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TRIAL CHAMBER II

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

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

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

Additional Programme Information Filing

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 “Reparations Filing” and “Draft Implementation Plan”).²
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 œuvre » (hereinafter “Trial Chamber order”),³ in which it, *inter alia*, found that, while it accepted the “broad outlines”, the information presented in the Draft Implementation Plan relevant to the proposed reparations programmes was insufficient for purposes of the Trial Chamber approving the Plan.⁴ In that same order, the Trial Chamber also found the Draft Implementation Plan to be incomplete with respect to a list of potential individual victims and accordingly instructed the Trust Fund to submit a first set of potential individual victim dossiers by 31 March 2016, for which the deadline was subsequently extended to 31 May 2016.
3. Regarding the requested information relevant to the proposed reparations programmes, the Trial Chamber instructed the Trust Fund to file, by 7 May 2016, a set of proposed collective reparations programmes, including:
 - 1) the specific terms of reference for each *programme* for which the Trust Fund is considering issuing a request for proposals or entering into a contract;
 - 2) a “precise evaluation” of the cost of each *programme*; and
 - 3) the time limits for each *programme*’s implementation.⁵
4. Regarding the individual victim dossiers, the Trial Chamber stated that it would consider the proposed collective reparations programmes after it had considered the first set of

¹ ICC-01/04-01/06-3177-Red; Document relatif aux réparations et projet de plan de mise en œuvre, ICC-01/04-01/06-3177-Red-tFRA.

² ICC-01/04-01/06-3177-AnxA; Annexe A au « Document relatif aux réparations et projet de plan de mise en œuvre », ICC-01/04-01/06-3177-AnxA-tFRA.

³ ICC-01/04-01/06-3198.

⁴ Trial Chamber order, para. 20.

⁵ Trial Chamber order, paras 21-22.

dossiers and that it “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”.⁶

5. On 4 May 2016, the Trial Chamber granted the Trust Fund’s request for an extension of time for the filing of the requested additional information to 7 June 2016.⁷

6. On 31 May 2016, the Trust Fund transmitted the first set of victim dossiers to the Trial Chamber (hereinafter “Victim Dossier Filing”).⁸ In that filing, the Trust Fund presented various difficulties and concerns regarding the Trial Chamber’s individualised victim eligibility approach that it encountered in its first missions undertaken to compile the victim dossiers.⁹ In that same filing, the Trust Fund also requested reconsideration of the Trial Chamber order and requested that the Trial Chamber take into account the information provided in the present filing for purposes of deciding upon the request for reconsideration.¹⁰

7. In compliance with the Trial Chamber order, the Trust Fund hereby transmits additional information regarding its proposed collective reparations programme originally set out in the Draft Implementation Plan.

8. In making this submission, the Trust Fund wishes to assure the Trial Chamber that it has worked as diligently and efficiently as possible to obtain and provide the Trial Chamber with the requested additional information by the established deadline.

9. However, as is further developed below, the Trust Fund’s ability to provide the degree of detail requested is necessarily limited by certain procedural and operational realities from which the Trust Fund cannot deviate. The Trial Chamber’s conditionality of the outcome of the ongoing individual victim eligibility process to its approval of the collective reparations programme has resulted in a high degree of programmatic uncertainty that negatively affects the Trust Fund’s ability to provide the requested additional information to the degree specified in the order. This is particularly so in light of the Trial Chamber’s statement in its order that, for purposes of assessing and potentially approving the Trust Fund’s proposed

⁶ Trial Chamber order, para. 23.

⁷ Décision prorogeant le délai pour le dépôt de l’information additionnelle relative aux programmes de réparation, ICC-01/04-01/06-3207.

⁸ ICC-01/04-01/06-3208.

⁹ Victim Dossier Filing, paras 8, 43-84.

¹⁰ Victim Dossier Filing, para. 10.

collective reparations *programmes*, it will consider the harms identified and assessed for only those individually approved victims, while those harms already have been identified, based on the findings in the conviction and sentencing decisions, by the Appeals Chamber in its 3 March 2015 judgment and amended order of reparations (hereinafter “Appeals Chamber Reparations Judgement” and “Amended Order for Reparations”),¹¹ which were confirmed in the Trust Fund’s 2015 community consultations in Ituri province, as discussed in the Reparations Filing accompanying the Draft Implementation Plan.

10. Therefore, in the present filing, the Trust Fund will also share information relevant to the procedural and operational framework under which it is working, as well as its view of the methodological impact of the individual victim eligibility process on the further development of collective reparations programmes for the victims of the crimes for which Mr Lubanga was convicted. The Trust Fund considers that this information is directly relevant to the present filing and provides critical context for the requested additional information provided herein.

II. OVERVIEW OF THE DRAFT IMPLEMENTATION PLAN

11. The Trust Fund presented the Draft Implementation Plan for collective reparations to victims in the Lubanga case, based on a thorough and in-depth contextual assessment.

12. The context in which the collective reparations programme was devised to be implemented was informed by, among other things: Trust Fund consultations with potential victims and communities associated with the case in Ituri province; a conference of international experts comprised of practitioners, researchers, and academics; the Victims Participation and Reparation Sections (hereinafter “VPRS”) victim mapping report; legal analysis of the judicial record of the case, including the relevant appellate decision (2102), the Appeals Chamber Reparations Judgement and Amended Order for Reparations (2015); and the Trust Fund’s more than eight years of programmatic and operational experience implementing a victim assistance programme in eastern Democratic Republic of the Congo (including reintegration projects of former child soldiers).

¹¹ 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, paras 186-191; AMENDED order for reparations, 3 March 2015, ICC-01/04-01/06- 3129-AnxA, para. 58.

13. The design of the collective reparations programme was informed by the findings and information gleaned from this contextual assessment. Crucial factors such as the potential number of 3,000 victims (direct and indirect) and the manner of their screening and enrollment as an integral part of programme implementation formed the foundation for the development of the collective reparations programme. The estimated complement of EUR €1,000,000 to administer the programme was similarly premised on these conclusions.

