

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-01/06

Date: 15 November 2018

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

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

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

Observations pursuant to rule 103 of the Rules of Procedure and Evidence

Source:

The Trust Fund for Victims

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

The Office of the Prosecutor

Counsel for the Defence

Ms Catherine Mabile

Mr Jean-Marie Biju-Duval

Legal Representatives of Victims V01

Mr Luc Walley

Mr Frank Mulenda

Legal Representatives of Victims V02

Ms Carine Bapita Buyanandu

Mr Paul Kabongo Tshibangu

Mr Joseph Keta Orwinyo

The Office of Public Counsel for Victims **The Office of Public Counsel for the Defence**

Ms Paolina Massidda

Ms Sarah Pellet

States Representatives

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section Others

Victims Participation and Reparations Section

I. RELEVANT BACKGROUND

1. On 14 March 2012, Trial Chamber I, sitting in its previous composition, rendered its decision pursuant to article 74 of the Statute,¹ in which it found Thomas Lubanga Dyilo (“Mr Lubanga”) guilty of the crimes of conscripting and enlisting children under the age of 15 years into the *Union des patriotes congolais* and the *Forces patriotiques pour la libération du Congo* and using children under the age of 15 years to participate actively in hostilities, within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute. On 10 July 2012, Mr Lubanga was sentenced to a term of 14 years imprisonment.² On 7 August 2012, Trial Chamber I rendered a decision on the principles and procedures to be applied to reparations in the case (“Decision on Reparations”).³

2. On 12 December 2012, the Appeals Chamber rendered its decision on the admissibility of the appeals against the Decision on Reparations (“Admissibility Decision”).⁴ In its Admissibility Decision, the Appeals Chamber deemed the Decision on Reparations to be an order for reparations within the meaning of article 75 of the Statute and as such could be appealed pursuant to article 82(4) of the Statute.⁵

3. On 3 March 2015, the Appeals Chamber issued, by majority, its judgment on the appeals against the Decision on Reparations (“Appeals Chamber Reparations Judgment”),⁶ attaching as an annex the “Order for Reparations (amended)” (“Order for Reparations”),⁷ in which it: (i) determined that four out of the five elements that constitute a reparations order, with the exception of the amount of Mr Lubanga’s liability for the reparations ordered, were of a sufficiently precise degree to meet the requirements of a collective reparations order;⁸ (ii) ordered, pursuant to the relevant provisions of the Regulations of the Trust Fund for Victims (“TFV Regulations”), the Trust Fund for Victims (“Trust Fund”) to submit a draft implementation plan (“DIP”);⁹ (iii) requested the Trust Fund to provide, in the DIP, a monetary amount that it considered necessary to remedy the harms caused by the crimes for

¹ Judgment pursuant to Article 74 of the Statute, [ICC-01/04-01/06-2842](#).

² Decision on Sentence pursuant to Article 76 of the Statute, [ICC-01/04-01/06-2901](#).

³ Decision establishing the principles and procedures to be applied to reparations, [ICC-01/04-01/06-2904](#).

⁴ 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, [ICC-01/04-01/06-2953](#).

⁵ [Admissibility Decision](#), paras 63, 64.

⁶ Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, [ICC-01/04-01/06-3129](#).

⁷ [ICC-01/04-01/06-3129-AnxA](#).

⁸ [Appeals Chamber Reparations Judgment](#).

⁹ [Order for Reparations](#), para. 75.

which Mr Lubanga was convicted; and (iv) to include a monetary amount, if its Board of Directors so decided pursuant to regulation 56 of the TFV Regulations, that it would complement as an advance for the payment of the awards.¹⁰

4. On 14 August 2015, the newly composed Trial Chamber overseeing the case, Trial Chamber II (“Trial Chamber”), rendered its decision on the Trust Fund’s request for a time extension to submit the DIP,¹¹ in which it held that the Trust Fund had to include therein, *inter alia*, a list of the victims potentially eligible to benefit from the reparations, including the requests for reparations and the supporting material.¹²

5. On 3 November 2015, the Trust Fund submitted a filing,¹³ to which it annexed the DIP,¹⁴ which included a victim screening methodology for the collective reparations awards.

