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TRIAL CHAMBER III

Before: Judge Joyce Aluoch, Presiding
Judge Geoffrey Henderson
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

v. JEAN-PIERRE BEMBA GOMBO

Public document

Observations relevant to reparations

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

Ms Fatou Bensouda
Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes
Ms Kate Gibson
Ms Melinda Taylor

Legal Representative of Victims

Ms Marie-Edith Douzima-Lawson

The Office of Public Counsel for Victims

Ms Paolina Massidda
Ms Sarah Pellet

States Representatives

REGISTRY

Registrar

Mr Herman von Hebel

Victims and Witnesses Unit

Mr Nigel Verril

Victims Participation and Reparations Section

Ms Isabelle Guibal

I. Background

1. On 21 March 2016, pursuant to article 74 of the Statute, Trial Chamber III (hereinafter “Trial Chamber”) convicted Mr. Jean-Pierre Bemba Gombo (hereinafter “Mr. Bemba”) under article 28 (a) of the Statute of the war crimes and crimes against humanity of murder and rape, and the war crime of pillaging (hereinafter “Conviction Decision”).¹

2. On 21 June 2016, the Trial Chamber sentenced Mr. Bemba to 18 years for these crimes (hereinafter “Sentencing Decision”).²

3. On 22 July 2016, the Trial Chamber invited *inter alia* the Trust Fund for Victims (hereinafter “Trust Fund”) to file observations by 15 September 2016 on the process to be followed relevant to reparations in the present case (hereinafter “Order for Observations”).³ Upon the request of various participants to the proceedings,⁴ the Trial Chamber granted an extension for the filing of the observations to 17 October 2016⁵ and subsequently to 31 October 2016.⁶

4. The Trust Fund hereby submits the requested observations.

5. The Trial Chamber has requested observations on five topics. The Trust Fund’s present observations follow the order of the issues as laid out by the Trial Chamber. However, with regard to the fourth topic, i.e. whether it would be useful to appoint experts pursuant to rule 97 (2) of the Rules to assist the Trial Chamber in relation to the identified topics, the Trust Fund has included its views in this regard directly in the section where the relevant topic is addressed. As such, this topic does not appear as a separate heading in the present observations.

6. Further, the Trust Fund notes that, for several of the topics, it has already made submissions thereon in the context of reparations proceedings in other cases before the Court.

¹ Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343.

² Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399.

³ Order requesting submissions relevant to reparations, ICC-01/05-01/08-3410, para. 7.

⁴ See Legal Representative of victims, Request for an extension of time to file submissions relevant to reparations, 23 August 2016, ICC-01/05-01/08-3427; Trust Fund, Request for an extension of the time limit, 30 September 2016, ICC-01/05-01/08-3437.

⁵ See Order on the request for extension of time to file submissions relevant to reparations, 25 August 2016, ICC-01/05-01/08-3429.

⁶ Order on the Trust Fund for Victims’ request for an extension of the time limit, 7 October 2016, ICC-01/05-01/08-3442.

Where relevant, the Trust Fund has included references to these previous submissions and not repeated them in full in the present submissions.

7. The Trust Fund welcomes the Trial Chamber's invitation to submit observations in the present proceedings and wishes to express its willingness and commitment to provide additional information on the topics addressed herein or any other matter that the Trial Chamber considers may be helpful.

8. Should the Trial Chamber decide to appoint experts to assist it in determining these issues, the Trust Fund would also welcome the opportunity to make further submissions so that it can take into account the expert submissions to further develop and refine as warranted its own observations.

II. Observations of the Trust Fund

A. Principles of reparations

9. In its Order for Observations, the Trial Chamber requested observations on “whether the principles established by the Appeals Chamber in the *Lubanga* case need to be amended or supplemented in the light of the particular circumstances of the case”.⁷

10. The Trust Fund recalls that in its judgment pursuant to article 82 (4) of the Statute on the final reparations appeals in the *Lubanga* case (hereinafter “*Lubanga* Reparations Judgment”),⁸ the Appeals Chamber agreed with the *Lubanga* Trial Chamber that “Trial Chambers should articulate principles within the context of the circumstances of the specific case at hand”, but clarified that “principles relevant to the circumstances of a case must be distinguished from the order for reparations, i.e. the Trial Chamber's holdings, determinations, and findings based on those principles”.⁹ The Appeals Chamber therefore held that “[p]rinciples should be general concepts that, while formulated in light of the

⁷ Para. 7 (a).

⁸ Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129. *See also* Order for Reparations (amended), Annex A to *Lubanga* Reparations Judgment, ICC-01/04-01/06-3129-AnxA (hereinafter “*Lubanga* Amended Order for Reparations”).

⁹ *Lubanga* Reparations Judgment, para. 55.

circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers”.¹⁰

11. Based on the above, the Trust Fund would make the following observations. First, given that the Trial Chamber and the parties and participants, having participated in the entirety of the trial and subsequent sentencing proceedings, are by far the most intimately familiar with and knowledgeable about the specific facts and circumstances of the *Bemba* case, it is the Trust Fund’s view that the development of any further principles therefrom is primarily a matter for the Trial Chamber and the trial participants. At this stage of the proceedings where the Trust Fund has not yet been seized of an order for reparations, the Trust Fund submits that it is not its role to attempt to familiarize itself with the entirety of the trial record and the intricacies of the specific circumstances of this case. In this regard, the Trust Fund defers to those most familiar with the case, i.e. the Trial Chamber and the trial participants.

12. Furthermore, the Trust Fund would point out that its role in reparations is as the implementing agency of awards for reparations to the Court as a whole and that its mandate as the implementing partner relates to the stage *after* it has been seized of an order for reparations issued by a Trial Chamber.¹¹ This relationship is thus at an institutional level. The Trust Fund serves this role for all cases resulting in a conviction and an order for reparations that emanate from the various Trial Chambers at the Court. Currently, there are four separate cases at various stages of reparations proceedings. It is therefore neither realistically feasible nor necessarily appropriate, during the stage prior to the issuance of an order for reparations

¹⁰ *Ibid.*; see also *Lubanga* Amended Order for Reparations, para. 5.

¹¹ See Regulations of the Trust Fund for Victims, regulation 50 (b), providing that: “For the purposes of these regulations, the Trust Fund shall be considered to be seized: [...] (b) When the Court makes an order for reparations against a convicted person and orders that the award be deposited with or made through the Trust Fund in accordance with rule 98, sub-rules 2 to 4 of the Rules of Procedure and Evidence.”. See also Appeals Chamber, 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, 14 December 2012, ICC-01/04-01/06-2953 (hereinafter “*Lubanga* Reparations Admissibility Decision”), paras 53 (“The Appeals Chamber considers that, under the statutory framework for reparations [...] reparations proceedings can be divided into two distinct parts: 1) the proceedings leading to the issuance of an order for reparations; and 2) the implementation of the order for reparations, which the Trust Fund may be tasked with carrying out.”), 55 (“The second part of the reparations proceedings consists of the implementation phase, which is regulated primarily by article 75 (2) of the Statute and rule 98 of the Rules of Procedure and Evidence. If the Trial Chamber has ordered that reparations be made through the Trust Fund pursuant to rules 98 (3) and 98 (4) of the Rules of Procedure and Evidence, or that the award for reparations be deposited with the Trust Fund pursuant to rule 98 (2) of the Rules of Procedure and Evidence, the Trust Fund plays an important role in this phase and the Regulations of the Trust Fund apply. In this respect, the Appeals Chamber notes that, under the Regulations of the Trust Fund, an order for reparations has to be issued in order to seize the Trust Fund and allow it to undertake implementation activities in relation to reparations.”).

or during appellate proceedings related to that order, for the Trust Fund's role to be construed as the same as the parties of each case.

13. This is not to suggest that the Trust Fund has no role or interest in reparations proceedings prior to the issuance of the order for reparations. The Trust Fund submits that its role at this stage of proceedings should be understood as an advisory role on the principles, procedure, and implementation modalities on the basis of its mandates and accountability to States, as well as its institutional experience, networks and multidisciplinary competencies. In this regard, the Trust Fund has an institutional interest in reparations principles and their consistent development throughout cases at the Court. Thus, in so far as the specific circumstances of each case lead to the development and refinement of reparation principles, the Trust Fund submits that this should be done without undermining or contradicting the already developed case law in this regard. The Trust Fund also has an interest in ensuring that reparations principles 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.

14. Accordingly, the Trust Fund considers that its role at this stage of proceedings is primarily to address how certain issues that may be decided upon in the order for reparations could potentially affect the efficient and timely implementation of that order, as well as to highlight those issues for which the Court's legal framework relevant to reparations is set out in the Regulations of the Trust Fund,¹² which are the applicable legal instrument at the implementation stage of reparations following the Trial Chamber's issuance of the order for reparations.¹³ The Trust Fund's present observations are therefore guided by this understanding of its role at this stage of the proceedings, not only in relation to the issue of principles, but to all of the issues for which the Trial Chamber has requested observations.

¹² 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.

¹³ See in this regard, *Lubanga* Reparations Admissibility Decision, paras 52 (holding that the Regulations of the Trust Fund 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."); *Lubanga* 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").