14. The Trust Fund's Draft Implementation Plan was inspired by the Regulations of the Trust Fund and more in particular based on its interpretation of the Amended Order for Reparations issued by the Appeals Chamber. The Trust Fund assumed that victims would only be screened at the programme implementation stage, as indicated in the Appeals Chamber Reparations Judgment and the Amended Order for Reparations.¹²

15. However, the Trial Chamber, as manifest in its order of 9 February 2016, took issue with the Trust Fund's understanding of eligibility screening to be an administrative procedure during programme implementation. Instead, it decided to approach victim eligibility as a legal procedure prior to programme approval or implementation, with eligibility determinations to be made by the Trial Chamber, requiring the compilation of individual victim dossiers, including both detailed victimization information and a harm assessment at the individual level, as well as informed consent by each victim to agree to have his or her identity revealed and challenged by the convicted person.

16. The Trust Fund considers that the Trial Chamber's victim eligibility process fundamentally affects a key component of collective reparations programming in the Lubanga case to such an extent that the applicability of the Trust Fund's Draft Implementation Plan, including the €1 million complement offered by the Trust Fund Board of Directors, has been invalidated.

17. As the Trust Fund has previously argued,¹³ the Trial Chamber's procedural approach to victims' eligibility and harm will result in a significantly lower number of victims being able to benefit from reparations than it had estimated at the time of proposing the Draft Implementation Plan. Moreover, this approach of the Trial Chamber may exclude in

¹² See Victim Dossier Filing, paras 54-59, 198.

¹³ Victim Dossier Filing, paras 60-74, 149-152, 156, 159-160.

particular vulnerable victims such as female victims or victims who are still stigmatized today because of the harm they suffered. Not least in this respect, the Trial Chamber's victim eligibility process directly impacts on the Trust Fund's programming and calls for its substantive revision. In fact, as will be explained in the following, the implications of the Trial Chamber's process fundamentally undermine the viability of the Draft Implementation Plan as presented on 3 November 2015.

A. Implications for the Trust Fund's ability to complement payments of reparations awards

18. The Trust Fund respectfully submits that, as described in regulation 56 of the Regulations of the Trust Fund,¹⁴ its Board of Directors has a financial responsibility to manage the funds in its reparations reserve with a view to maintaining the ability to complement the payments of reparation awards that may eventually be ordered in all ongoing cases. However, the funds available to the Trust Fund to complement the payment of awards for reparations are inherently limited so that, if reparations are primarily funded out of the Trust Fund's reparations reserve, it is unrealistic that there will be sufficient financial means to remedy all harm to all victims in all cases. Therefore, the Trust Fund must carefully consider how to most effectively use the limited resources available to it for the maximum benefit of victims.

19. In consequence, if the Trust Fund's concern that significantly fewer victims than initially anticipated in November 2015 (i.e. at the time of the submission of the Draft Implementation Plan) will be able to benefit from reparations becomes a reality, the Board of Directors may feel compelled to revise downward the "complement" sum of money that finances

¹⁴ See also Appeals Chamber Reparations Judgement, para. 113, wherein the Appeals Chamber held that: "The Appeals Chamber also considers that the factors laid out in regulation 56 of the Regulations of the Trust Fund relevant to whether to complement a specific reparation award are not ones that an individual Trial Chamber has the requisite competence to appropriately balance. In this regard, the Trust Fund's Board of Directors must consider not only its activities undertaken pursuant to its assistance mandate under regulation 50 (a) of the Regulations of the Trust Fund, but also all of the other ongoing legal proceedings at the Court that may give rise to an order for reparations. Furthermore, the Board of Directors is much better placed than an individual Trial Chamber to evaluate the effectiveness of any potential fundraising from donors that could also be used to support a reparation award, which could be potentially relevant to the above factors. The Appeals Chamber is therefore of the view that, in addition to the clear text of the provision at issue, the decision by the Assembly of States Parties to place the authority to determine whether to complement the resources collected for an award for reparations with the Board of Directors, as opposed to an individual Trial Chamber, is clearly preferable from a policy and practical perspective, given the competing financial considerations that must be balanced in deciding whether to complement an award for reparations that is ordered in a specific case." [Footnotes omitted.]

reparations in accordance with the reduction in the level of programming required for fewer victims. Moreover, considering the view of the Board of Directors that the development and implementation of the collective reparation programme under the current Chamber's approach does more harm than good, by potentially benefiting a disproportionately small number of eligible victims and by causing additional fear, re-traumatization, and a sense of inequity among the victim population, continuation of this approach may compel the Board of Directors to reconsider its proposed plan and complement in total.

B. Procedural uncertainties and their impact on the Trust Fund's ability to program

20. The Trust Fund recalls that the Trial Chamber stated that it would consider the proposed collective reparations *programmes* after it had considered the first set of victim dossiers and that it “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”.¹⁵

21. Below, the Trust Fund will first discuss the programming challenges that arise directly from the Trial Chamber's stated approach, following which the Trust Fund proposes an approach that it submits alleviates the present difficulties and that it respectfully requests the Trial Chamber to consider adopting.

1. Challenges directly arising from the Trial Chamber's approach

22. At the outset, the Trust Fund would like to express that it fully shares the concerns of the Trial Chamber, the parties, and in particular victims and their communities, that far too much time has already passed since the crimes that gave rise to the harm that reparations seek to address has been committed.

23. The Trust Fund recalls that the Trial Chamber itself has established a time frame that envisions the victim eligibility process to continue at least until 31 December 2016.¹⁶ The Trust Fund notes that it is currently not clear whether, after 31 December 2016 and following a review of the number of eligible victims at that point, the Trial Chamber may find it

¹⁵ Trial Chamber order, para. 23.