6. On 9 February 2016, the Trial Chamber issued an order instructing the Trust Fund to supplement the DIP (“Order to Supplement the DIP”),¹⁵ wherein it: (i) deferred its approval on the grounds that it was incomplete; (ii) held that its ability to rule on the monetary amount of Mr Lubanga’s liability depended on examining the eligibility of potential beneficiaries and the extent of the harm they suffered; and (iii) held that the Trial Chamber was “responsible for deciding on the status of eligible victims once the Defence ha[d] had the opportunity to submit its observations on the eligibility of each victim.”¹⁶ In relation to this latter point, the Trial Chamber instructed the Trust Fund “to prepare a file for each potential victim”, which were to be submitted in three batches to the Trial Chamber, which would then “issue decisions regarding the status of the victims eligible to benefit from the reparations based on the batches of files received and the observations of the Defence.”¹⁷

7. On 15 February 2016, the Trust Fund requested leave to appeal the Trial Chamber’s Order to Supplement the DIP (“Request for Leave to Appeal”),¹⁸ which the Trial Chamber denied on 4 March 2016.¹⁹

¹⁰ [Order for Reparations](#), para. 78.

¹¹ *Décision relative à la requête du Fonds au profit des victimes aux fins de prorogation du délai pour le dépôt du projet de plan de mise œuvre*, [ICC-01/04-01/06-3161](#) (“Decision on the Request for Extension of Time”).

¹² [Decision on the Request for Extension of Time](#), paras 6, 7.

¹³ Filing on Reparations and Draft Implementation Plan, ICC-01/04-01/06-3177-Conf; a public redacted version was registered on 3 November 2015, [ICC-01/04-01/06-3177-Red](#).

¹⁴ Draft Implementation Plan for collective reparations to victims, [ICC-01/04-01/06-3177-AnxA](#).

¹⁵ Order instructing the Trust Fund for Victims to supplement the draft implementation plan, [ICC-01/04-01/06-3198-tENG](#).

¹⁶ [Order to Supplement the DIP](#), para. 14.

¹⁷ [Order to Supplement the DIP](#), paras 17-18.

¹⁸ 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), [ICC-01/04-01/06-3200](#).

8. On 31 May 2016, the Trust Fund submitted the first batch of victim dossiers,²⁰ wherein it also requested the Trial Chamber to reconsider the individual victim eligibility process set out in the Order to Supplement the DIP (“Reconsideration Request”).²¹

9. On 15 July 2016, the Trial Chamber issued an order indicating that the identification of individual victims should continue and instructed the Registry to assist the legal representative of the victims team V01, the legal representative of the victims team V02, and the Office of the Public Counsel for Victims (“Legal Representative V01”, “Legal Representative V02”, and “OPCV”, respectively, jointly “LRVs”) and the Trust Fund to this end.²² The Trial Chamber further indicated that the purpose of the individual eligibility process was to collect a “sample” of files illustrative of all potentially eligible victims in the instant case to inform its decision as to the amount of Mr Lubanga’s liability for reparations.²³

10. On 21 October 2016, the Trial Chamber authorised OPCV to conduct an identification process for individual victims and to transmit to the Trial Chamber, through the Victims Participation and Reparations Section (“VPRS”), the files of potentially eligible victims.²⁴

11. On 15 December 2017, the Trial Chamber issued its decision fixing the amount of Mr Lubanga’s liability for reparations at USD 10 million (“Liability Decision”).²⁵

12. The Legal Representative V01 and the Defence appealed on 15 and 18 March 2018, respectively.²⁶ On 9 and 15 May 2018 respectively, the Legal Representative V02 and Legal

¹⁹ *Décision relative à la requête du Fonds sollicitant l'autorisation d'interjeter appel de l'ordonnance du 9 février 2016*, [ICC-01/04-01/06-3202](#).

²⁰ First Submission of Victim Dossiers, 31 May 2016, [ICC-01/04-01/06-3208](#).

²¹ [First Submission of Victim Dossiers](#), paras 9, 20-21.

²² *Ordonnance enjoignant au Greffe de fournir aide et assistance aux représentants légaux et au Fonds au profit des victimes afin d'identifier des victimes potentiellement éligibles aux réparations*, 15 July 2016, [ICC-01/04-01/06-3218](#), para. 8, Judge Herrera Carbucciona dissenting, [ICC-01/04-01/06-3217-Anx](#).

²³ *Ordonnance enjoignant au Greffe de fournir aide et assistance aux représentants légaux et au Fonds au profit des victimes afin d'identifier des victimes potentiellement éligibles aux réparations*, 15 July 2016, [ICC-01/04-01/06-3218](#), para. 8, Judge Herrera Carbucciona dissenting, [ICC-01/04-01/06-3217-Anx](#); see also in regards to the Trial Chamber’s clarification regarding the purpose of the individual eligibility process: *Ordonnance relative à la requête du Bureau du conseil public pour les victimes du 16 septembre 2016*, 21 October 2016, [ICC-01/04-01/06-3252](#), para. 15, Judge Herrera Carbucciona dissenting, [ICC-01/04-01/06-3252-Anx](#); *Ordonnance relative à la transmission des dossiers de victimes potentiellement éligibles aux réparations à l'équipe de défense de Thomas Lubanga Dyilo*, 22 February 2017, [ICC-01/04-01/06-3275](#), para. 12; cf. [Order to Supplement the DIP, paras 14, 15](#).