15. Following from this and as a second observation, the Trust Fund notes that certain of the principles established by the *Lubanga* Trial Chamber and affirmed on appeal by the Appeals Chamber are potentially applicable to the present case. For example, the *Lubanga* Trial Chamber established the principle that: “Priority may need to be given to the certain victims, who are in a particularly vulnerable situation or who require urgent assistance”.¹⁴

16. In the context of the present case, the Trust Fund observes that the Trial Chamber heard evidence that victims of rape contracted sexually transmitted diseases, including HIV/AIDS.¹⁵ Further, in the context of sentencing, the Trust Fund notes that the Trial Chamber found that the crime of rape was committed against particularly defenseless victims, and accordingly found this to constitute an aggravating circumstance under Rule 145 (2) (b) (iii) of the Rules.¹⁶

17. Recalling the amount of time that has passed since the commission of these crimes and noting the inadequacy of available medical treatment in the Central African Republic (hereinafter “CAR”),¹⁷ the Trust Fund suggests that the Trial Chamber may wish to consider whether it is appropriate to apply this principle to such victims and include in the eventual order for reparations instructions that priority be given to these victims in the implementation of the awards for reparations.¹⁸ As will be further discussed below, this may be of particular relevance to the present case where the available funds may not cover the entirety of the financing of the awards contained in the order for reparations. In such circumstances, the Trust Fund considers that clear, fact-based instructions related to the prioritization of the implementation of awards would be of critical importance for the preparation of any draft implementation plan that may be required following the Trust Fund being seized of the order for reparations pursuant to regulation 50 (b) of the Regulations of the Trust Fund.¹⁹

¹⁴ *Lubanga* Amended Order for Reparations, para. 19.

¹⁵ See Sentencing Decision, para. 38 and footnote 110 with references to the Conviction Decision.

¹⁶ Sentencing Decision, paras 41-43.

¹⁷ See e.g. Sentencing Decision, para. 37, referring to the expert testimony of Dr. Daryn Reicherter (P925).

¹⁸ The Trust Fund notes that for individual awards for reparations where the Trial Chamber does not identify the individual beneficiaries ordered pursuant to rule 98 (2) of the Rules, the Regulations of the Trust Fund also provide that the Board of Directors may institute a prioritization system for verification and disbursement of the awards. See regulation 65 (“Taking into account the urgent situation of the beneficiaries, the Board of Directors may decide to institute phased or priority verification and disbursement procedures. In such cases, the Board of Directors may prioritize a certain sub-group of victims for verification and disbursement.”).

¹⁹ See, in the regard, regulations 54, 57, 59, 69 of the Regulations of the Trust Fund.

18. Third, the Trust Fund observes that the *Lubanga* Trial Chamber also developed principles that, while they are of a general nature and could also apply in other cases, specifically respond to the particular circumstances of that case. In particular, it articulated principles on child victims,²⁰ establishing that, as a general matter, “reparations decisions concerning children [...] should be guided, *inter alia*, by the Convention on the Rights of the Child”²¹ and also drew guidance from the sections of the Paris Principles²² relevant to measures for former child soldiers²³ and the United Nations Basic Principles on Reparation for Victims.²⁴

19. The Trial Chamber may wish to consider whether it is appropriate to articulate reparations principles specific to victims of the present case, i.e. for victims of the crimes of pillaging, rape, and murder. Regarding victims of the crime of rape, the Trust Fund would call to the Trial Chamber’s attention the “Guidance Note of the Secretary-General, Reparations for Conflict-Related Sexual Violence”²⁵ issued in June 2014 (hereinafter “Guidance Note”), which the Trial Chamber may wish to consider as a source of guidance for reparations to these victims.

20. The Guidance Note addresses matters relevant to the design, implementation, and administration of reparations. In particular, the Guidance Note sets out the following principle: “In any initiative designed to fulfil the victims of sexual violence right to reparations, it is vital that appropriate attention be paid to any on-going protection concerns for victims and to ensuring that initiatives themselves ‘do no harm’”.²⁶ Furthermore, with respect to the modalities of reparations to victims of conflict-related sexual violence, the

²⁰ See *Lubanga* Amended Order for Reparations, Principle 7, entitled “Child victims”.

²¹ *Lubanga* Amended Order for Reparations, para. 24.

²² UNICEF, The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, 1 February 2007.

²³ See e.g. *Lubanga* Amended Order for Reparations, footnote 5.

²⁴ United Nations General Assembly, Resolution adopted on the Report of the Third Committee, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, Adopted at the 64th plenary meeting on 16 December 2005.

²⁵ Available at: <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>.

²⁶ Guidance Note, Section A “Guiding Principles for Operational Engagement”, p. 5.

Guidance Note establishes the principle that “[r]eparations should strive to be transformative, including in design, implementation and impact”.²⁷

21. The Trust Fund strongly agrees with both of these principles and notes that it already applies these principles throughout all of its activities and interactions with victims under its assistance mandate activities undertaken pursuant to regulation 50 (a) of the Regulations of the Trust Fund.²⁸ The Trust Fund intends, if so requested, to prepare a draft implementation plan in the present case that reflects these principles and would welcome the Trial Chamber’s explicit affirmation of this intended approach, and any further developments thereon that the Trial Chamber considers appropriate, in the order for reparations.

22. With regard to the principle of “Do no harm” referred to in the Guidance Note, the Trust Fund submits that this principle should guide each and every stage of reparations proceedings, those both preceding and following the issuance of an order for reparations. In the Trust Fund’s view, the principle of “Do no harm” should be viewed as a dynamic and positive obligation in all Court-initiated interactions with victims, thus implying that its application seeks not only to actively prevent harming victims, but equally to positively create reparative value to the victims through their participation in the relevant procedures and proceedings. In this sense, the Trust Fund submits that the principle of “Do no harm” should be interpreted and applied in a manner that encourages victims’ interactions with the Court to be not merely neutral, but a potentially empowering and healing experience.

23. As mentioned, the principle of “Do no harm” is one of the core guiding principles of all of the Trust Fund’s interactions with victims within the jurisdiction of the Court. Under its assistance mandate, the Trust Fund has as of this year reached and provided assistance to more than 300,000 victims. This wealth of experience has permitted the Trust Fund to develop the principle of “Do no harm” into three main requirements that are applied across all activities undertaken by the Trust Fund. These requirements, which the Trust Fund submits should apply equally throughout reparations proceedings and in the implementation of orders for reparations, are that activities should be designed and implemented according to an

²⁷ See Principle 4, pp. 8-9.

²⁸ See *The Prosecutor v. Thomas Lubanga Dyilo*, Trust Fund, First submission of victim dossiers, 31 May 2016, ICC-01/04-01/06-3208 (hereinafter “*Lubanga* 31 May 2016 Submission”), para. 9 (“The Trust Fund would respectfully recall that it is an independent body, working in a collaborative partnership with the Court, with its own mandate and duties, foremost of which is to interact with victims in accordance with the principle of ‘do no harm’”).

approach that is: 1) trauma-sensitive;²⁹ 2) gender-sensitive;³⁰ and 3) context-sensitive.³¹ Under the fifth issue identified by the Trial Chamber, i.e. any other issue that the Trust Fund wishes to bring to the Trial Chamber's attention, the Trust Fund will briefly elaborate on how it envisions applying the principle of "Do no harm" and these three corresponding requirements in the implementation of any awards for reparations ordered in this case.

24. Finally, the Trust Fund notes that the *Lubanga* Trial Chamber articulated two principles relevant to reparations to legal entities.³² Under the principle entitled "Modalities of reparations", that Trial Chamber established that: "Restitution may also be apposite for legal bodies such as schools or other institutions".³³ The Trust Fund observes that this principle was not applied in the *Lubanga* case. However, the Trust Fund notes that, in the present case, 14 organizations or institutions were admitted as participating victims under rule 85 (b) of the Rules³⁴ and, while the Trust Fund has only limited access to the underlying alleged harms, appear to have been victims of the crime of pillaging.

25. The Trust Fund notes that the Trial Chamber may identify a range of potential modalities of reparations for victims generally, based upon which the Trust Fund will then develop a draft implementation plan, or the Trial Chamber may already in the order for reparations indicate a specific modality of reparations for specific victims or groups of victims.³⁵ The

²⁹ See *The Prosecutor v. Thomas Lubanga Dyilo*, Trust Fund, Annex A to "Filing on Reparations and Draft Implementation Plan", ICC-01/04-01/06-3177-AnxA (hereinafter "Draft Implementation Plan"), paras 29-30, 41-64, wherein the Trust Fund described the trauma-sensitive approach to engaging with potential victims at the point of first contact and intake it proposed to implement in the context of the *Lubanga* case.

³⁰ See *The Prosecutor v. Thomas Lubanga Dyilo*, Trust Fund, "Filing on Reparations and Draft Implementation Plan", ICC-01/04-01/06-3177, Chapter IV, "The order for reparations and gender considerations"; and Draft Implementation Plan, Chapter III, "Operational Issues", as well as Trust Fund for Victims Strategic Plan 2014-2017, 4.3 "Cross-cutting themes": "1. Support the advancement of women's human rights, increase the participation of women and incorporating gender perspectives including addressing disparities and the impact of sexual and gender-based violence in line with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and UN Security Council Resolutions on women, peace and security.", pages 20-21.