¹⁶ Trial Chamber order, para. 18 (“The Chamber instructs the TFV to provide it with the first batch of files of potential victims, via the Registry if necessary, by 31 March 2016, the second batch by 15 July 2016 and the third batch by 31 December 2016”).

necessary to order that further missions to identify potential victims be undertaken (particularly with regard to new potential victims to be represented by OPCV) or whether 31 December 2016 represents an absolute deadline for all potential victims to have come forward. The Trust Fund observes in this regard that it was not consulted by the Trial Chamber regarding the feasibility of identifying victims and completing victim eligibility process within this potentially absolute deadline.

24. The Trial Chamber's adversarial victim eligibility approach results in a degree of legal and procedural uncertainty that makes it impossible for the Trust Fund to propose any realistic further detail of programme design, planning and implementation. The Trust Fund recalls that, at the present stage, only one round of victim eligibility missions have been completed, involving a very limited, select sample of 31 victims, 29 of whom are victim participants and already represented by one of the legal representatives of victims teams¹⁷ and thus familiar with the Court. The Trust Fund reiterates its concerns that it is not possible to extrapolate from this sample the kind of programme information needed to make any determinations of the kind that the Trial Chamber seems intent on making.¹⁸

25. Moreover, the eventual scope of reparations has become much less clear. It is not possible to assess whether the eligibility process instituted by the Trial Chamber will allow for tens, hundreds, or a thousand and more victims to be eligible for reparations. This outcome will depend on factors as yet undetermined by the Trial Chamber, including how it intends to assess the victim dossiers and whether it will allow the legal representatives and OPCV to respond with further clarifying or supporting information following the convicted person's challenge to any potential victim. As indicated in the Victim Dossier Filing, due to security concerns very few potential victims are willing to consent to revealing their identity to the convicted person and as a consequence will not be eligible to benefit from collective reparations.¹⁹ Other issues highlighted in the Victim Dossier Filing,²⁰ such as the negative impact on victim participation caused by the requirement to conduct an upfront harm assessment outside of a safe counseling setting, the lack of an approved plan to present to the

¹⁷ Victim Dossier Filing, paras 29-33.

¹⁸ Victim Dossier Filing, paras 156-160.

¹⁹ Victim Dossier Filing, paras 67-73.

²⁰ Victim Dossier Filing, paras 48- 66.

victims, and the disruption to the victims' lives caused by completing the entirety of the protracted process, equally limits the number of potential victims who will be able to even reach the stage of having their dossier considered by the Trial Chamber for purposes of determining eligibility. The direct consequence of such a burdensome and restrictive eligibility process is a significant reduction in the number of victims potentially eligible for collective reparations awards. At present, the Trust Fund is neither in a position to gauge the number of victims, nor the rate or timeframe at which they may be able to successfully navigate the Trial Chamber's identification process and thereby become eligible to benefit from the collective reparations awards.

26. The fundamental change to the method and expected outcome of the victim identification process has accordingly reduced and distorted the reservoir from which potential victims may be drawn from and on the basis of which programming may be conceived. Next to the victim base, the harm base informing substantive programme development will be affected.

27. Due to the revised potential victim eligibility regime, more time will be required to accumulate different programming information, such as the number of victims, types of injuries, victim locations, and other information that would be suitable in quality, representation, and reliability for the Trust Fund to develop a new draft implementation plan. The Trust Fund considers that it will not be until after the end of this year for a sufficient data set of victim information to emerge from the Trial Chamber on which the Trust Fund could develop and design a corresponding reparation programme that suits the particularly recognized injuries from a select, non-representative number of victims. Only then it may be possible to render informed estimates and assumptions that would form the basis of programming design and development as well as to create a revised complement figure for the Board of Directors' consideration.

28. The expressed resolve of the Trial Chamber to evaluate a proposed reparations programme in relation to the eventual number of eligible victims and their corresponding harms not only dramatically alters the number of potential victims,²¹ but changes the point in time at which the undertaking of detailed programme design and development makes sense.

²¹ *Supra* para. 17.

29. The Trust Fund notes that a clear understanding of the scope and magnitude of a programme is a central prerequisite of any realistic programming. Accordingly, the Trust Fund regrets not to be in a position to provide the information requested by the Trial Chamber, i.e. it cannot share specific terms of reference for potential *programme* elements; nor can it give a “precise evaluation” of the cost of each proposed *programme* element or time limits for their implementation.

2. The original approach of the Draft Implementation Plan

30. The Trust Fund submits that the factual uncertainties that hinder implementation of reparations in this case are closely tied to the Trial Chamber’s conceptual understanding of seemingly reducing collective reparations to a calculation that seeks to simply add up harm at the individual level during the implementation stage of the proceedings.

31. In the Trust Fund’s view, it is this approach, rather than the existence of uncertainties *per se*, that hinders progress of implementation of reparations at this stage. If, however, the Trial Chamber would be open to re-orienting its conceptual understanding of collective reparations, the Trust Fund submits that these persisting uncertainties can be adequately accounted for and addressed.

32. The Trust Fund posits that programmatic uncertainties: (i) will always exist to some degree when translating a legal concept to a reality, as in the case of implementing reparations; (ii) are a logical consequence of the notion of collective reparations in the sense of Rule 98 (3) of the Rules, when not all victims are known; but (iii) are straightforward when dealt with in such a way as to build in programmatic adaptability to efficiently and effectively deliver reparative value to victims in a financially responsible manner. The Trust Fund further submits, that based on its extensive experience of delivering redress to victims at the collective level under its assistance mandate, it has the expertise to do so in the context of implementing orders for reparations.

33. A programme is defined as a set of related projects with a shared long term results framework. A project is defined as an individual or collaborative initiative that is carefully planned (inputs) to deliver particular results (outputs) that contribute to the programme’s outcomes and objectives. As will be explained below, the Trial Chamber’s request for detailed *programme* information in fact pertains to project level information.