²⁴ *Ordonnance relative à la requête du Bureau du conseil public pour les victimes du 16 septembre 2016*, 21 October 2016, [ICC-01/04-01/06-3252](#), Judge Herrera Carbucciona dissenting, [ICC-01/04-01/06-3252-Anx](#).

²⁵ *Rectificatif de la “Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu”*, 21 December 2017, ICC-01/04-01/06-3379-Conf-Corr; a public redacted version was registered on 21 December 2017, [ICC-01/04-01/06-3379-Red-Corr](#).

Representative V01 responded to the Defence appeal and, on 18 May 2018, the Defence responded to the Legal Representative V01's appeal.²⁷ On 18 May 2018, the OPCV filed a consolidated response to the two appeals,²⁸ to which the Legal Representative V01 and the Defence, after being granted leave,²⁹ responded on 16 and 20 August 2018 respectively.³⁰

13. On 21 September 2018, the Appeals Chamber invited the Trust Fund to submit observations on the appeals by 11 October 2018, and indicated that a hearing was going to be held on 17 October 2018, in order to hear submissions and observations on the appeals.³¹

14. On 4 October 2018, the Appeals Chamber issued an order postponing the hearing initially scheduled, and informed that the hearing would be held in December 2018, with the date to be set in a future order.³²

15. On 9 October 2018, the Trust Fund requested an extension of time to submit its observations on the appeals,³³ which was granted on 10 October 2018, extending the time limit for the filing of the written observations to 15 November 2018.³⁴

²⁶ *Mémoire de la Défense de M. Thomas Lubanga Dyilo relatif à l'appel à l'encontre de la "Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu" rendue par la Chambre de première instance II le 15 décembre 2017 et modifiée par décisions des 20 et 21 décembre 2017*, 15 March 2018, ICC-01/04-01/06-3394-Conf; a public redacted version was registered on 15 March 2018, [ICC-01/04-01/06-3394-Red.](#); Représentants légaux du groupe de victimes V01, *Corrigendum au Mémoire dans l'appel contre la "Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu" du 15 décembre 2017 de la Chambre de première Instance II*, 20 March 2018, ICC-01/04-01/06-3396-Conf-Corr; a public redacted version was registered on 5 April 2018, [ICC-01/04-01/06-3396-Corr-Red.](#)

²⁷ *Corrigendum à la Réponse consolidée des représentants légaux du groupe des victimes V02 aux mémoires de la défense de M. Thomas Lubanga Dyilo et des représentants légaux du groupe des victimes V01 contre la "Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu" du 15 décembre 2017 de la chambre de première instance II*, 9 May 2018, [ICC-01/04-01/06-3404-Corr](#); *Réponse des Représentants légaux du groupe de victimes V01 au Mémoire de la Défense de M. Thomas Lubanga Dyilo relatif à l'appel contre la "Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu" rendu par la Chambre de première instance II le 15 décembre 2017 et modifiée par décisions des 20 et 21 décembre 2017*, 15 May 2018, [ICC-01/04-01/06-3405](#); *Réponse de la Défense de M. Thomas Lubanga Dyilo au "Mémoire dans l'appel contre la "Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu" du 15 décembre 2017 de la Chambre de première instance II" communiqué le 19 mars 2018 par les Représentants Légaux du groupe de victimes V01*, 18 May 2018, [ICC-01/04-01/06-3406](#).

²⁸ *Réponse consolidée aux Mémoires d'Appel de la Défense et des Représentants légaux des victimes V01 contre la Décision de la Chambre de première instance II du 15 décembre 2017*, 18 May 2018, [ICC-01/04-01/06-3407](#).

²⁹ Decision on requests for leave to reply, 26 July 2018, [ICC-01/04-01/06-3412](#).

³⁰ *Réplique consolidée de la Défense aux Réponses des Représentants Légaux du groupe des victimes V01 et du Bureau du Conseil public pour les victimes déposées respectivement les 15 et 18 mai 2018*, 16 August 2018, [ICC-01/04-01/06-3414](#); *Réplique à la "Réponse consolidée aux Mémoires d'Appel de la Défense et des Représentants légaux des victimes V01 contre la Décision de la Chambre de première instance II du 15 décembre" déposée par le Bureau du conseil public pour les victimes en date du 18 mai 2018*, 20 August 2018, [ICC-01/04-01/06-3416](#).