³¹ See, for a further explanation of these three cross-cutting requirements, *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of hearing of 13 October 2016, ICC-01/04-01/06-T-368-Red-ENG, p 15, line 18 – p. 17, line 3.

³² See Principle 1. Beneficiaries of reparations, para. 8, affirming that, as provided in rule 85 (b) of the Rules of Procedure and Evidence, reparations may be granted to legal entities.

³³ *Lubanga* Amended Order for Reparations, para. 36.

³⁴ Conviction Decision, para. 21.

³⁵ See in this regard *Lubanga* Reparations Judgment, paras 200-201. See also para. 204, wherein the Appeals Chamber determined that the Trial Chamber had not definitively excluded restitution as a potential modality for reparations for former child soldiers. The Appeals Chamber held that, while the Trial Chamber had indicated its view that this modality may not be appropriate for former child soldiers, it had left it to open to the Trust Fund to propose awards based on this modality. The Appeals Chamber therefore held that if the Trust Fund did include this modality

Trust Fund submits that the Trial Chamber may wish to consider whether first the principle relevant to legal entities itself needs to be further refined or adapted based on the circumstances of the *Bemba* case and second whether it wishes to apply the principle in the order for reparations and establish a specific modality of reparations for these victims. In the section below relevant to the types of reparations that may be appropriate in this case, the Trust Fund discusses this matter in more detail.³⁶

B. Criteria and methodology relevant to the eligibility of victims, the relevant harms, and the scope of liability

26. The second issue for which observations are requested in the Order for Observations is “the criteria and methodology to be applied in the determination and assessment of (i) the eligibility of victims; (ii) the relevant harms and; (iii) the scope of liability of Mr. Bemba, including the determination of the precise extent of the (monetary) obligations to be imposed on him”.³⁷

27. The Trust Fund reiterates its view that, at this stage of the proceedings, determinations on these matters fall fully within the purview of the judiciary and as such are a matter for the Trial Chamber to decide. Furthermore, these determinations should be based on the Trial Chamber’s appreciation of the specific circumstances of the *Bemba* case, which the Trust Fund again notes should be primarily informed by the submissions and views of the parties to the trial proceedings.

28. At the same time, the Trust Fund notes that, specifically with regard to the eligibility of victim beneficiaries, the applicable legal framework provides a Trial Chamber with the option to decide this itself or to leave the eligibility determination to the Trust Fund. In this regard, the legal framework differs on how these matters are to be determined, and by which entity, depending on whether they are decided in the order for reparations or are determined at the ensuing implementation stage. The Trust Fund therefore welcomes the opportunity to address how the Regulations of the Trust Fund relate to the matters identified under this second issue. The Trust Fund accordingly limits its observations to those aspects that touch upon the legal

in its draft implementation plan, it was required to provide “full reasons” as to why it had been included despite the Trial Chamber’s view.

³⁶ See *infra* paras 105-113.

³⁷ Order for Observations, para. 7 (b).

framework, as laid out in the Court’s legal texts and clarified by the Appeals Chamber, in particular in regards to the framework applicable after an order for reparations is issued.

1. The eligibility of victims

29. At the outset, the Trust Fund notes that there is no overarching requirement that individuals be identified or have their eligibility determined in a judicially-based process for purposes of a Trial Chamber issuing an order for reparations.³⁸ In this regard, in the *Lubanga* Reparations Judgment, the Appeals Chamber established that the fifth required element of an order for reparations was that the order “must *either* identify the victims eligible for reparations, *or* set out the criteria of their eligibility for reparations”.³⁹ The Trust Fund also notes that the requirement that a Trial Chamber must establish eligibility criteria in the order for reparations applies to both individual awards and to collective awards. Finally, the Trust Fund observes that how the eligibility of victims is to be determined differs depending on whether the order for reparations is for individual awards or for collective awards. Below, the Trust Fund will address individual and collective reparations in turn. Following that, the Trust Fund will discuss the issue of the convicted person’s role in the eligibility screening process.

30. Beginning with individual awards for reparations, the Trial Chamber *may* identify the individual beneficiaries and make determinations in relation to the harms that they suffered in the order for reparations, but it is not required to do so in all cases. This point was clarified by the Appeals Chamber when it held in relevant part that: “The Trial Chamber is not required in all circumstances (the Court “may”) to decide upon the scope and extent of any damage, loss or injury in relation to individual requests filed under rule 94 [...]”⁴⁰ and that: “The Regulations of the Trust Fund provide for: 1) the possibility for it to be seized of an order for reparations where *it would determine* whether a particular individual was eligible to receive an award for reparations or to participate in a collective award” (emphasis added).⁴¹

³⁸ See *Lubanga* Reparations Judgment, para. 167 (“The Appeals Chamber also notes that the Regulations of the Trust Fund provide for the inclusion of unidentified beneficiaries into a reparations programme and for their identification only at the implementation stage [...]”).

³⁹ *Lubanga* Reparations Judgment, paras 1 (Key Findings), 205.

⁴⁰ *Lubanga* Reparations Judgment, para. 148 (b).

⁴¹ *Lubanga* Reparations Judgment, para. 147 (d).

31. In the *Lubanga* Reparations Judgment, the Appeals Chamber also acknowledged the two separate legal avenues for awarding individual reparations. The first avenue, which is application based, is governed by rule 94 of the Rules (and potentially rule 95 of the Rules). Proceeding under this legal avenue would mean that in the order for reparations, the Trial Chamber would identify the individual beneficiaries pursuant to rule 98 (2)⁴² of the Rules and, at the implementation stage, disbursement of the awards would be governed by the process laid out in regulation 59 of the Regulations of the Trust Fund which provides, under the heading “*Cases where the Court identifies each beneficiary*” that:

59. Where the Court orders that an award for reparations against a convicted person be deposited with the Trust Fund in accordance with rule 98, sub-rule 2, of the Rules of Procedure and Evidence, the draft implementation plan shall set out the names and locations of victims to whom the award applies, where known (and subject to confidentiality), any procedures that the Trust Fund intends to employ to collect missing details, and methods of disbursement.

32. The second legal avenue for awarding individual reparations is provided for in regulations 60-65 of the Regulations of the Trust Fund under the heading “*Cases where the Court does not identify the beneficiaries*”. As explicitly detailed in the Regulations, proceeding under these provisions means that identifying and determining the eligibility of specific beneficiaries is an administrative process that the States Parties entrusted to the Trust Fund Secretariat, with a verification process of those determinations being tasked to the Trust Fund’s Board of Directors.

33. That these two different legal avenues are distinct was acknowledged by the Appeals Chamber when it held that “these regulations [60-65] [...] cannot be understood to refer to the reparation requests filed under rule 94 of the Rules of Procedure and Evidence, which are in any case relevant to an ‘application based process’”.⁴³

⁴² For purposes of these submissions, the Trust Fund does not address rule 98 (1) of the Rules. The Trust Fund wishes to express however its willingness to make such submissions at a later point, should the Trial Chamber wish to receive submissions on when this provision is applicable versus the process laid in rule 98 (2) of the Rules.

⁴³ *Lubanga* Reparations Judgment, para. 143.

34. The Trust Fund notes that it is open to the Trial Chamber at this stage of the proceedings to order VPRS to collect individual reparations requests pursuant to rule 94 of the Rules from individuals who did not participate in the trial proceedings and have not yet made a request for reparations. This process would then take place prior to the order for reparations being issued.⁴⁴ As already explained, the alternative approach would be to order individual reparations to unidentified beneficiaries pursuant to rule 98 (2) and regulations 60-65 of the Regulations of the Trust Fund.

35. The Trust Fund considers that, if the Trial Chamber wishes to award individual reparations in this case, it is for the Trial Chamber to decide which legal avenue is most appropriate in the circumstances of this case. However, based on its experience and in line with the principle of “Do no harm”, the Trust Fund would like to take the opportunity to make the following observations.

36. First, the Trust Fund respectfully submits that a rule 94 applications based process should only be initiated once the Trial Chamber has concluded, at least internally, that it is appropriate to order individual reparations, either only or in combination with collective reparations. The Trust Fund submits that an individual request process inevitably raises expectations that individual reparations awards will be ordered, no matter how carefully it may be explained that this is not guaranteed. If the Trial Chamber ultimately orders only collective reparations awards, this expectation can lead to victims feeling misled, as well as resenting that their time has been taken up completing an intensive and invasive process that ultimately is of, at best, indirect relevance to the order for reparations and the awards from which they will benefit. The Trust Fund respectfully submits that avoiding unrealistically raising victims’ expectations, particularly when dealing with populations who have little to no interaction with the Court or its unique legal framework, and being respectful of the amount of effort, time and resources required to complete a reparations request process (including gathering the supporting documentation) are important qualities of the principle of “Do no harm” in interactions with victims.