34. Even in regards to a single incident, victims experience harm on multiple levels. The greater the duration and exposure to violence and victimization, so too is the depth and complexity of injury to the person, which requires an equally complex and integrative response to remedy. For example, a livelihood project will not merely address the challenge of income generation, but will also contain a strong psycho-social component intended to simultaneously foster reintegration of the victim within the family and the community. In the Trust Fund's considered experience, an integrated approach towards addressing a victim's material and psycho-social needs positively influences the degree to which they may become reintegrated into the family and community.

35. Similarly, a victim suffering from physical injury may require medical treatment complemented by both psychological counseling and specialized socio-economic support to be fully rehabilitated from their injuries. Because of the traumatic circumstances through which victims are injured at multiple levels – physically, psychologically, economically, and socially – an integrated initiative is required to redress the interrelated layers of injury.

36. When orchestrating integrated programming of this sort, it is highly unusual that any single organization or project could contain the spectrum of required skills and expertise capable of implementing such varied initiatives as vocational training, improved agricultural, surgery, physiotherapy, and trauma counseling. Therefore, the Trust Fund designed a collective reparations programmatic framework that would weave together multiple projects implemented by numerous organizations, each performing those aspects that match their specific expertise.

37. The Trust Fund respectfully submits that the Draft Implementation Plan, as submitted on 3 November 2015, including a screening process and based on a well-founded understanding of integrated programming, provides an appropriate approach to deal with programmatic uncertainty.

38. Based on the expert advice received during the May 2015 expert consultation, the Trust Fund proposed to base the rehabilitative activities on the presumption that all victims (direct and indirect) had suffered some form of psychosocial harm, albeit to a varying degree. In addition, the Trust Fund informed its programming based on the determinations of the Trial Chamber pertaining to specific harms resulting from the crimes at the conviction and

sentencing stage, as affirmed by the Appeals Chamber,²² which were corroborated by the Trust Fund's community consultations in Ituri, involving over 2,000 people, undertaken during June and July 2015.

39. The Draft Implementation Plan developed by the Trust Fund is a collective reparations programmatic framework that, when implemented, would be propose multiple integrated projects responding to a particular type of harm. The overall programmatic framework of the Draft Implementation Plan is designed to be adaptive over a three year implementation period to evolve with the requirements of victims (direct and indirect) over time and as and when they would enter the programme. The Draft Implementation Plan was designed in accordance with the Trust Fund's strategic plan of 2014-2017.

40. Goals and objectives such as reconciliation, reintegration, and rehabilitation of victims and their families would be advanced through the creation and implementation of interrelated projects integrated into a programmatic framework guided by the principles of reparations. An individual project alone cannot provide a holistic remedy to the depth and complexity of victims' injuries, whether psychological, material, sociological, and/or physical in nature.

41. The draft implementation plan devised by the Trust Fund was promulgated in accordance with the precepts laid out in the Regulations of the Trust Fund²³ and presented the Trial Chamber with a reparations programme that incorporates the scope and forms of reparations in relation to the types of injuries identified by the Appeals Chamber in the Amended Order for Reparations and, as instructed in the Reparations Judgment, information received during the 2015 community consultations in Ituri. As long as it remains unclear how wide or narrow the Trial Chamber will delineate the harm that may be redressed through reparations vis-à-vis each individual victim that it admits as eligible to benefit from reparations,²⁴ it is conceptually not possible to redesign the programme. The Trust Fund asserts that offering an artificial menu of deceptively specific "reparation packages" would be a misleading way to respond to the complexity of harm suffered by victims in the present case.

²² Amended Order for Reparations, para. 58.

²³ See e.g. Regulations of the Trust Fund 54, 55, 56, 57, 58, 69, 70, and 71.

²⁴ See Victim Dossier Filing, paras 145-160.

42. Instead, the Trust Fund respectfully submits that the Draft Implementation Plan, as submitted on 3 November 2015, already contains all the necessary elements to address programmatic uncertainties, whilst at the same time being able to respond to the varied needs of victims for redress. Therefore, the Trust Fund respectfully requests the Trial Chamber to abandon its current procedural approach and to allow for full implementation of the Draft Implementation Plan, including the screening mechanism laid out therein, subject to any modifications at the operational level based on Mr. Lubanga's observations or that the Trial Chamber deems necessary.

C. On the “precise evaluation of costs”

43. The Trust Fund considers that it may be of assistance to provide further explanation than that already set out in its Draft Implementation Plan²⁵ of the legal framework governing procurement processes at the Court and the Trust Fund to enable the Trial Chamber to have a good understanding of how these processes will affect the implementation of reparations.

44. The Trust Fund would like to recall that the Court's procurement rules require an open tender process in the solicitation and selection of Trust Fund implementing partners (intermediaries) regardless of whether the organization is engaged to implement assistance or reparation projects.

45. However, the Regulations of the Trust Fund afford a degree of flexibility to the Trust Fund, in the exercise of its judgement, to select competent and experienced implementing partners when conducting collective reparations. In particular, Rule 71 of the Regulations states that the “Trust Fund may identify intermediaries or partners, or invite proposals for the implementation of the award.”

46. Accordingly, once implementation of the collective awards is about to begin after the Trial Chamber has approved the determinations contained in the Draft Implementation Plan, the Trust Fund will consider the availability of intermediaries, and their respective skill sets, against the technical programmatic qualities of the approved implementation plan to determine whether or not it is appropriate, and to what extent, to “sole source” collective reparations implementing partners or whether an open tender procurement process is merited.

²⁵ See e.g. Draft Implementation Plan, paras 180-195.

47. The Trust Fund will consider proposals from non-governmental organisations and technical service providers that:

- a. Are legally registered in the DRC, for at least two years, and are in compliance with all required laws, regulations, and other requirements of the Government of the Democratic Republic of the Congo (must submit a copy of registration certificate);
- b. Have in place appropriate and functional management and governance structures with decision-making authority positioned in the DRC.
- c. Are DRC entities in accordance with the requirements and spirit of the national NGO policy.
- d. Have a demonstrable record of sound financial management and successful implementation of comparable grant-funded projects.
- e. Additional technical competencies will be referenced in the collective reparation proposal template.