³¹ Scheduling order for a hearing before the Appeals Chamber and invitation to the Trust Fund for Victims to submit observations, [ICC-01/04-01/06-3419](#).

³² Order regarding the hearing scheduled by the Appeals Chamber, [ICC-01/04-01/06-3423](#).

³³ Request for an Extension of Time, [ICC-01/04-01/06-3426](#).

³⁴ Decision on Trust Fund for Victims' request for time extension, [ICC-01/04-01/06-3428](#).

16. On 6 November 2018, the Appeals Chamber issued an order scheduling an oral hearing on the appeals for 11 and 12 December 2018.³⁵

17. The Trust Fund hereby submits its observations on the appeals.

II. PRELIMINARY REMARKS

18. In this section, the Trust Fund will address two primary topics, as the observations that follow are shaped by these two considerations. These topics are: (i) how the Trust Fund understands its role in judicial reparations proceedings and (ii) the interplay between the Trust Fund's previous submissions in these proceedings and the present invitation to make observations on issues arising out of the Legal Representative V01 and Defence appeals.

A. The Trust Fund's role in judicial reparations proceedings

19. In reparations proceedings, the Trust Fund's relationship to the Court can be understood as a partnership covering three different dimensions - as an independent expert body (during judicial proceedings), and as the implementing³⁶ and (potential) funding agency,³⁷ depending on the Court's needs. This relationship is at an institutional level. The Trust Fund serves this role for all cases resulting in a conviction and an order for reparations at the Court. It is therefore neither realistically feasible nor necessarily appropriate, during the stage prior to the issuance of an order for reparations or during related appellate proceedings, for the Trust Fund's role to be construed as the same as the parties of each case.

20. This is not to suggest that the Trust Fund has no role or interest in judicial reparations proceedings. The Trust Fund considers that its role should be understood as an advisory role on the principles, procedure, and implementation modalities on the basis of its mandates and

³⁵ Order scheduling an oral hearing and determining the conduct of that hearing, [ICC-01/04-01/06-3429](#).

³⁶ The Trust Fund notes that, under the applicable legal framework, a Trial Chamber may proceed under rule 98 (1) of the Rules and not make the awards "through" the Trust Fund, in which case the role of the Trust Fund would not include the preparation of a draft implementation plan or being tasked with the implementation of the awards.

³⁷ The Trust Fund's primary role in reparations proceedings (post-order) is as the implementing agency of awards for reparations, a function which it provides to the Court as a whole and relates to the stage after it has been seized of an order for reparations pursuant to regulation 50 (b) of the TFV Regulations. The sequencing set out in the applicable legal framework relevant to when the Trust Fund's implementing activities are activated reflects the institutional partnership between the Court and the Trust Fund and also provides a clear delineation between the judicial-based proceedings relevant to reparations, including the appellate process, which falls fully within the competence and expertise of the relevant Chambers, and the subsequent administrative and programmatic processes of implementation, which falls within the competence, specialized expertise, experience and knowledge of the Trust Fund. In addition, once an order for reparations has been issued, the Trust Fund may serve as a funding agency by virtue of regulation 56 of the TFV Regulations, which permits the Board of Directors, at its discretion, to complement the payment of awards for reparations

its institutional experience, networks and multidisciplinary competencies. In this regard, the Trust Fund has an institutional interest in reparations related judicial determinations and their consistent development throughout cases at the Court. The Trust Fund also has an interest in ensuring that judicial determinations that impact upon the procedure and implementation of reparations are established in a manner that allows for an efficient, operationally and financially feasible, and victim-centered implementation process.

21. Accordingly, the Trust Fund considers that its role is primarily to address how certain issues that may be decided upon in these proceedings could potentially affect the efficient and timely implementation of the reparations awards at issue, as well as to address those issues for which the Court's legal framework relevant to reparations is set out in the TFV Regulations,³⁸ which are the applicable legal instrument at the implementation stage.³⁹

22. Contrarily to the above and in line with the Trust Fund's submission that its role is not to be construed as the same as a party in a case, the Trust Fund does not consider it to be its role to advocate for specific outcomes in relation to judicial determinations that are based on the specific circumstances of a particular case or which involve a challenge to the reasonableness of the manner in which a Trial Chamber exercised its judicial authority in relation to facts or evidence before it, as these are matters for the parties to address.⁴⁰

23. The Trust Fund's present observations are therefore guided by this understanding of its role in these judicial proceedings.

³⁸ Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, 28 November to 3 December 2005, ICC-ASP/4/Res.3.