37. Second, the Trust Fund also notes that proceeding under rule 94 of the Rules could potentially significantly extend the time period before the order for reparations would be

⁴⁴ See *Lubanga* Admissibility Decision, para. 54.

issued. The Trust Fund does not wish to imply that rule 94 is *per se* inappropriate or less preferable than proceeding under regulations 60-65 of the Regulations of the Trust Fund. However, the Trust Fund is of the view that the time lag between an individual having their eligibility determined and the actual implementation of the individual awards is a relevant consideration that should be taken into account in terms of whether the amount of time that an individual may have to wait between these two events is itself potentially harmful. One advantage to proceeding under regulations 60-65 is that the identification process would take place only after the order for reparations had already been issued and thus the provision of the individual award could take place at a much closer time.

38. The Trust Fund would further point out the complicating factor of appellate proceedings. While certainly not always the case, it should nonetheless be noted that the implementation of an order for reparations is likely to be suspended until the appellate proceedings relevant to the conviction and sentencing decisions have been finalized. Mr. Bemba is currently appealing his conviction and his sentence. This has the potential to further extend the amount of time between when an individual would complete the rule 94 process and when any award can be actually implemented.

39. Finally, the Trust Fund notes that there are more than 5,000 participating victims in the *Bemba* case and there is a potential for several thousands of additional currently unidentified victims to also be eligible for reparations. The Trust Fund is not aware of the exact number of participating victims who have also already applied for reparations. However, the Trust Fund would call to the Trial Chamber's attention that this raises a legal question that has not yet been litigated at the Court, i.e. a situation where the Trial Chamber would be seized of individual reparations requests and also potentially consider it appropriate to order individual reparations to other unidentified beneficiaries under the Regulations of the Trust Fund. The question of whether in that situation the Trial Chamber would be required to decide pursuant to the procedures set out in rule 94 of the Rules on each of the individual requests already submitted was left open by the Appeals Chamber in the *Lubanga* case.⁴⁵

40. The Trust Fund does not consider it to be its role to take a position on the legal issues and procedural implications at stake in resolving this question, but raises it in terms of the

⁴⁵ See *Lubanga* Reparations Judgment, para. 152.

practical concerns related to the substantial delay such a process might cause in terms of when the actual implementation of the reparation awards could take place. In the Trust Fund's view, the potential delay needs to be considered in terms of whether such a procedure is appropriately trauma-sensitive and whether participating in such a procedure negatively impacts the potential reparative value for victims when interacting with the Court.

41. Turning to orders for collective reparations pursuant to rule 98 (3) of the Rules, the Trust Fund would make the following observations. First, the Trust Fund recalls the Appeals Chamber's holding that:

151. [...] [T]he Appeals Chamber recalls that it has already held above that "reparation orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence", decisions which are based on the evidence and factual findings relevant to the entire trial proceedings. The Appeals Chamber considers that it would contravene this principle to require that collective reparations can only be awarded on the basis of the individual requests for reparations received.

152. The Appeals Chamber therefore holds that, when only collective reparations are awarded pursuant to rule 98 (3) of the Rules of Procedure and Evidence, a Trial Chamber is not required to rule on the merits of the individual requests for reparations. Rather, the determination that it is more appropriate to award collective reparations operates as a decision denying, as a category, individual reparation awards. [Footnotes omitted.]⁴⁶

42. The Trust Fund notes that, in arriving at this conclusion, the Appeals Chamber stated that it found "particularly instructive the explanatory note in relation to the interpretation of article 75 (1) of the Statute [...]", which it then set out as follows:

150. [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

⁴⁶ *Lubanga* Reparations Judgment, paras 151-152.

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. [Emphasis added, footnote omitted.]⁴⁷

43. The Trust Fund submits that, when read together and in the context of the legal framework, the eligibility of individual victims does not need to be decided in an order for collective reparations. However, as already mentioned above, the order for collective reparations does then need to set out the criteria for eligibility in the collective awards.

44. Turning to the Regulations of the Trust Fund relevant to collective awards, the Trust Fund notes that, unlike the procedure set out for individual awards, the Regulations are silent in relation to how eligibility is to be determined in collective awards. In the context of the *Lubanga* reparations proceedings, the Trust Fund has had the opportunity to further develop its position in this regard,⁴⁸ which is presented in summary form in the following paragraph.

45. In brief, the Trust Fund envisions an administrative screening process for collective reparations awards that is modeled, with certain modifications, on the procedure laid out in regulations 60-65 of the Regulations of the Trust Fund pertaining to individual awards. In this regard, the Trust Fund submits that a verification process of each individual beneficiary by its Board of Directors (as provided for under regulations 63 and 64 for individual reparations awards) is not appropriate or operationally feasible for collective reparations awards. Furthermore, the Trust Fund notes that the administrative procedure adopted by the States Parties does not include the involvement of legal support to potential beneficiaries at the implementation stage of reparations. While noting this absence, the Trust Fund nevertheless considers that there may be a need for legal advice and support to any potential beneficiaries, concerning their general right to reparations and in particular to those who do not pass the Trust Fund's administrative screening. The Trust Fund proposes that this could be achieved through a robust administrative appeals process whereby the Trust Fund Board of Directors shall establish and be advised by an independent review panel regarding these cases. The

⁴⁷ *Lubanga* Reparations Judgment, para. 150.

⁴⁸ See for the full discussion of this issue, *The Prosecutor v. Thomas Lubanga Dyilo*, Trust Fund, Observations on the "Requête afin de solliciter des lignes directrices de la Chambre suite à l'Ordonnance émise le 15 juillet 2016", 3 October 2016, ICC-01/04-01/06-3237, paras 24-33.

Trust Fund would keep the Trial Chamber fully apprised of this review process and its outcomes as part of the regular implementation reports it will submit.

46. As a last point related to the type of reparations ordered and how victim eligibility should be determined, the Trust Fund recalls that rule 97 (1) of the Rules permits a Trial Chamber to order both individual and collective reparations. Above, the Trust Fund has argued that an administrative eligibility process overseen by the Trust Fund during the implementation stage of reparations is provided for in the Court's legal framework. The Trust Fund submits that this is equally the case when both individual and collective awards are ordered by the Trial Chamber. In this regard, the Trust Fund highlights that, if collective and individual reparations awards are ordered, victims may benefit from both types. From an operational standpoint, the Trust Fund submits that it would be logistically and administratively problematic (as well as unnecessarily duplicative and costly) to have separate and distinct eligibility procedures for these two types of awards. Rather, in such a scenario, it would make procedural and practical sense to have the eligibility process comprehensively managed by the Trust Fund.

47. Finally, the Trust Fund wishes to address the matter of the role of the convicted person in the eligibility screening process. In the Trust Fund's view, where the 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.

48. Contrarily, where the Trial Chamber does not identify individual beneficiaries or enter findings on individual claims for reparations in the order for reparations, but instead sets out the criteria for eligibility under either regulations 60-65 of the Regulations of the Trust Fund (individual awards to unidentified individuals under rule 98 (2)) or regulation 69 (collective reparations pursuant to rule 98 (3)), the convicted person may challenge the criteria on appeal⁴⁹ and may make observations on the *proposed*⁵⁰ eligibility screening process that the

⁴⁹ See *Lubanga* Reparations Judgment, para. 166.

Trust Fund will include in its draft implementation plan. Thus, the convicted person is able to challenge the criteria established by the Trial Chamber as well as the manner in which the criteria will be applied by the Trust Fund. The Trust Fund underlines in this regard that the proposed eligibility screening process forms a part of its draft implementation plan and is thus subject to approval by the Trial Chamber before implementation may begin. Accordingly, the convicted person will have the opportunity to raise any concerns regarding the proposed screening process with the Trial Chamber before any approval is given.

49. The Trust Fund respectfully submits that the above process is fully in line with the applicable legal framework for reparations awards where individual victims are not identified in the order for reparations, and operationally and financially feasible, while also ensuring that the eligibility criteria set out in the order for reparations are fully respected in the implementation of the reparations awards. Furthermore, as held by the Appeals Chamber,⁵¹ the processes laid out in the Regulations of the Trust Fund are not contrary to the rights of the convicted person, in that, in addition to being able to challenge the criteria on appeal, this administrative process: (i) is subject to review and comment by the convicted person at the process level before implementation begins and (ii) fully respects the monitoring and oversight role of the Trial Chamber at the implementation stage of reparations.

2. The relevant harms

50. The Trust Fund defers to the trial participants in terms of defining the relevant types of harms from the crimes for which Mr. Bemba was convicted for purposes of reparations. The Trust Fund therefore limits its observations in this regard to two points that relate to how it understands the certain matters decided in the Appeals Chamber's Reparations Judgment in the *Lubanga* case.

51. First, in the *Lubanga* case, the Trust Fund recalls that in amending the Trial Chamber's order by defining the harms relevant for reparations, the Appeals Chamber limited itself to those harms for which findings were made in the context of the trial proceedings, either

⁵⁰ See *Lubanga* Amended Order for Reparations, para. 66 ("The Trust Fund shall provide Mr Lubanga with the opportunity to review its *proposed* screening process of victims at the implementation stage" (emphasis added); see also *Lubanga* Reparations Judgment, paras 165-168.

