implementation plan, the actual implementation of which the Trial Chamber also monitors and oversees.⁶⁹

165. The Trust Fund respectfully submits that the Trial Chamber’s understanding of how liability must be determined for purposes of an order for reparations, if it sets a precedent, has serious and negative repercussions beyond concerns about the present case, not least because it effectively renders void numerous provisions of the Trust Fund.

166. In this respect, the Trust Fund notes with concern that the Trial Chamber’s approach if also adopted in the future would have profound consequences for any potential future individual reparations awards in the sense of Rule 98 (2) of the RPE. The Trust Fund observes that, under the Trial Chamber’s requirement that the convicted person be able to challenge the eligibility of each potential victim, and must know their identity in order to do so, as well as that a Trial Chamber must decide on eligibility and the extent of harm on an individual level, a Trial Chamber would not be able to issue an order for individual reparations where the beneficiaries were not identified therein. This is directly contradictory to Section II of the Regulations of the Trust Fund, entitled “Cases where the Court does not identify the beneficiaries”, which further elaborates on how to address cases that fall within Rule 98 (2) of the RPE. Applying the Trial Chamber’s approach to the Rule 98 (2) of the

⁶⁷ Appeals Chamber Reparations Judgment, para. 46.

⁶⁸ *Ibid.* See also the annex to ASP Resolution Establishing the Trust Fund.

⁶⁹ The Trust Fund acknowledges that only this second responsibility is governed by the Regulations of the Trust Fund.

RPE scenario of individual awards where the beneficiaries are not yet identified, would make the procedure laid out in regulations 60 to 65 of the Regulations of the Trust Fund, which were adopted by the Assembly of States Parties, a mere surplusage. In fact, if one thinks it through to the very end, the scenario of Rule 98 (2) of the RPE would lose its application. Why would the Court have to go “through the Trust Fund” and deposit the awards there first, if it had already finally identified and determined all eligible individual victims?

167. The potential consequences for collective reparations are equally profound. In this respect, the Trust Fund recalls that, as explained by the Appeals Chamber, the factors laid out in rule 98 (3) of the Rules govern the discretion of a Trial Chamber to decide that it is “more appropriate ” to order collective reparations, rather than individual reparations. One of the determining factors for the appropriate is the number of victims.

- **Failure to adequately procedurally reflect the collective nature of awards ordered in this case**

168. In the present case, the Appeals Chamber observed that the original Trial Chamber based its decision to order collective reparations on *inter alia* its finding of “‘the considerable people’ affected by the crimes for which Mr. Lubanga was convicted”.⁷⁰ The Trust Fund also recalls that Appeals Chamber found “particularly instructive” for its understanding of collective reparations the explanatory note in relation to the interpretation of article 75 (1) of the Statute, which the Appeals Chamber reproduced in its Reparations Judgment as stating that

“[t]his provision intends that where there are only a few victims the Trial Chamber may make findings about their damage, loss and injury. Where there are more than a few victims, however, *the Trial Chamber will not*

⁷⁰ Appeals Chamber Reparations Judgment, para. 153.

*attempt to take evidence from or enter orders identifying separate victims or concerning their individual claims for reparations. Instead, the Trial Chamber may make findings as to whether reparations are due because of the crimes and will not undertake to consider and decide claims of individual victims.*⁷¹ [Emphasis added.]

169. The Trust Fund is deeply concerned that the procedures stipulated in the Trial Chamber order, if considered legally required for establishing liability in an order for collective reparations in cases with potentially tens of thousands of victims, such as potentially in the *Bemba* case, would be operationally and financially impossible for either the Trust Fund (or the Court) to manage and in addition would be very time consuming, further delaying the implementation of reparations.

170. In light of these considerations, the Trust Fund submits that the Trial Chamber order does no less than threaten the viability of collective reparations at the Court. As has occurred in this case, the ability of the Trust Fund to serve as the Court's implementing partner for purposes of reparations is at stake.

171. The Trust Fund considers that such a result would be devastating for the Court, for the Trust Fund, and most importantly, for the untold numbers of victims of mass crimes occurring in the Court's jurisdiction. The Trust Fund urges the Trial Chamber to consider the systemic ramifications of its approach to imposing liability and the seriousness of the concerns that the Trust Fund is compelled to raise herein.

- **Considerations related to sequencing**

172. The Trust Fund submits that the Trial Chamber's approach is also procedurally unsound in light of what it has argued above in relation to the two stages of reparations proceedings.