³⁹ See in this regard, Admissibility Decision, paras 52 (holding that the TFV Regulations are an instrument to the Rome Statute), 55 ("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."); Appeals Chamber Reparations Judgment, para. 148 (a) ("The Appeals Chamber has recognized that the Regulations of the Trust Fund are an instrument to the Rome Statute for purposes of interpreting provisions related to reparations awarded through the Trust Fund").

⁴⁰ For this reason, the Trust Fund does not address herein the issues of whether the Trial Chamber discriminated *de facto* against the participating victims by subjecting them to a different procedure or failed to provide adequate reasons for rejecting dossiers and disregarding the assessment made by the Trust Fund (see Legal Representative V01's Appeal Brief, paras 33-43, and 44-55, respectively); whether the Trial Chamber misapplied the standard of proof during the screening process (see Defence's Appeal Brief, paras 49-146); that the impugned decision violated the principles applicable to assess a convicted person's liability by disregarding the plurality of co-perpetrators and the specific circumstances of the case (see Defence's Appeal Brief, paras 226-268); or the alleged violation of the *non ultra petita* rule (see Defence's Appeal Brief, paras 269-278) because the Trust Fund considers that these are issues that relate to the Trial Chamber's exercise of its judicial authority and are to be addressed by the parties to the case.

B. Trust Fund’s previous submissions in these proceedings and the present invitation to make observations

24. The Trust Fund notes that, as held by the Appeals Chamber in this case⁴¹ and reiterated recently by Pre-Trial Chamber I: “when acting within the parameters of rule 103 of the Rules, the respective Chamber should take into consideration whether the proposed submission of observations may assist it “in the proper determination of the case”.⁴²

25. The Trust Fund is mindful of the distinct purpose of observations and in that spirit considers it necessary to address the particular procedural history in this case relevant to the issues raised on appeal that could, in respect of the first consideration of the Trust Fund’s role, be appropriate for it to submit observations on.

26. First, the Trust Fund recalls that, in the Appeals Chamber Reparations Judgment, the Appeals Chamber held that “the [Decision on Reparations] contains sufficient elements to be an order for reparations within the meaning of article 75 of the Statute, subject to the amendments detailed in this judgment.”⁴³ In other words, the Trust Fund observes that a reparations order had already been issued in the *Lubanga* case in 2012, which was later amended by the Appeals Chamber in its Reparations Judgment. In this respect, the Trust Fund notes that many of the issues raised on appeal have already been definitively addressed and decided by the Appeals Chamber in its Reparations Judgment. The Trust Fund therefore does not consider that it would be of assistance to point out the Appeals Chamber’s own holdings to it and does not intend to address this aspect in its observations.

27. Second, the Trust Fund also recalls that it has already comprehensively and exhaustively addressed many of the issues raised in these appeals in the context of its Request for Leave to Appeal and Reconsideration Request,⁴⁴ which are a part of the case record available to the Appeals Chamber. The Trust Fund does not consider that it would be of assistance for it to repeat information already in the record.

28. Therefore, recalling its first consideration relevant to its role that encompasses working in all reparations cases throughout the Court and bearing in mind the purpose of observations pursuant to rule 103, the Trust Fund’s below submissions relate to a discussion

⁴¹ [Appeals Chamber Reparations Judgment](#), para. 247.

⁴² *The Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the “Application by Lawyers for Justice in Libya and the Redress Trust for leave to submit observations pursuant to Rule 103 of the Rules of Procedure and Evidence” and the “Defence Request for Leave to Respond to the Application”, 5 September 2018, [ICC-01/11-01/11-649](#), para. 11.

⁴³ [Appeals Chamber Reparations Judgment](#), para. 38.

⁴⁴ *See supra* para. **Error! Reference source not found.**

of the subsequent jurisprudence and practice at the Court in line with the *Lubanga* Appeals Chamber Reparations Judgment, specifically in relation to aspects that are regulated by the TFV Regulations or could impact on the implementation stage of proceedings.

III. OBSERVATIONS OF THE TRUST FUND

A. Introduction

29. In its observations, the Trust Fund will address three issues. However, before setting them out, the Trust Fund considers it relevant to frame them within the context of the final Order for Reparations in this case, namely that the reparations awards in the *Lubanga* case relate exclusively to one type of reparations, i.e. collective reparations ordered pursuant to rule 98 (3) of the Rules. The Trust Fund therefore discusses individual reparations awards only to the extent that in so doing it may assist in illuminating an aspect of the legal framework at the Court relevant to collective reparations awards.

30. Below, the Trust Fund addresses the issues of: (i) the victim eligibility procedure; (ii) the role of the Defence in victim eligibility procedures; and (iii) the interplay between establishing the amount of liability for reparations and unidentified victims found eligible at the implementation stage.