48. Implementing partners of the Trust Fund must possess a proven programmatic, budgetary/financial, and administrative competency to implement robust projects in eastern Democratic Republic of the Congo. Implementing partners must pose no conflict of interest with either the Trust Fund or other departments of the ICC by way of their activities or associated staff members. This implies for instance, that in order to avoid conflict of interest, Trust Fund implementing partners shall not be engaged as intermediaries with any of the ICC's organs or sections, including the Office of the Prosecutor and the Registry's VPRS.

49. In the situation that an open tender procurement process is deemed appropriate to solicit competent and experienced implementing partners, the Trust Fund will have to coordinate with the Registry's procurement unit to conduct the tendering process. Grants to implementing partners will be issued using an open and transparent solicitation process through the release of a tendering process (Advertisement, Expressions of Interest, Request for Proposals - RFPs) to identify and engage locally registered organisations. Prospective grantees will eventually draft proposal applications in response to specific programmatic,

geographic, beneficiary targets, and budgetary requirements, which will be fully described in the Reparations RFP.

50. Each proposal application will be evaluated and scored against the selection criteria specified. The RFP's open review and evaluation process permits the Trust Fund to allocate resources to grantees in a transparent and effective manner. The Trust Fund will also seek to leverage and complement existing projects or programmes supported by other donors and national initiatives, where possible. In the Trust Fund's experience under the assistance mandate, such an open tender process may take between 8 to 12 months. The Trust Fund observes that the expedited procedure under Regulation 71 of the Trust Fund Regulations may have limited application because of difficulties in identifying appropriate implementing partners in the region.

51. Once implementing partners are selected, the Trust Fund field-based programme staff will conduct project planning meetings with grantees. The planning process will include grantee orientation and guidance to comply with the grant guidelines, programme and project strategy, technical standards, and best practice. Project narrative and budget reporting formats and procedures will also be disseminated. The Trust Fund intends to report to the Trial Chamber, in accordance with the relevant provisions of the Regulations of the Trust Fund, on the process and programmatic outcomes of this process, allowing the Trial Chamber to take note of the interventions within the programmatic framework of the approved Implementation Plan.

52. The Trust Fund also intends to ensure the monitoring of grants in accordance with regulation 72 of the Regulations of the Trust Fund to review the implementation of the specified activities.

53. A "precise evaluation" of the cost of each project cannot be made in the abstract and, sequentially, cannot be given prior to the procurement process taking place. Similarly, the Trust Fund cannot begin selecting projects and implementing partners until a Draft Implementation Plan is approved.

54. Furthermore, the Trust Fund respectfully submits that any kind of rehabilitation activity, including those proposed in the Draft Implementation Plan as collective reparations awards, involve economies of scale. For example, medical interventions involve certain baseline

costs. No matter whether surgery is provided to small or large numbers of patients, an operating theatre must be established and equipped and it may be necessary to relocate highly specialized surgeons and medical expertise. Consequently, the average cost of the same standard medical intervention per victim will greatly vary depending on the number of patients attending and their respective locations. Similarly, the price per pupil to partake in an accelerated literacy program will vary significantly depending on whether five or 50 students participate in the project.

D. On specificity of terms of reference – geographic location of activities

55. The Trust Fund also considers that uncertainty currently exists regarding where the most strategic focus of the reparations programme should be geographically located.

56. The VPRS mapping report annexed to the Reparations Filing states that of the 151 recognized victim participants in the Lubanga case: 62% are Alur, 22% Hema, 3% Bira, Lendu 1%, Nande 1%, and other ethnic groups 11%. Moreover, out of 72 victims who presented applications for reparations: 79% were Alur, 13% Hema, 3% Bira, 3% Lendu, and 3% from other ethnicities.

57. However, this ethnic breakdown significantly deviates from an ethnic breakdown of the general population in Ituri, those that populated the ranks of the UPC, and those impacted by the crimes, in that certain ethnic groups are significantly underrepresented whilst others are significantly overrepresented.

58. In the Trust Fund's understanding, this may be due to the fact that ethnic identity plays a factor in whether or not victims are willing and able to identify themselves to the Court.

59. As has been explained in the Victim Dossier Filing,²⁶ security concerns and social pressure are a reality for victims in Ituri. It appears that the pressure on potentially eligible victims not to claim reparations may be felt particularly strongly by ethnic Hema victims

²⁶ Victim Dossier Filing, paras 67-69.

because of the respect that the convicted person continues to enjoy throughout Ituri Province and among his own ethnic community.²⁷

60. Certain victims, whilst theoretically eligible for reparations and under different circumstances interested in receiving them, may feel reluctant to claim reparations because of shame and stigma attached to the crimes from which they have suffered, social pressure, or concerns for their personal safety. Often this affects unfortunately the most vulnerable victims who would be in most dire need of receiving redress, victims that are traumatized, socially excluded, and who have a weak voice within their communities.

61. The Trust Fund notes that this problem would likely have arisen had there been a screening process at the implementation stage as proposed in the Draft Implementation Plan. Mindful of this problem and with a view to mitigate its effects, the Trust Fund in the Draft Implementation Plan outlined an outreach and dialogue approach to work with community leaders and other stakeholders that were designed to mitigate these negative consequences and foster acceptance of the collective reparations awards.²⁸ As explained in the Victim Dossier Filing, the Draft Implementation Plan also contains a trauma-sensitive approach in engaging with potential victims at the point of first contact and intake.²⁹

62. However, based on its experience of the April 2016 victim assessment missions, the Trust Fund is convinced that the much more formalized and adversarial identification and eligibility process devised by the Trial Chamber further exacerbates the under- and over-representation of certain groups versus others.