⁷¹ Appeals Chamber Reparations Judgment, para. 150, footnote 181.

173. The Trust Fund recalls that in the Appeals Chamber Reparations Judgment, the Appeals Chamber “stress[ed] that the imposition of liability on a convicted person, including the precise scope of that liability, should be done by the Trial Chamber in the order for reparations”.⁷² For the Trust Fund it follows logically that when this determination is read with the above quoted holding that a draft implementation plan can only be prepared *following* the issuance of that order for reparations, it becomes clear that liability cannot be derived or based on any aspect of a draft implementation plan submitted by the Trust Fund.

174. This is further supported by the Appeals Chamber’s clarification that a draft implementation plan submitted pursuant to either regulation 57 or 69 of the Regulations of the Trust Fund is not the order for reparations under article 75 of the Statute. From this and as is further elaborated upon below, the Trust Fund submits that the convicted person’s liability, as imposed in the order for reparations, is not linked to the estimated or actual cost of any particular reparations programme approved in a draft implementation plan or to the actual number of individuals who participate in any approved reparations programme/s, but rather, as stated above, “is derived from separate and distinct considerations relevant to the harm caused by the crimes for which the person was convicted and sentenced”.⁷³

- **Following the Appeals Chamber’s guidance on the determination of liability**

175. The Trust Fund would also respectfully request that the Trial Chamber take into consideration the manner in which the original Trial Chamber assessed the extent of the damage and harm for purposes of sentencing Mr. Lubanga.

⁷² Para. 237.

⁷³ *Supra* para. **Error! Reference source not found.**

176. In particular, the Trust Fund notes that the Trial Chamber made findings in this regard based on its evaluation of evidence that was not based on individualised harm. To the contrary, the Trial Chamber relied upon the harms caused to child soldiers as a general matter as identified in *inter alia* international human rights instruments, the testimony of expert witnesses, United Nations reports and NGO reports, as well as academic articles.⁷⁴

177. In this regard, the Trust Fund notes that the original Trial Chamber considered:

“38. As the Chamber described in the Judgment, the principal historical objective underlying the prohibition against the use of child soldiers is to protect children under the age of 15 from the risks that are associated with armed conflict, and particularly they are directed at securing their physical and psychological wellbeing. This includes not only protection from violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment, including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear.”

[Footnotes omitted.]

178. Furthermore, in determining whether a harm could be considered a part of the gravity of the crimes for which Mr. Lubanga was convicted, the Trial Chamber evaluated whether the harm was “sufficiently widespread that it could be characterised as occurring in the ordinary course [of the commission of the crimes]”.⁷⁵

179. The Trust Fund therefore submits that extent of the damage and the harm to victims and their families found in the Sentencing Decision and upon which the

⁷⁴ Trial Chamber Sentencing Decision, paras 37-42.

⁷⁵ Trial Chamber Sentencing Decision, para. 74.

Appeals Chamber Reparations Judgment is based should be understood as harms that are in essence inherent to the crimes for which Mr. Lubanga was convicted. Put differently, the extent of the damage and harm found therein are the harms that are characterized as occurring in the ordinary course of the commission of the crimes of enlisting, conscripting and using children under the age of 15 to actively participate in hostilities.

180. In conclusion, the Trust Fund submits that the individualised harm assessments currently mandated by the Trial Chamber order are not only in themselves harmful to the potential victims, but they are also unnecessary and risk distorting the true extent of the damage and harm caused to victims for purposes of establishing the amount of Mr. Lubanga's liability.⁷⁶ Mr. Lubanga's liability can and should be imposed based on the general and overall extent of the damage and harm caused to victims that forms the basis of his conviction and sentence.

*b) Request for reconsideration and the Trust Fund's
proposed way forward*

181. For the above reasons, the Trust Fund respectfully requests that the Trial Chamber reconsider its understanding that the Appeals Chamber has instructed it to carry out an individualized eligibility process for purposes of establishing Mr. Lubanga's liability. The Trust Fund further requests that the Trial Chamber reconsider its conceptual approach to the principle that Mr. Lubanga's liability must be proportional to the crimes for which he was convicted and sentenced and instead take into account the relevant findings therein, found beyond reasonable doubt and confirmed on appeal, as the foundation for determining the extent of the harm caused by Mr. Lubanga's crimes.