B. Victim eligibility procedure for collective reparations

31. At the outset, the Trust Fund recalls that the fifth required element of a reparations order,⁴⁵ namely the obligation to identify eligible victims or, of more relevance to this topic, set out the legal criteria of eligibility, is not qualified or limited in any way by the type of reparations awarded. In other words, it is the Trust Fund's understanding that this element is also required in the case of only collective reparations awards being ordered under rule 98 (3) of the Rules. The Trust Fund notes that, following *Lubanga*, three Trial Chambers have dealt with the procedure for victim eligibility in the context of collective awards, namely in the *Al Mahdi*, *Bemba*, and *Katanga* cases.

32. In the *Al Mahdi* case, the Trial Chamber articulated two distinct victim eligibility proceedings based on the type of award, i.e. individual⁴⁶ or collective, as well as different linkage requirements between the harm suffered and Mr Al Mahdi's crimes.

⁴⁵ [Appeals Chamber Reparations Judgment](#), Key Finding no. 1.

⁴⁶ The Trial Chamber ordered the administrative screening of potential beneficiaries of *individual awards* to be conducted by the Trust Fund, with the preliminary assistance of VPRS, by way of an individual application-

33. With respect to the legal criteria of eligibility for the collective awards, the Trial Chamber set out the following: “the community of Timbuktu, i.e. organisations or persons ordinarily residing in Timbuktu at the time of the commission of the crimes or otherwise so closely related to the city that they can be considered to be part of this community at the time of the attack”.⁴⁷ The footnote to this criterion adds that: “[i]t is noted that many inhabitants of Timbuktu fled Timbuktu due to the occupation.”⁴⁸ In terms of the fourth element, related to the obligation to identify modalities of reparations, the Trial Chamber ordered collective reparations for the community of Timbuktu and the displaced population,⁴⁹ specifically mentioning resettlement as a potential activity under the economic harm collective award.

34. The Trust Fund notes that the *Al Mahdi* Trial Chamber explicitly differentiated between the two different victim eligibility procedures based on type of award, stating: “[it] is also emphasized at the outset that anyone not participating in the screening can still participate in collective reparations programmes – the screening process concerns only individual reparations.”⁵⁰ In this regard, the Trust Fund would highlight that Mr Al Mahdi is personally liable for the collective awards no different than for the individual compensation portion of the reparations awards. However, it is the Trust Fund that will, in a programmatic framework and working with trusted local professionals, identify and screen administratively, without an individual application based process, those displaced persons who fit the Trial Chamber’s criteria for purposes of benefiting from a collective award.

35. While the *Bemba* case did not ultimately result in an order for reparations, the Trust Fund notes that reparations proceedings did take place and that many of the submissions were in relation to the potential ordering of collective reparations awards. In this regard, the Trust Fund observes that, in its order requesting initial submissions, the *Bemba* Trial Chamber stated the following: “At this preliminary stage and **pending a determination by the Chamber of the approach to be taken on reparations**, the Registry is *not* required to [...] seek individual applications for reparations”.⁵¹ While not definitive, the Trust Fund observes that this statement appears to imply that the *Bemba* Trial Chamber

based procedure. See Trial Chamber VIII, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, 17 August 2017, [ICC-01/12-01/15-236](#) (“*Al Mahdi Reparations Order*”)

⁴⁷ [Al Mahdi Reparations Order](#), para. 56.

⁴⁸ [Al Mahdi Reparations Order](#), fn. 86.

⁴⁹ Al Mahdi 12 of July Decision, see e.g. paras 83, 103.

⁵⁰ [Al Mahdi Reparations Order](#), para. 145.

⁵¹ Order requesting submissions relevant to reparations, 22 July 2016, [ICC-01/05-01/08-3410](#), para. 10 (bold added, italics in original).

was of the view that the Court's legal framework provides for victim eligibility to be done without an individual application process being required.

36. In regards to the third case involving victim eligibility procedures in the context of collective awards,⁵² the *Katanga* case, the Trust Fund notes that, unlike in the *Al Mahdi* and *Bemba* cases, the Trial Chamber in this case decided to proceed pursuant to a pre-order for reparations individual application eligibility process pursuant to rule 94 of the Rules. At the same time, recalling that reparations procedures should be based on the specific circumstances of the case, the Trust Fund notes that, in regards to this procedural choice, the Trial Chamber stated that “[t]he Chamber notes further that the crimes of which Mr Katanga was convicted took place as part of the attack on Bogoro, that is, an attack on a definite place throughout the course of one day”⁵³ and then went on to state in a footnote that “[t]he Chamber is nonetheless cognizant that the modus operandi adopted in the case at bar will not necessarily apply to other cases, in particular where the number of potential victims is very high and/or where the acts of which the person was convicted encompass a considerable stretch of time and/or their geographical reach is much greater than it is here.”⁵⁴

C. The role of the Defence in victim eligibility procedures for collective reparations

37. The Trust Fund observes that the issue of the role of the Defence in victim eligibility procedures is, similar to the above discussion, affected by the type of reparations ordered. In addition, the two distinct stages of reparations proceedings, pre- or post- order for reparations, also impact on the foreseen role of the Defence in these procedures.