63. At this stage of the proceeding, the Trust Fund has only assessed 31 victims. It is therefore premature to determine which localities will contain a high concentration of potentially eligible victims and where therefore it practically will make the most sense to locate reparation activities. In addition, the likely impact of the adversarial identification process devised by the Trial Chamber on the geographic spread of eligible victims cannot yet be fully evaluated.

²⁷ *Ibid.* See also Victim Dossier Filing, footnote 27, containing relevant text from an email from legal representative Luc Walley.

²⁸ Draft Implementation Plan, paras 196-207.

²⁹ Victim Dossier Filing, paras 1, 48; referring to Draft Implementation Plan, paras 29-30, 41-64.

E. On specificity of terms of reference – collective projects, including activities beyond rehabilitation in a narrow sense

64. The Trust Fund is further concerned that the Trial Chamber’s individualized adversarial eligibility process and the statement that it reserves the right to modify any proposed collective reparations programme so that it “best matches” only those harms that the Trial Chamber identifies from that process undermines the ability of the Trust Fund to create a collective programme that accomplishes the full scope of the objectives of reparations as set out by the original Trial Chamber and affirmed by the Appeals Chamber.

65. In particular, the Trust Fund notes that the Trial Chamber thus far has not addressed its position regarding symbolic interventions and programs aimed at promoting reconciliation and non-repetition. Such initiatives form, in the Trust Fund’s view, a key component of reparations awards in light of the objectives identified by the original Trial Chamber and affirmed by the Appeals Chamber in the Amended Order for Reparations under the principles of reparations.

66. Because the Trial Chamber’s current procedural approach appears to be limited to reparation awards that result in individual benefits, the Trust Fund respectfully invites the Trial Chamber to consider whether and to what extent it considers that such inherently collective activities should form part of the overall reparations program. The Trial Chamber is further invited to confirm that persons outside the pool of assessed and approved victims must necessarily be allowed to play a role in the implementation of the order so as to make such symbolic activities result in a benefit to the victims, particularly in terms of addressing stigma and discrimination in the community due to the victims’ role as a child soldier. Furthermore, as is evident from the victims’ concerns laid out in Victim Dossier Filing, many victims face discrimination because “asserting to have been a victim of a violation committed by Mr. Lubanga would go against community sentiment and could result in negative repercussions and retaliation against themselves or their family”.³⁰ Thus, in the Trust Fund’s view, there is a need for broader community involvement to address this aspect of

³⁰ Victim Dossier Filing, para. 68.

discrimination and stigma for the benefit of the victims and to assist in their reconciliation with and reintegration into the community.

F. On procedural uncertainties and sequencing

67. The Trust Fund also reiterates its concerns expressed in the Victim Dossier Filing regarding how the procedural uncertainties and a possible appeal at any stage of the proceedings may affect programme implementation.

68. As mentioned, the Trial Chamber expressed that it would consider the proposed collective reparations programmes after it had considered the first set of dossiers and that it “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”.³¹ The Trust Fund reiterates that this could be reasonably understood as an indication that the Trial Chamber intends to issue a “new” order for reparations, which the Trust Fund strongly considers is not what the Trial Chamber is currently tasked with.³²

69. In the Trust Fund’s view, it is not advisable to enter into the implementation of collective awards based on an approved plan, as long as legal uncertainties persist. Once implementation has begun, it will not be possible to halt or reverse course without seriously negative consequences for the victims benefitting from the reparations programme. Outside of the legal and administrative realm, the implementation of reparations awards directly affects the lives of participating victims. It will create facts that cannot be undone. The prospect of an appeal with suspensive effect over reparations implementation³³ would have very negative consequences: one cannot simply halt a rehabilitative project for however long it may take to have legal clarity through an appellate decision.

70. Furthermore, any change once implementation of collective awards has begun could have serious negative financial consequences for the Trust Fund, as entire programmes may need to be redesigned, which in turn also has financial implications regarding any implementing partners with whom the Trust Fund would have already entered into a contract.

³¹ Trial Chamber order, para. 23.

³² Victim Dossier Filing, 106-109, 133-134.

³³ See in this respect Victim Dossier Filing, paras 108-109.

G. On distinguishing between the two mandates of the Trust Fund

71. The Trust Fund wishes to take this opportunity to clarify, not only for the possible benefit of the Trial Chamber, but equally for the Court as a whole and the broader interested community, the clear distinctions that must be kept between the Trust Fund's two mandates, reparations and assistance, so that the intrinsic advantages of both are not damaged.

72. The Trust Fund submits that a logic according to which "if any victim is not deemed eligible according to an adversarial and restrictive eligibility process for reparations, then (s)he can resort to redress under the assistance mandate in a comparable form for more or less the same harm as victims eligible for reparations" introduces a fallacious understanding that leads to: 1) procedural incoherence with respect to the two separate legal frameworks that govern reparations and assistance projects; 2) the erosion of the statutory rights of victims to reparations; 3) the undermining of the intrinsic symbolic value and meaning of Court ordered reparations; and 4) disregard for the Trust Fund's discretion to decide based on its own needs assessment where to focus its efforts under the assistance mandate most effectively.

73. Below, the Trust Fund will address each of these points in more detail.

1. The legal frameworks that govern reparations awards and assistance projects

74. The Trust Fund respectfully submits that the clear distinction between the two mandates is reflected by the fact that, as has been explained by the Trust Fund in its filing accompanying the Draft Implementation Plan,³⁴ the Trust Fund's assistance and reparations mandates each follow different legal procedures. Reparations are determined only after a criminal case has resulted in a conviction and are decided by a Trial Chamber in accordance with the legal framework applicable for reparations. Assistance mandate activities, on the other hand, are initiated in situations before the Court, at the Trust Fund Board's discretion and following a needs assessment. Prior to undertaking any assistance activities, the Trust Fund notifies the responsible Pre-Trial Chamber according to regulation 50 of the Regulations of the Trust Fund so that it can assess whether the intended activities interfere with any on-going criminal cases pending before the Court.