⁵¹ See *Lubanga* Reparations Judgment, para. 168.

relevant to the conviction or sentencing decisions.⁵² However, the Trust Fund would call to the Trial Chamber's attention that the Appeals Chamber clarified that the limitations it set was "without prejudice to other potential scenarios", identifying specifically the scenario where a Trial Chamber makes a finding as to a harm for purposes of reparations that "is based on evidence received at a reparations hearing, in written submissions from the parties and participants, or from experts who were engaged for the purpose of providing such evidence".⁵³ In distinguishing these scenarios from the situation in the *Lubanga* case, the Appeals Chamber noted that this scenario is "relevant to time frame prior to the issuance of an order for reparations and that the Court's statutory framework provides for the convicted person to be able to challenge any such evidence that could potentially be relied upon in the eventual order for reparations".⁵⁴

52. The Trust Fund therefore submits that the *Lubanga* Reparations Judgment should not be read as limiting the potential harms for purposes of reparations to only those harms already identified in the context of the conviction and sentence in all cases or in the present case. Rather, in the Trust Fund's view, that limitation should be understood as relating to the specific circumstances of the *Lubanga* case, where "the Trial Chamber did not elicit any evidence specific to harm caused by the crimes for which Mr Lubanga was convicted specifically for the purpose of reparations".⁵⁵ The Trust Fund notes in this regard that the current proceedings in the *Bemba* case are at the pre-reparations order stage and that the Trial Chamber may utilize the provisions of rule 97 (2) to seek such information from relevant experts. In sum, the Trust Fund would submit that the other scenarios identified by the Appeals Chamber are still available to the Trial Chamber to pursue in terms of identifying additional harms relevant for purposes of reparations.

53. The second point that the Trust Fund would like to raise relates to the potential of ordering reparations awards to communities as a whole. In the Trust Fund's view, the Appeals Chamber did not rule that reparations *per se* cannot be awarded to a community, but rather, in the context of the *Lubanga* case, the Trial Chamber had not sufficiently established

⁵² *Lubanga* Reparations Judgment, paras 186-191.

⁵³ *Lubanga* Reparations Judgment, para. 185.

⁵⁴ *Ibid.*

⁵⁵ See *Lubanga* Reparations Judgment, para. 186.

a causal link between any such harms and the crimes for which Mr. Lubanga was convicted, which reparations are intended to remedy. The Trust Fund notes in this regard that the Appeals Chamber held that:

The Appeals Chamber notes that certain crimes may have an effect on a community as a whole. The Appeals Chamber considers that, if there is a sufficient causal link between the harm suffered by members of that community and the crimes of which [the convicted person] was found guilty, it is appropriate to award collective reparations to that community, understood as a group of victims. Therefore, an award of collective reparations to a community is not necessarily an error.⁵⁶

54. In the Trust Fund's view, the Trial Chamber may wish to consider receiving submissions from the parties and participants, as well as potentially from experts, regarding whether the crimes for which Mr. Bemba was convicted caused harm to any communities as a whole.

3. The scope of Mr. Bemba's liability

55. The Trust Fund does not consider it to be its role to make any observations related to the precise monetary amount of liability that should be imposed on Mr. Bemba. Rather, the Trust Fund's observations focus on the legal framework for purposes of imposing liability for reparations, particularly with respect to information that is only determined during the implementation stage of proceedings, i.e. after the order for reparations has been issued, and thus cannot in the Trust Fund's submission, logically or sequentially, serve as the basis for establishing the precise amount of Mr. Bemba's liability. Following that, the Trust Fund will briefly discuss those factors that it suggests the Trial Chamber may wish to consider for purposes of determining the amount of Mr. Bemba's liability.

a) Applicable legal framework

56. As established by the *Lubanga* Trial Chamber: "Reparations fulfill two main purposes that are enshrined in the Statute: they oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Court to ensure that offenders account for their acts".⁵⁷

⁵⁶ *Lubanga* Reparations Judgment, para. 212.

⁵⁷ *Lubanga* Amended Order for Reparations, para. 2.

57. Based on this principle, the Appeals Chamber articulated two additional principles specific to the liability of the convicted person for reparations. First, that “[r]eparation orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for the criminal acts is determined in a sentence” and, second, that “[t]he convicted person’s liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case”.⁵⁸

58. The imposition of liability must be established in the order for reparations itself. As held by the Appeals Chamber in the *Lubanga* case:

At the outset, the Appeals Chamber stresses that the imposition of liability on a convicted person, including the precise scope of that liability, should be done by the Trial Chamber in the order for reparations. Indeed, the Appeals Chamber considers it to be beyond question that a person subject to an order of a court of law must know the precise extent of his or her obligations arising from that court order, particularly in light of the corresponding right to effectively appeal such an order, and that the extent of those obligations must be determined by a court in a judicial process.⁵⁹

59. Finally, regulation 50 (b) of the Regulations of the Trust Fund provides that the Trust Fund may only consider itself seized once an order for reparations within the meaning of article 75 has been issued by the Court.

60. Thus, the Court’s legal framework provides a clear sequence: a Trial Chamber issues an order for reparations, including as a necessary element the amount of liability, at which point the Trust Fund is then seized of that order. Based upon being seized of that order, the Trust Fund then prepares a draft implementation plan and its Board of Directors considers whether to complement the payment of any awards in the order for reparations.⁶⁰

⁵⁸ *Lubanga* Amended Order for Reparations, paras 20-21.

⁵⁹ *Lubanga* Reparations Judgment, para. 237. *See also* paras 1 (Key findings), 32 (“[T]he Appeals Chamber holds that an order for reparations under article 75 of the Statute must contain, at a minimum, five essential elements: [...] 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; [...]”).

⁶⁰ For purposes of these observations, the Trust Fund has not addressed the matter of suspensive effect of implementation of the order for reparations being granted pending the appellate proceedings relevant to the conviction, sentence, or order for reparations.

61. This sequencing 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. This sequencing reflects the institutional partnership between the Court and the Trust Fund. To put it simply, the Trust Fund is not a judicial body, rather it implements through administrative and programmatic processes judicial orders for reparations emanating from the Court.

62. In this same regard, recognized best practices and the applicable financial legal framework relevant to, *inter alia*, the development of an adaptive and integrated programmatic framework, the procurement of services, requirements of transparency and competition with respect to an international bidding and selection process for project proposals, and scope of work contracting with local implementing partners⁶¹ are not matters that relate to the criminal proceedings over which the Chambers of the Court preside. The Trust Fund respectfully submits that the ultimate success of the reparations regime lay out in the Court's legal framework hinges upon there being a mutual respect and recognition for the different institutional roles and competencies of the Court and the Trust Fund.

b) Information not relevant to the determination of the amount of liability

63. The Trust Fund submits that it follows from the sequencing set out in the legal framework that determinations made pursuant to the Regulations of the Trust Fund, i.e. after the order for reparations has been issued, cannot serve as the basis for the imposition of liability. To hold otherwise risks introducing procedural incoherence into the separate judicial and administrative stages of reparations.

64. Beyond the express provisions of the legal framework, the Trust Fund submits that there are important considerations relevant to procedural fairness and its fiscal obligations that also support the view that the implementation of an order for reparations should only take place once the judicial proceedings relevant to that order have been completed, including a decision on the monetary amount for those reparations for which the convicted person is liable.

⁶¹ See, for a brief overview of the relevant processes for these activities, *The Prosecutor v. Thomas Lubanga Dyilo*, Trust Fund, Additional Programme Information Filing, 7 June 2016, ICC-01/04-01/06-3209 (hereinafter "Trust Fund's 7 June 2016 Filing"), paras 43-52.

Beginning implementation prior to this occurring would pose serious risks to the Trust Fund's ability to manage its resources in a fiscally appropriate and responsible manner, both in relation to other Court proceedings that may result in an order for reparations being issued and in relation to the Trust Fund's ability to enter into binding contracts for services with local implementing partners. Furthermore, the Trust Fund submits that beginning implementation of awards for reparations prior to the amount of liability for those awards being finalized also raises legal concerns regarding whether the right to appeal an order for reparations, enshrined in article 82 (4) of the Statute, can be meaningfully exercised if the implementation (and thus also payment) of the awards ordered has already taken place.

65. Recalling its submissions above in relation to the fact that the Court's legal framework provides for an order for reparations to be issued without identifying or determining the eligibility of individual victim beneficiaries, the Trust Fund submits that the scope of victims of Mr. Bemba's crimes (upon which the Trust Fund submits liability can be based and which is addressed further below) should not be conflated with the number of *beneficiaries* ultimately determined to be eligible through the Trust Fund's administrative screening process to receive an award for reparations or participate in a collective reparations programme.

66. The Trust Fund considers that this same rationale applies with respect to whether the actual final costs of specific reparations projects can be the basis for imposing a specific amount of liability.

67. This is because these determinations are only made during the actual implementation of the awards for reparations. In this respect, the Trust Fund considers that it may be helpful to the Trial Chamber for the Trust Fund to explain in more detail the various steps that occur during the implementation stage of reparations.