38. In the *Al Mahdi* case, the Trust Fund recalls that the Trial Chamber granted the Defence a role only in the screening process for individual reparations awards that will occur during the implementation phase.⁵⁵ The fact that the Trial Chamber did not extend its reasoning to collective reparations is explained, as set out in the above section, by the fact that the screening process as such was held by the Trial Chamber (and not disturbed on appeal) to not be applicable to collective reparations. It follows necessarily from this that, in the *Al Mahdi* case jurisprudence, the Defence equally has no role in regards to who is deemed an eligible beneficiary of a collective reparations award.

⁵² In *Katanga*, the Trial Chamber awarded both individual and collective awards to 297 victims.

⁵³ *Ordonnance de réparation en vertu de l'article 75 du Statut*, 24 March 2017, [ICC-01/04-01/07-3728](#) (“*Katanga* Reparations Order”), para. 32.

⁵⁴ [Katanga Reparations Order](#), fn. 71.

⁵⁵ [Al Mahdi Reparations Order](#), paras 12(iii), 144, 145.

39. In regards to the *Katanga* case, the Trust Fund recalls that, while the Trial Chamber gave the Defence a role in reviewing reparations applications and ultimately awarded collective reparations to those found to be eligible through that individual process, the *Katanga* process took place before the issuance of the order for reparations and was accordingly governed by different provisions that do provide for a Defence role at that stage. In this regard, under the Court's legal framework, where a Trial Chamber identifies individual reparations award beneficiaries in the order for reparations pursuant to requests brought under rule 94 of the Rules, the convicted person's role is set out in rule 94 (2) of the Rules. Thus, the convicted person has the right to be notified of the requests and to make submissions thereon in line with article 75 (3) of the Statute *prior to* the Trial Chamber issuing an order for reparations on those requests.

40. Contrarily, where the Trial Chamber does not identify individual beneficiaries in the order for reparations, but instead sets out the criteria for eligibility, this process is regulated by TFV regulation 69 (collective reparations pursuant to rule 98 (3)), which, as noted by the Appeals Chamber, does not provide a similar Defence role in the post-order implementation stage. The Trust Fund notes that the *Lubanga* proceedings are at the post-order implementation stage of collective reparations.

D. The issue of establishing liability and unknown victims at the implementation stage

41. The Trust Fund notes that the determination of the harm caused and the amount liability occurs necessarily at the time of the issuance of an order for reparations, in accordance with article 75 of the Statute. In order to determine the extent of the harm and the scope of the liability of a convicted person, the Trial Chamber must take into account the findings made in the conviction and sentencing decisions.

42. Regarding the determination of liability, in particular, the Trust Fund observes that a convicted person's liability shall be proportionate to the harm caused and, *inter alia*, to the person's participation in the commission of the crimes for which he or she was convicted.⁵⁶ In the *Al Mahdi* case, for example, the Trial Chamber determined the amount it deemed

⁵⁶ [Appeals Chamber Reparations Judgment](#), para. 118; [Order for Reparations](#), para. 21. *See also* about the unanimity on this subject: [Al Mahdi Reparations Order](#), para. 50; [Katanga Reparations Order](#), para. 252.

proportionate for the harm caused by Mr Al Mahdi on the basis of his crimes, taking into consideration his level of participation and the specific circumstances of the case.⁵⁷

43. The Trust Fund also notes that the Appeals Chamber has held that a Trial Chamber should also take into account the service cost to repair,⁵⁸ as a fundamental element to be taken into consideration at the stage of determination of the reparation award.⁵⁹

44. The Trust Fund notes that the *Katanga* Reparations Order indirectly refers to this concept⁶⁰ and it has otherwise more openly been addressed in the case law of the Court.⁶¹ For instance, in the *Al Mahdi* case, the Trial Chamber took into account the amount spent by UNESCO in the restoration of the protected buildings, as a parameter to enlighten its discretionary determination of the financial liability of Mr Al Mahdi.⁶² Likewise, in the *Katanga* case, the Trust Fund provided the Trial Chamber with the service cost to repair regarding the loss of personal belongings.⁶³

45. In regards to this point, the Trust Fund would like to draw the attention of the Appeals Chamber to the difference between the service cost to repair and the actual cost of the eventual reparations programme that is to be implemented by the Trust Fund, since the cost of the programme does not strictly address the harms in the way the Chamber determines them. The establishment of the cost of each program takes place at a later stage, after the award of reparations has been set. For example, the prices of the programmes of reparations

⁵⁷ [Al Mahdi Reparations Order](#), para. 110-134.