⁷⁶ See in this respect Amended Order for Reparations, Reparations Principles, para. 45 ("The awards ought to be proportionate to the harm, injury, loss and damage as established by the Court.").

182. The Trust Fund notes in this respect, the Appeals Chamber’s statement that, in order for it to impose an amount of liability on Mr. Lubanga, it “would need to be provided with relevant information, given that the Trial Chamber had only made limited enquiries previous to the issuance of [its reparations order]”.⁷⁷

183. The Trust Fund also notes that in the Sentencing Decision, the Trial Chamber stated that it had “not reached conclusions to the criminal standard, namely beyond reasonable doubt, as to the precise number, or proportion, of the recruits who were under 15 years”, despite having received submissions in this regard. The Trust Fund also observes that the Trial Chamber stated that, despite this, “in passing sentence, [the Trial Chamber] has reflected its determination that the involvement of children was widespread”.⁷⁸

184. The Trust Fund recognizes the extremely difficult task given to the Trial Chamber by the Appeals Chamber and wishes to provide the Trial Chamber with its understanding of the Appeals Chamber’s statement and instruction in the hope that this may be of assistance to the Trial Chamber.

185. The Trust Fund understood the Appeals Chamber to consider that the information in the conviction and sentencing decisions, while the basis for the harm caused by Mr. Lubanga’s crimes, was insufficient for purposes of establishing an exact amount of liability. As set out in its Draft Implementation Plan, the Trust Fund understood the reference to “relevant information” to mean additional information relevant to *inter alia* the total number of direct and indirect victims who could potentially be eligible for reparations, the costs associated with remedying the harms caused, and the costs related to administrative processes necessary to implement reparations in the context of the DRC.

⁷⁷ Appeals Chamber Reparations Judgment, para. 238.

⁷⁸ Trial Chamber Sentencing Decision, para. 50.

186. In the Trust Fund's understanding, the Appeals Chamber requested the Trust Fund's assistance with these matters because of its knowledge of the situation on the ground in the DRC based on its work under its assistance mandate. The Trust Fund submits that it complied with this "extraordinary" request in its Draft Implementation Plan when it directed the Trial Chamber to a number of expert sources that could help provide this additional information.

187. In this regard, the Trust Fund recalls that, in its Reparations Filing, it directed the Trial Chamber to a number of non-governmental organisations that had prepared reports documenting the prevalence of child soldiers in the UPC during the relevant time that could serve as one basis for determining the total scope of direct and indirect victims who were harmed by Mr. Lubanga's crimes.⁷⁹

188. The Trust Fund also recalls that it directed the Trial Chamber to cases where monetary reparations had been awarded to victims in the context of war crimes and crimes against humanity by the DRC military courts and, in this context, provided the Trial Chamber with the sums awarded in those cases.⁸⁰ The Trust Fund also directed the Trial Chamber to international human rights jurisprudence that in its view could be of assistance for determining how to arrive at a specific monetary amount for purposes of liability.⁸¹

189. Further, the Trust Fund recalls that it also provided the Trial Chamber with information relevant to the costs of operating in the DRC, based on its long history of repairing harm to victims in the DRC in the context of its assistance mandate.⁸²

190. The Trust Fund respectfully proposes to the Trial Chamber that it should use the findings from the trial and appellate proceedings regarding the scope and extent of

⁷⁹ Trust Fund Reparations Filing, paras 242-253.

⁸⁰ Trust Fund Reparations Filing, paras 220-229.

⁸¹ Trust Fund Reparations Filing, paras 230-236.

⁸² Trust Fund Reparations Filing, paras 266-310.

the harm caused, as well as the wide spread nature of the violations, as the foundation for determining Mr. Lubanga's liability. The information provided by the sources that the Trust Fund identified in its Reparations Filing can, as necessary, also assist to fill any evidentiary gaps in order for the Trial Chamber to arrive at a determination of the monetary amount of liability to be imposed on Mr. Lubanga.

191. The Trust Fund also suggests that the parties and potentially the Prosecutor and Registry staff may also be to direct it to relevant resources and information in this regard.

192. Finally, the Trust Fund wishes to assure the Trial Chamber of its willingness and readiness to provide additional potential resources should the Trial Chamber determine that this could be of assistance.

VII. Outcomes of the April 2016 victims assessment missions

193. Under the current approach, which the Trust Fund reiterates should be revised, the Trust Fund submits that the 12 victims whose dossiers are transmitted in the attached annexes should be deemed eligible for reparations.