³⁴ Reparations Filing, paras 156 - 158

75. In this regard, assistance activities under the regulatory framework are prohibited from being related to a case, interfering with a case against an accused or with a legal issue in a case. Under the Court's legal framework, assistance activities carried out under regulation 50 (a) of the Regulations of the Trust Fund cannot be associated with a case at the pre-trial stage or while the trial proceedings are on-going. In the Trust Fund's view, while the issue has not yet been litigated before the Court, its assistance activities should also not, as a matter of policy, relate to any specific case at the post-conviction stage.

76. The difference in the procedural frameworks applicable to the Trust Fund's mandates means that it is not possible for victim beneficiaries to simply be "moved" from one mandate to another. In recalling that assistance activities are linked to the wider situation before the Court, but cannot be related to a specific case, the Trust Fund observes that multiple cases may arise from a single situation, with potentially overlapping crime bases and victims, and that these cases may proceed at different paces. This means that, while one case may be closed, other related cases arising out of the same situation may be still at the pre-trial or trial stage of proceedings. The Trust Fund notes that attempting to address harm caused to victims considered to be attributable to a convicted person in a specific case is not a relevant factor for the Pre-Trial Chamber to consider in determining whether to approve an assistance mandate project. It submits that attempting to introduce such a factor would lead to legal uncertainty and arguably might even create a conflict with the factors that are relevant (i.e. whether the assistance activity is related to a case or interferes with a case against an accused or a legal issue in a case).

77. The Trust Fund submits that conflating its assistance mandate with reparations arising from a specific case risks prejudicing the rights of accused persons in other cases, whereas maintaining a strict separation between the two mandates respects the competing and equally important rights and interests of both accused persons before the Court and victims of crimes prosecuted before the Court.

2. The statutory rights of victims to reparations

78. The drafters of the Court's legal texts deliberately chose to create a statutory right to reparations for victims in cases ending in a conviction before the Court, thereby codifying and giving effect to the right to reparations laid out in various human rights instruments. The

Trust Fund submits that this right must be understood within the Court’s legal framework as a whole and should not be interpreted in an isolated and out of context manner. In this regard, the Trust Fund observes that, in creating the statutory framework relevant to reparations, the drafters were fully cognizant of the potential avenue for addressing harm to victims through the Trust Fund’s assistance mandate.

79. With this context in mind, the Trust Fund submits that due regard should be given to the fact that the drafters intended for *reparations* to be awarded in cases where individual victims in a case could not be identified due to, *inter alia*, the magnitude of harm committed and the number of victims. The Trust Fund recalls, as noted by the Appeals Chamber in a different context in its Reparations Judgment, the following explanatory note in relation to the interpretation of article 75 (1) of the Statute

“[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 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.*³⁵ [Emphasis added.]

80. The Trust Fund further recalls, as already laid out in its Victim Dossier Filing,³⁶ the text of rule 98 (2) of the Rules, the procedure for which is laid out in regulations 60 to 65 of the Regulations of the Trust Fund under Section II, entitled “Cases where the Court does not identify the beneficiaries”. The Trust Fund highlights in this regard that the Regulations of the Trust Fund are a comprehensive instrument, in which the Assembly of States Parties addressed and set out the applicable procedures for both Court ordered reparations and activities conducted under the assistance mandate.

81. On the basis of the above, the Trust Fund respectfully submits that it cannot reasonably be called into question that the intent of the drafters of the Statute and the Assembly of States

³⁵ Appeals Chamber Reparations Judgment, para. 150, footnote 181.

³⁶ Victim Dossier Filing, paras 166-167.

Parties was for *reparations*, and not assistance, to be provided in cases where individual victims were not identified.

3. The intrinsic symbolic value and meaning attached to Court ordered reparations

82. The Trust Fund considers that its two mandates each have their own intrinsic value and that these distinct values should be maintained and upheld. There is an important reparative dimension in the Trust Fund's assistance mandate that recognizably distinguishes it from development and humanitarian work.³⁷ The Trust Fund considers, however, that the moral value of Court-ordered reparations is distinct from the value of benefitting from the assistance mandate: the judicial proceeding resulting in Court ordered reparations involve the public accountability and acknowledgment that the convicted person has wronged the victims.

83. The Trust Fund recalls that, as noted by the Appeals Chamber in its Reparations Judgment in relation to the title of rule 150 of the Rules, according to commentators:

“this rule reflects the strong views expressed during the drafting of the Rules of Procedure and Evidence that, despite its inclusion in the Statute under “appeal against other decisions”, an order for reparations should be classified as a “fundamental” decision, treated in the same manner as a decision of conviction, acquittal or sentence.”³⁸

84. In this regard, the Trust Fund respectfully recalls that the Court's *raison d'être*, reflected in its jurisdictional limitations and the text of its Preamble, is to address “the most serious crimes of concern to the international community”, crimes from which the damage and harm caused to victims “deeply shock[s] the conscience of humanity”. The Trust Fund submits that a characteristic of the very crimes that the Court was created to address is the large-scale scope of victims, the sheer magnitude of which and manner in which the crimes are carried out often renders it impossible to individually list all of the victims. The Trust Fund submits

³⁷ See “Trust Fund's for Victims First Report on Reparations”, 1 September 2011, ICC-01/04-01/06-2803-Conf-Exp, With public redacted version, registered on 23 March 2012, ICC-01/04-01/06-2803-Red, paras 196 - 214.

³⁸ Appeals Chamber Reparations Judgment, para. 67, referring to H. Brady, “Appeal”, in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Inc., 2001), p. 575, at p. 582.

that it is contrary to the Statute's purpose to put in place a system whereby a convicted person's liability to repair harm would decrease as the number of victims harmed from the crimes increases.