⁵⁸ [Katanga Reparations Appeals Judgment](#), para. 72 “In the view of the Appeals Chamber, rather than attempting to determine the “sum-total” of the monetary value of the harm caused, trial chambers should seek to define the harms and to determine the appropriate modalities for repairing the harm caused with a view to, ultimately, assessing the costs of the identified remedy. The Appeals Chamber considers that focusing on the cost to repair is appropriate, in light of the overall purpose of reparations, which is indeed to repair. This approach is also appropriate in light of the need to ensure that reparations proceedings advance efficiently. In assessing the cost of repair, the Trial Chamber may seek the assistance of experts and other bodies, including the TFV, before making a final ruling thereon. This ruling on the cost of repairing the harm is to be taken by the trial chamber, in the exercise of its judicial functions under the Statute.”

⁵⁹ Trust Fund Victims, Observations in response to the Trial Chamber’s order of 15 July 2016 with Public redacted version of Annex A: Index of annexes, and public annexes 1-5 and 7-14, 30 September 2016, ICC-01/04-01/07-3714-Red, para. 17.

⁶⁰ [Katanga Reparations Order](#), para. 186, fn. 263.

⁶¹ Trial Chamber III, Public redacted version of “Order regarding follow-up matters arising from Expert Report ICC-01/05-01/08-3575-Anx-Corr2-Red”, 22 December 2017, ICC-01/05-01/08-3588-Red, paras 7-10 the Trial Chamber address in particular in the paragraph 10 the question of the cost to repair as a component of the method to determine the reparation award.

⁶² [Al Mahdi Reparations Order](#), para. 110-134.

⁶³ [Katanga Reparations Order](#), paras 204-205.

proposed by the Trust Fund and approved by the Trial Chamber in the *Katanga* case were different from the monetary evaluation of the harm made by the Trial Chamber.⁶⁴

46. The Trust Fund further recalls that, as stated in *supra* section B of the present observations, the Court's case law demonstrates that it is not necessary to have previously identified the number of victims eligible in order to have a valid reparations order, for the purpose of determining the amount of the convicted person's liability.

47. In the *Al Mahdi* case, the Trial Chamber, in application of the *Lubanga* Appeals Chamber Reparations Judgment, rejected the argument that the victims should be precisely identified by the Trial Chamber in order to determine the extent of the harm caused.⁶⁵ The Trial Chamber further considered that the fact that a victim may not intend to receive reparation should not have an impact on the assessment of the harm, and therefore on the financial liability of the convicted person.⁶⁶ Lastly, in light of the applicable legal framework, the Trial Chamber held that, either for individual or collective reparations, a Trial Chamber does not need to precisely identify all the victims who will benefit from the reparations to determine the degree of the harm caused.⁶⁷

IV. Conclusion

48. The Trust Fund wishes to express its appreciation for being invited to submit observations arising in these appeals and further wishes to convey its willingness to offer additional information and to address the questions put forward by the Appeals Chamber, as appropriate, at the oral hearing scheduled for 11 and 12 December 2018.

⁶⁴ Comparing the monetary evaluation of the harm suffered by the victims in the Katanga Reparation Order and the Draft Implementation Plan of the Trust Fund (Trust Fund for Victims, Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017 (ICC-01/04-01/07-3728), 25 July 2017, ICC-01/04-01/07-3751-Red) shows it.

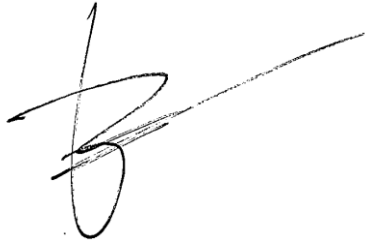
⁶⁵ [Al Mahdi Reparations Order](#), para. 59.

⁶⁶ [Al Mahdi Reparations Order](#), para. 65.

⁶⁷ [Al Mahdi Reparations Order](#), para. 59.

FOR THE FOREGOING REASONS

The Board of Directors of the Trust Fund for Victims respectfully submits these requested observations.



Pieter W.I. de Baan

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

Dated on 15 November 2018
At The Hague, The Netherlands