68. First, the Trust Fund recalls again that the implementation stage of reparations is triggered by it being seized of an order for reparations, including the amount of liability for the reparations ordered. As is set out in the Regulations of the Trust Fund, the Trust Fund is then tasked with preparing a draft implementation plan. The draft implementation plan will not already contain specific detailed projects and activities. Rather, the Trust Fund will submit a detailed programmatic framework, including the objectives, outcomes and necessary

activities that comprehensively respond to all of the modalities for reparations, and which the Trust Fund considers can realistically be implemented within the amount of liability imposed, that are contained in the order for reparations.⁶² Should the reparations order provide for individual awards, the Trust Fund's draft implementation plan will contain proposed implementation modalities in accordance with the parameters and details of the specific awards.

69. Following the Trial Chamber's approval of the programmatic framework, this framework will then be transformed into a call for proposals (procurement process), to be submitted by locally established service providers. The submitted project proposals will provide further details to the project framework based on the applicants' knowledge, their experience, and their local standing. Successful proposals will be projects that comprehensively respond to and advance the overall objectives of the reparations awards. The selected projects constituting the size and nature of the eventual specific awards will then require the review and approval of the Trust Fund's Board of Directors prior to being shared with the Trial Chamber for its approval.

70. In the Trust Fund's view, the Trial Chamber's approvals at these two key moments will serve the dual purpose of, one, ensuring that the awards are responsive to the reparations order and, as such, to the types and scope of harms, as well as the modalities to remedy those harms, identified by the Chamber in that order for reparations; and, two, the procedure will be conducive to establishing a meaningful and effective partnership between the Court and the Trust Fund in mutual respect of each other's roles and responsibilities according to the Rome Statute's regulatory framework.

71. The Trust Fund's programmatic framework is purposefully designed to be adaptive and flexible, thereby permitting the shifting of resources (always within the absolute cap of the amount of liability imposed) to respond to the specific needs of the victim beneficiaries.⁶³ Thus, it is not the case that, if a specific project comes in under budget, this amount of money would somehow "reduce" the amount of liability. Rather, the Trust Fund would redirect these savings into expanding other projects and potentially approving additional projects or

⁶² See, for further information on an integrated programmatic framework versus a specific project within that framework, Trust Fund's 7 June 2016 Filing, paras 33-36.

⁶³ See in this respect Trust Fund's 7 June 2016 Filing, paras 39-40.

activities within the programmatic framework laid out in the draft implantation plan that was approved by the Trial Chamber. In this regard, the Trust Fund wishes to make clear that the entirety of the “reparations liability envelope” will be exhausted by utilizing adaptive programming within the parameters of the modalities for reparations awarded in the order for reparations.

72. Finally, the Trust Fund wishes to also clarify that a complement pursuant to regulation 56 of the Regulations of the Trust Fund made by the Board of Directors should not be equated with the amount of liability to be imposed on the convicted person. In this regard, the Trust Fund wishes to highlight that a decision to complement the *payment* of reparations awards is taken: 1) only after the order for reparations has been issued and the availability of funds from the convicted person has been determined and 2) on the basis of the factors set out in regulation 56 of the Regulations of the Trust Fund. In particular, the Trust Fund would point out that the decision to complement the payment of an award or awards, as well as the amount of the complement, is based in large part on factors that are *unrelated* to the circumstances of the particular case at hand.

73. Regulation 56 provides that:

The Board of Directors shall determine whether to complement the resources collected through awards for reparations with “other resources of the Trust Fund” and shall advise the Court accordingly. Without prejudice to its activities under paragraph 50, sub-paragraph (a), the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under rule 98, sub-rules 3 and 4 of the Rules of Procedure and Evidence and taking particular account of ongoing legal proceedings that may give rise to such awards.

74. As is laid out in the second sentence of the regulation, in deciding whether to complement the payments of reparations awards in a particular case, the Trust Fund’s Board of Directors takes into account 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

on-going legal proceedings at the Court that may give rise to an order for reparations.⁶⁴ Recalling the principle of liability established by the Appeals Chamber, the Trust Fund submits that the factors taken into account to determine whether to complement the payment of an award for reparations are distinct and unrelated to the factor of “the harm caused” by the crimes for which the person was convicted, which is the relevant factor for purposes of determining the amount of liability for reparations.

75. Furthermore, given that the convicted person bears the sole liability for reparations, the Trust Fund's complement in the form of a financial contribution, whatever its size, to the payment of reparations awards that were ordered against a convicted person is, by definition, inside the boundaries of that person's financial liability.⁶⁵

76. Finally, the Trust Fund would also call to the Trial Chamber's attention the fact that the amount of a complement under regulation 56 of the Regulations of the Trust Fund may be increased by the Board of Directors at a later point in the implementation process due to *inter alia* successful fundraising efforts for the awards contained in the order for reparations. Thus, in a scenario where the available resources from the convicted person and the initial regulation 56 complement are less than the full amount of liability, the Trust Fund's Board of Directors may increase its complement *up to, but not exceeding, the total amount of liability*, also taking into account the resources from the convicted person. The Trust Fund would respectfully submit that making the amount of a convicted person's liability dependent upon potentially shifting amounts of a regulation 56 complement, particularly where the change in the amount of the complement is attributable to for example fundraising efforts, risks making the determination of the amount of liability an arbitrary exercise based on factors that are not relevant to a determination of what is proportionate in light of the harm caused to victims by the crimes or the circumstances of the case. In other words, using the complement as a basis for establishing the amount of a convicted person's liability for reparations would seem to not accord with the principle of liability, nor would the complement appear to qualify as a factor

⁶⁴ See *Lubanga* Reparations Judgement, para. 113.

⁶⁵ See *Lubanga* Reparations Judgement, para. 5 (Key Findings) (“In cases where the convicted person is unable to immediately comply with an order for reparations for reasons of indigence, the Trust Fund may advance its “other resources” pursuant to regulation 56 of the Regulations of the Trust Fund, but such intervention does not exonerate the convicted person from liability. The convicted person remains liable and must reimburse the Trust Fund.”).

that could be taken into account under the non-exhaustive list of factors enumerated by the Appeals Chamber in the principle of liability.

c) Information potentially relevant to the amount of liability imposed

77. Above, the Trust Fund has submitted that the ultimate number of eligible victim beneficiaries, the final costs of specific projects, and the amount of any potential complement under regulation 56 of the Regulations of the Trust Fund are not appropriate bases for determining the precise amount of a convicted person's liability for reparations.

78. In this section, the Trust Fund has set out certain categories of information that in its view may be relevant to determining the amount of Mr. Bemba's liability. These categories are: 1) evidence and findings in the context of Mr. Bemba's conviction and sentence relevant to the extent and scope of the harms caused to victim by the crimes for which he was convicted; 2) the types and modalities of reparations ordered; and 3) the costs of services and/or operating in CAR.

1. Evidence and findings in the context of Mr. Bemba's conviction and sentence

79. In the *Lubanga* Reparations Judgment, the Appeals Chamber established that a convicted person's liability for reparations "must be *proportionate* to the harm caused" by the crimes for which the person was convicted (emphasis added).⁶⁶ The Appeals Chamber also noted that the determination of a sentence is based *inter alia* on the factor of the "extent of the damage caused, in particular the harm to victims and their families [...]".⁶⁷

80. In the Sentencing Decision, this Trial Chamber held

As reflected in Article 81(2)(a) and Rule 145(1), and as emphasized by the Appeals Chamber, the sentence must be *proportionate* to the crime and the culpability of the convicted person (emphasis added).⁶⁸

81. The Trust Fund submits that a sentence is a no less "precise" determination than the "precise" amount of liability to be imposed for reparations. In this regard, the Trust Fund

⁶⁶ *Lubanga* Reparations Judgment, para. 6 (Key Findings).

⁶⁷ *Lubanga* Reparations Judgment, para. 147 (e), referring to rule 145 (c) of the Rules.

⁶⁸ Sentencing Decision, para. 11. *See also Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the Decision on Sentence pursuant to Article 76 of the Statute", 1 December 2014, ICC-01/04-01/06-3122, paras 38-40.

observes that a sentence is not determined based on a mathematical calculation involving the number of victims and the individual harms suffered by each victim. Indeed, the imposition of a sentence does not require at all a separate pre-determination of the exact number of victims who have suffered harm.

82. Recalling the Appeals Chamber’s statement regarding the “intrinsic link” between the conviction, the sentence and the order for reparations, the Trust Fund submits that the harm caused to victims relevant to Mr. Bemba’s liability should be understood as a manifestation of the harm relevant for his sentence and thus should be determined on the basis of no less than the findings regarding the extent of damage and harm to victims and their families used for purposes of imposing that sentence. In short, the Trust Fund respectfully submits that the extent of the harm for which Mr. Bemba is liable encompasses already the damage and harm that formed the basis of his sentence.