194. The Trust Fund notes that three potential victims have consented to reveal their identity to the convicted person in accordance with the Trial Chamber's prerequisite of eligibility for collective reparations. Nine potential victims could not consent to the prerequisite requirement because of their deeply felt fear of reprisal and concern for their safety.

195. In this context, the Trust Fund would like to clarify its understanding that it is the Trust Fund's role in accordance with the Trial Chamber order to transmit to the Trial Chamber those potential victims that have been assessed as victims eligible to benefit from reparations. However, in the view of the Trust Fund, the representational responsibility of the Legal Representatives for Victims remains

intact as they continue to advocate for the legal interests of their clients exercise their right to reparations.

196. The Trust Fund would further like to note that in the transmitting these dossiers, it submits them only to the Trial Chamber the legal representative. As such, the Trust Fund has not made any redactions. The Trust Fund wishes to confirm with the Trial Chamber its understanding that, once so ordered by the Trial Chamber, it is to redact Section E because it contains confidential information pertaining to contact details of the potential victims (telephone numbers and address). As a matter of principle, any other redactions should be requested by the legal representatives or OPCV directly with the Trial Chamber.

VIII. Conclusion

197. Based on the above related findings of its first undertaking to comply with the Trial Chamber's order of 9 February 2016, the Trust Fund submits that the current victim identification and harm assessment process is harmful to the well-being and interests of victims and contrary to the goal of providing appropriate redress to victims that is at the core of the Court's reparations system and therefore needs to be reconsidered.

198. As argued throughout the present submission, the Trust Fund is convinced that requirements related to the determination of eligibility do not require an individual assessment of victims "claims". In line with the Appeals Chamber, the Trust Fund submits that the identification of eligible victims is to take place during the implementation of actual awards (as foreseen explicitly in the Regulations of the Trust Fund and proposed in the Trust Fund's filing and Draft Implementation Plan) and that, noting the amended reparations order issued by the Appeals Chamber, the Regulations of the Trust Fund provide the applicable legal framework for the present, reparations implementation phase of proceedings.

199. Therefore, the Trust Fund suggests to the Trial Chamber that rather than proceeding along the lines of an adversarial judicial procedure as laid out in the Trial Chamber order, it reverts to acknowledge the administrative authority of the Trust Fund as described in the Regulations of the Trust Fund and recognized by the Appeals Chamber and along the lines proposed in the Draft Implementation Plan and the Trust Fund's subsequent submissions. The Trust Fund respectfully submits that this would be in accordance with the Court's statutory framework relevant to reparations and, as such, would be more responsive to the collective nature of the reparations awarded and the widespread nature of the crimes for which Mr. Lubanga was convicted. The Trust Fund respectfully requests the Trial Chamber to reconsider its current approach to this effect.

200. As will be demonstrated in the forthcoming filing of the Trust Fund, due on 7 June 2016 in response to the Trial Chamber's request to provide more detailed information on the programmatic elements in the Trust Fund's Draft Implementation Plan of November 2015, the current procedural approach of the Trial Chamber is a major methodological obstacle to comply with this request. It is fundamentally challenging the Trust Fund's programme logic and essentially undermining the Trust Fund's ability to maintain the core elements of its draft implementation plan as well as the corresponding financial complement. The Trial Chamber is respectfully invited to review the present filing on victim identification and harm assessment in conjunction with the forthcoming filing on additional programme information.

201. Finally, the Trust Fund reiterates its commitment to jointly working with the Trial Chamber and other parties and stakeholders to these proceedings, so as to fulfil the promise of reparations set out in the Rome Statute in such a way as to ensure equity and responsiveness to the rights of victims and the convicted person, as well as systemic viability and the most effective and efficient use of the available limited organisational capacities and financial resources.

FOR THE FOREGOING REASONS

The Board of Directors respectfully submits this filing, including a request for reconsideration of the current procedural approach and the first set of victim dossiers in response to the Trial Chamber's Order of 9 February 2016.

A handwritten signature in black ink, consisting of a stylized 'P' and 'W' followed by a long horizontal stroke.

Pieter W.I. de Baan

Executive Director of the Secretariat of the Trust Fund for Victims,
on behalf of the Board of Directors of the Trust Fund for Victims

Dated this 31 May 2016

At The Hague, The Netherlands