85. The Trust Fund acknowledges that accurately reflecting the scope of harm caused by these crimes is a challenging and difficult task within the context of criminal proceedings, necessitating procedures and time that is distinct from domestic criminal proceedings. But, it is what Chambers must grapple with in order to arrive at a decision on conviction and sentence. The Trust Fund submits that this difficult task must be carried through to the end of the proceedings and that the Court cannot turn away from the challenge of fully capturing the scale and extent of the damage and harm caused to victims at the moment of reparations. The Trust Fund respectfully submits that limiting reparations by equating assistance with reparations to victims does not do justice to the "fundamental" nature of an order for reparations and drafters' intention that reparations should be treated "in the same manner as a decision of conviction, acquittal, or sentence".

4. The Trust Fund's discretion under its assistance mandate

86. The Trust Fund respectfully wishes to underline that as reflected in the clear language of regulation 50 a (i) of the Regulations of the Trust Fund, the Trust Fund shall be considered to be seized under the assistance mandate when "the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families" it is the mandate and the prerogative of the Board of Directors to assess whether and where to focus its efforts under the assistance mandate.

87. To determine the necessity of an intervention under the assistance mandate, the Trust Fund may decide to carry out a detailed needs assessment that assesses the particular needs of victims in a situation country as well as the overall contextual situation, such as the availability of service providers in the situation country that could implement specialized assistance for victims and the security situation. Because the Trust Fund is dependent on voluntary contributions for its work under the assistance mandate, and these contributions are limited in comparison to the needs of victims before the International Criminal Court, given that international crimes typically affect large numbers of people in very serious ways, the decision where assistance is provided also depends on the overall availability of financial

resources to the Trust Fund, whilst bearing in mind that any intervention will need to be funded over a period of time, likely several years, to be sustainable.

88. In this respect, the Trust Fund would like to recall that the Appeals Chamber explicitly held that it is the Board of Directors, and not the Court, that is competent to weigh and appreciate the factors laid out in Regulation 56 of the Regulations of the Trust Fund, including managing activities undertaken pursuant to its assistance mandate and noted that “resources allocated to the general assistance projects need to be managed with a time frame of several years in mind.”³⁹

89. According to regulation 76 of the Regulations of the Trust Fund, the Board of Directors of the Trust Fund reports directly to the Assembly of States Parties on its activities. In doing so, it is accountable for managing the Trust Fund’s budget effectively for the benefit of victims. Indeed, the Board of Directors of the Trust Fund has not only the best overview over the availability of resources and may for instance be aware of multi-annual commitments, but it also has the legal responsibility to properly manage those. The Trust Fund is therefore seriously concerned that, if the discretion of its Board of Directors to initiate assistance activities where and when it deems these to be most appropriate is infringed upon, the Board will no longer be responsive to its duty of accountability for the activities of Trust Fund including the management of its financial and human resources.

5. Conclusion regarding the Trust Fund’s assistance and reparations mandates

90. Accordingly, and as a matter of principle applicable also beyond the present case, the Trust Fund appeals to the Court to refrain from any attempts to suggest that the Trust Fund’s assistance mandate may be used as an avenue to remedy gaps that may arise from the inherent limitations of the Court-ordered reparations regime in this and/or in any other cases. While doing so may at first seem a convenient solution for responding to the limitations of the Rome Statute reparations regime, reconstructing the Trust Fund’s assistance mandate to be a second-tier reparations alternative, compromises the systemic integrity of both, not only the reparations mandate of the Court and the Trust Fund, but also the Trust Fund’s assistance mandate.

³⁹ See Appeals Chamber Reparations Judgement para. 113, footnote 127. See also footnote 129.

H. Organizational implications of the procedural approach

91. Finally, the Trust Fund would like to inform the Trial Chamber that the rigorous victim identification process ordered by the Trial Chamber has organizational implications that go beyond the Trust Fund and that in turn have a direct bearing on how long it takes to identify and assess all potential victims in Ituri.

92. In particular, the Registry and OPCV (as well as the legal teams representing the victims and the convicted person) are required to maintain an adequate level of staff to support this very time intensive process.

93. This has a direct impact on an increased demand on the regular budget of the Court and the Trust Fund from which the related costs need to be allocated. In fact, because any additional costs incurred by the Trial Chamber's approach have not been included in the current annual budget, obtaining the required resources has already had a delaying effect on complying with the Trial Chamber's order because all involved struggle to secure the required financial and human resources.

III. REQUEST FOR RECONSIDERATION

94. The Trust Fund would respectfully like to recall the findings presented in its Victim Dossier Filing where it has explicitly noted its concerns related to the appearance that the victims' identification process will necessarily be very slow and time and resource intensive. At this stage, the Trust Fund has assessed a mere 31 victims, of which only 12 are completed for purposes of the Trial Chamber's assessment. Furthermore, it appears that future assessment missions would be even more cumbersome because they would concern victims less familiar with the Court.

95. As has been noted in the Victim Dossier Filing, the current procedural approach of the Trial Chamber is a major methodological obstacle to comply with the Trial Chamber's request for submitting additional programme information. As has been discussed above, it fundamentally challenges the Trust Fund's programmatic logic. Accordingly, it essentially undermines the Trust Fund's ability to maintain the core elements of its draft implementation plan as well as the corresponding financial complement.

96. The Trust Fund reiterates its commitment of 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.

97. In this vein, the Trust Fund respectfully requests the Trial Chamber to accept its request for reconsideration made in the Victim Dossier Filing, to revise its current procedural approach and to instead consider approving the Draft Implementation Plan of 3 November 2015 in its entirety. The Trust Fund remains committed to consult with the Trial Chamber on the specificities of this plan, in accordance with Regulation 57 of the Regulations of the Trust Fund for Victims.

FOR THE FOREGOING REASONS

The Board of Directors respectfully submits this filing in response to the Trial Chamber's Order of 9 February 2016.



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 7 June 2016

At The Hague, The Netherlands