83. Second, the Trust Fund also observes that the “number of victims” is contained in rule 98 (3) of the Rules as a factor to be considered by the Trial Chamber in deciding whether it is more appropriate to award collective reparations than individual awards. Recalling its earlier submission regarding not conflating the number of eventual *beneficiaries* with the number of *victims*, the Trust Fund points out that, sequentially, the Trial Chamber is required to consider the estimated scope or number of case victims *prior* to issuing the order for reparations. Furthermore, in the *Lubanga* case, the Appeals Chamber affirmed the principle established by the Trial Chamber that any award for reparations, including participation in a reparations programme, must be based on an informed voluntary choice on the part of any potential beneficiary and that, for purposes of that choice being an “informed” decision, consent may only be sought *after* the draft implementation plan has been approved by the Trial Chamber.⁶⁹ The Trust Fund submits that these determinations support its view that the ultimate number of reparations beneficiaries should not and cannot be equated with the number of victims for purposes of determining a convicted person’s amount of liability for reparations.

84. The Trust Fund submits that this view is further supported by the Appeals Chamber’s holding that:

⁶⁹ See *Lubanga* Reparations Judgment, paras 158-162

The factor of the number of “victims” under rule 98 (3) of the Rules of Procedure and Evidence is not limited to the number of individuals who have requested reparations or to the number of victims approved to participate as victims in the trial proceedings pursuant to rule 89 of the Rules of Procedure and Evidence, but rather encompasses the findings thereon in the decisions on conviction and sentence. In this respect, the Appeals Chamber notes that, pursuant to rule 145 (1) (c) of the Rules of Procedure and Evidence, a convicted person’s sentence is based, *inter alia*, on the extent of the damage and the harm caused to victims and their families, which is determined by reference to the evidence presented at trial and the factual findings made thereon.⁷⁰

85. Reparations at the Court can only be ordered where the criminal proceedings have resulted in a conviction. Mr. Bemba has been convicted and sentenced. The crimes for which he was convicted are not victim-less crimes. Following his conviction and sentence, the Trust Fund submits that it cannot be said that there are not yet any victims in this case, despite the fact that there are currently no reparations beneficiaries. In the Trust Fund’s view, Mr Bemba’s conviction and sentence, interpreted in the context of the intrinsic link between these determinations and the order for reparations, strongly implies that the eventual scope of reparations awards to victims should be proportionate to the nature and intent of the convicted crimes as well as to the corresponding severity of the sentence.

86. Finally, the Trust Fund submits that the Appeals Chamber’s holding cited above clarifies that the number of victims who were approved to participate at trial also should not be conflated with, or serve as the limit for, the number of victims for purposes of determining a convicted person’s liability for reparations. In this regard, the Trust Fund notes that, in the Conviction Decision under the heading of the widespread nature of the attack, this Trial Chamber held that:

688. The Chamber is satisfied that the specific underlying acts addressed [in the Conviction Decision] are only a portion of the total number of crimes committed by the MLC forces in the course of the 2002-2003 CAR Operation.

689. Accordingly, in light of the number of victims and the geographical scope of the attack, the Chamber finds beyond reasonable doubt that the attack against the civilian

⁷⁰ *Lubanga* Reparations Judgement, para. 148 (f).

population in the CAR in the context of the 2002-2003 CAR Operation was widespread.⁷¹

87. The Trust Fund suggests that the non-governmental organization (NGO) and expert reports relevant to the potential number of victims harmed by Mr. Bemba's crimes that were submitted in the trial proceedings⁷² may be an appropriate source of information to determine the scope of harm and estimated number of potential victims for purposes of imposing liability on Mr. Bemba. If additional information is needed, the Trust Fund would suggest that this would also be an issue for which it may be useful to appoint experts in order to assist the Trial Chamber.

2. The types and modalities of reparations awarded

88. The Trust Fund recalls the reparations principle established by the *Lubanga* Trial Chamber and affirmed by the Appeals Chamber that reparations "oblige those responsible for serious crimes *to repair* the harm they caused to the victims" (emphasis added).⁷³ The Trust Fund therefore submits that another relevant consideration for imposing liability should be the types and modalities of the reparations awarded. In this sense, there are different average costs associated with repairing harm depending upon whether that harm is addressed in a collective manner versus on an individual basis,⁷⁴ as well as whether harms are most appropriately remedied in the circumstances of this case by, for example, symbolic reparations awards versus compensation or rehabilitation, such as service-based awards.

3. The costs associated with services and/or operating in CAR

89. Following from the above point, the Trust Fund submits that the Trial Chamber may also wish to take into account the costs associated with services and/or operating in CAR, as well the standard of living in CAR. For example, if the Trial Chamber were inclined to award individual reparations awards in the form of compensation to remedy the physical injuries associated with rape, the average cost of the needed medical services in CAR would be of relevance. Similarly, if the Trial Chamber were for example inclined to order collective

⁷¹ Conviction Decision, paras 688-689.

⁷² See e.g. Conviction Decision, paras 486, 520, 525, 563.

⁷³ *Supra* para. 56.

⁷⁴ See, in this respect, Trust Fund's 7 June 2016 Filing, para. 54, for a discussion on the economies of scale relevant to the costs associated with remedying harms.

reparations awards in the form of rehabilitation, the costs associated with such forms of reparations in CAR would also be of relevance.

90. In this regard, the Trust Fund wishes to take this opportunity to inform the Trial Chamber of its current and past engagement in CAR.

91. Unlike the situation in the Democratic Republic of the Congo, the Trust Fund currently has no presence in CAR under its assistance mandate. In 2007, the Court opened an investigation into the situation in the CAR. This decision triggered the Trust Fund to undertake an evaluation mission in February 2009, where it consulted with government officials, grass roots and local organizations, including victims' associations, and national and international stakeholders such as, United Nation agencies, donors and large NGOs. Based on the needs assessment that resulted from this mission, the Trust Fund defined an action plan for the Central African Republic in order to offer multi-sectorial assistance to victims in general and specifically to victims of sexual and gender based violence. As a result, the Trust Fund launched a "Call for Expressions of Interest" from May to August 2011. About 20 organizations participated. In 2012, the process continued, including a notification of the relevant Pre-Trial Chamber⁷⁵ and engagement of the Court's Procurement Review Committee. Finally, six organizations - promoting victims' physical rehabilitation, psychological rehabilitation and material support - were selected to implement projects and a budget of €600,000 for this first year 2013 was set aside.

92. However, on 25 March 2013, the Trust Fund was unfortunately compelled to suspend its planned activities in the Central African Republic due to the deteriorating security situation. The Trust Fund has been unable to resume its activities since.

93. The Trust Fund continues to actively consider re-launching activities under the assistance mandate in the Central African Republic, security situation in CAR and financial resources of the Trust Fund permitting. Such activities would not be tied to a criminal case before the Court. They could take place prior, during, or after the implementation of reparation awards in this case.

⁷⁵ See *Situation in the Central African Republic*, Decision on the "Notification by the Board of Directors in accordance with Regulation 50 (a) of the regulations of the Trust Fund for Victims to undertake activities in the Central African Republic", 23 October 2012, ICC-01/05-41.

94. In light of this, the Trust Fund considers that it can currently only be of limited assistance to the Trial Chamber in terms of the cost of services and/or to operate in CAR. The Trust Fund accordingly submits that this is an additional topic where expert submissions may be of assistance to the Trial Chamber. The Trust Fund wishes to express its willingness to assist with the identification of local sources that may be able to provide such information based on the Trust Fund's previous engagements with local stakeholders and NGOs operating in CAR.

C. The types and modalities of reparations

95. The third issue for which observations are requested in the Order for Observations is “the types and modalities of reparations appropriate to address the harm relevant in the circumstances of the case, including factors relating to the appropriateness of awarding reparations on an individual based, a collective basis, or both”.⁷⁶

1. The types of reparations appropriate in this case

96. The Trust Fund submits that the issue of the “type” of reparations relates to whether the reparations are awarded on an individualized basis, on a collective basis, or to an intergovernmental, international or national organization. Rules 97 and 98 of the Rules set out the applicable standard to be applied by the relevant Chamber in deciding which type/s of reparations to award, as well as the factors relevant to that decision. In the *Lubanga* Reparations Judgment, the Appeals Chamber further clarified the meaning of these provisions.⁷⁷

97. Rule 97 (1) of the Rules provides that: “Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both”.

98. Rule 98 (3) of the Rules provides that: “The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate”.

⁷⁶ Amended Order for Observations, para. 7 (c).

⁷⁷ *Lubanga* Reparations Judgment, para. 148 (c)- (e). *See also* para. 152, wherein the Appeals Chamber explained how a determination as to the type of reparations may be challenged on appeal.

99. Rule 98 (4) of the Rules provides that: “Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.”

100. At the outset, the Trust Fund makes the following general observations relevant to the above legal provisions. First, as a matter of statutory construction, the Trust Fund submits that meaning of a “type” of reparations award should encompass reparations awarded through the Trust Fund to an organization pursuant to rule 98 (4) of the Rules.

101. Second, rule 97 (1) provides that a Trial Chamber may decide to award reparations on an individualized *and* collective basis (“or both”). The Trust Fund submits that reparations awarded pursuant to rule 98 (4) of the Rules are not an alternative to awards for individual and/or collective reparations. Rather, the Trust Fund submits that it falls within the Trial Chamber’s discretionary authority under these provisions to determine that it is appropriate to order any combination of individual reparations, collective reparations, and reparations to a rule 98 (4) organization.

102. Third, in light of the factors identified for a determination of whether it is more appropriate to award collective reparations, the Trust Fund submits that the Trial Chamber may award collective and individual awards to all victims, or may decide to award certain types of awards to only a sub-set of victims based on their having suffered a particular harm or because remedying that harm is more appropriately done on an individualized basis as opposed to a collective basis. The Trust Fund bases this submission on rule 98 (3) of the Rules’ inclusion of the “modalities” of reparations awarded as a factor relevant to determining which particular type of reparations is appropriate. As explained by the Appeals Chamber:

200. [...] [T]he harm caused to direct and indirect victims as a result of the crimes for which a person was convicted [...] is inter-linked with identifying the appropriate modalities of reparations in that specific case. In this sense, the appropriateness of a

modality of reparations can only be determined by reference to the harms that were caused and which the reparations seek to remedy.⁷⁸

103. Following from these general observations, the Trust Fund would like to raise three specific factors, which it submits may be at issue in the present case, that the Trial Chamber may wish to take into account in determining the type/s of reparations to award: a) the principle established by the *Lubanga* Trial Chamber relevant to the appropriate modality of reparations to legal entities; b) the link between the source/s of funding and the types of reparations that will realistically be implemented and c) the option of ordering awards for reparations pursuant to rule 98 (4) of the Rules, i.e. awards to intergovernmental, international or national organizations.

a) Modality of reparations to legal entities

104. The Trust Fund recalls its above observations regarding the fact that, under the principle entitled “Modalities of reparations”, that *Lubanga* Trial Chamber established that: “Restitution may also be apposite for legal bodies such as schools or other institutions”.⁷⁹

105. In the Trust Fund’s view, this modality of reparations, combined with the harm it is intended to remedy in this case (pillaging), suggests that individual awards for reparations may be appropriate for this specific subset of victims. The Trust Fund does not mean to suggest that the crime of pillaging as such is necessarily best remedied by the modality of restitution on an individualised basis for all victims. For persons, harms caused by this crime may be more appropriately remedied by other modalities or a collective award that has a transformative aim (such as vocational training and micro-loan programs that would permit the person to generate income in order to *inter alia* establish a new home or purchase property), as opposed to the often more elusive aim to return the person to their state of being prior to the commission of the crimes. However, these modalities, or their provision on a collective basis, are not necessarily applicable for non-person victims such as legal entities.

106. The Trust Fund reiterates its view that it is for the Trial Chamber to determine whether to apply this principle to these proceedings or whether, based on the specific circumstances of the *Bemba* case, the principle applicable to legal bodies needs to be adapted, further

⁷⁸ *Lubanga* Reparations Judgment, para. 200.

⁷⁹ *Supra* para. 24.

developed or expanded upon. However, the Trust Fund considers it important to raise this matter because its ability to implement individual reparations awards to this sub-set of victims (or more generally to victims in this case) is contingent on the source of the available resources to pay for the awards, which is discussed below in the next section.

b) The funding source and the appropriate type of reparations

107. The Trust Fund recalls that reparations flow from the criminal conviction. Accordingly, as has been confirmed as a matter of principle by the Appeals Chamber, they are the sole liability of the convicted person. That principle notwithstanding, there are two potential sources for funding the implementation of reparation awards: firstly, resources stemming from the convicted person; and secondly, resources that the Trust Fund at the discretion of its Board of Directors may make available according to regulation 56 of the Regulations of the Trust Fund.

108. The Trust Fund recalls⁸⁰ that regulation 56 of the Regulations of the Trust Fund allows the Trust Fund “to complement the resources collected through awards for reparations”. Furthermore, regulation 56, second sentence requires the Trust Fund to manage its available funds with a view to being in a position to “provide adequate resources to complement payments for awards” under rule 98 (3) and (4) of the Rules, taking into account other ongoing legal proceedings that may require such funding and without prejudice to the financial needs of the Trust Fund’s assistance mandate.

109. Based on the language in regulation 56 of the Regulations of the Trust Fund, the Trust Fund has consistently argued in reparations proceedings in other cases before the Court that its funds may only be used to complement collective reparation awards in the sense of rule 98 (3) or awards to an organization in the sense of rule 98 (4) of the Rules.

110. Consequently, the implementation (i.e. payment of) any order for individual reparations awards in the sense of either rule 98 (1) or (2) is dependent upon the assets of Mr. Bemba being available. The Trust Fund wishes to be clear that Mr. Bemba is also liable and thus responsible for the payment of any reparations awards under rule 98 (3) or (4) of the Rules. However, as mentioned above, the Trust Fund has the ability to complement those payments,

⁸⁰ See *supra* paras 72-74 for an explanation of the factors that the Trust Fund’s Board of Directors takes into account in deciding whether to complement the payment of a reparations award and at what amount.

in consideration of assets already recovered from Mr. Bemba or, anticipating asset recovery by the Court, until such assets are recovered from Mr. Bemba equaling the total amount of his liability, thus allowing the implementation of all or some of the awards to take place without delay. At present, the Trust Fund is not privy to the specifics of Mr. Bemba's financial situation. The Trust Fund is also not privy to whether there are existing competing claims from the Court if assets were to be secured. The Trust Fund understands that Mr. Bemba was not found indigent for the purpose of legal aid, but instead received an "advance" by the Court towards funding the legal cost for his defense in the criminal proceedings against him, which recovered by the Court, at least in part, when certain of Mr. Bemba's assets became available.⁸¹ The Trust Fund does not know if there are any outstanding costs in this regard still to be reimbursed and also notes that these legal proceedings are currently at the appeals stage, which may imply further legal costs. Furthermore, the Trust Fund also notes that separate article 70 proceedings against Mr. Bemba are currently at the sentencing stage.

111. In the Trust Fund's view, it is important to clarify the financial situation of Mr. Bemba, including regarding whether there are any outstanding "advances" related to the funding of his defense and, if so, what is the order of prioritization between the reimbursement of those advances and the payment of any reparations awards ordered against him, should any assets be secured. In this same respect, the Trust Fund would note that appellate proceedings are still ongoing in relation to Mr. Bemba's conviction and sentence (and may also arise in relation to his conviction in the article 70 proceedings). The Trust Fund submits that the Trial Chamber may also wish to consider whether this fact may affect the prioritization of any assets secured, at least until appellate proceedings are finalized in the criminal proceedings.

112. The Trust Fund notes that Rule 221 (2) of the Rules entrusts determinations related to the disposition or allocation of resources belonging to the convicted person to the Presidency and also notes that this rule clarifies that prioritizing the allocation of these assets to enforcing measures concerning reparations to victims is a statutory requirement. The Trust Fund observes that because prioritization falls to the Presidency, it is accordingly not a matter directly relevant to the Trial Chamber. The Trust Fund nonetheless submits that the Trial Chamber may wish to examine the potential implications raised by these matters prior to

⁸¹ See Resolution ICC-ASP/13/Res.1, adopted at the 12 plenary meeting, 17 December 2014, para. 5, Section D.

issuing the order for reparations in this case, particularly with regard to the need to manage victims' expectations and to avoid any potential negative effects that a substantial delay in the actual realization of an award from the time it was ordered may cause.

113. Finally, the Trust Fund would like to stress that because of the principle of liability of the convicted person for repairing the harm that he has caused and in order to ensure the viability of the Rome Statute reparations regime, the Court has an obligation to secure assets from the convicted person for the purpose of funding reparation awards in a proactive and effective way. The Trust Fund would encourage the Trial Chamber, to the extent it has not already done so, to proactively engage with the other relevant organs of the Court to ensure that any potentially available assets are secured in a timely manner, bearing in mind the anticipated timetable for the issuance of an order for reparations in this case.

c) Reparations awarded pursuant to rule 98 (4) of the Rules

114. The Trust Fund would like to take the opportunity to briefly elaborate on what its Regulations stipulate with regard to rule 98 (4) of the Rules awards so that, should the Trial Chamber consider this as an option, it would be aware of the applicable legal framework.

115. The Regulations of the Trust Fund discuss 98 (4) awards in Chapter V of the Regulations of the Trust Fund, which consists of regulations 73 to 75. It stipulates that where the Court orders that such an award be made through the Trust Fund, the draft implementation plan shall set out: a) the concerned organization(s) and a summary of their relevant expertise; b) a list of specific functions that the concerned organization(s) is/are to undertake in the fulfillment of the Court's order; and c) a memorandum of understanding or other contractual terms between the Trust Fund Board of Directors and the concerned organization setting out the roles and responsibilities and monitoring and oversight. If the Trust Fund enters into such an arrangement, then the Secretariat shall oversee the work of the concerned organization in fulfilling the Court's order, subject to the overall oversight of the Court. Finally, the Court may decide whether the award that is to be fulfilled by the "rule 98 (4) organization" is to be characterized as individual or collective and the relevant rules (regulations 59-68 for individual awards and regulations 69-72 for collective awards) shall apply *mutatis mutandis*.

116. In addition to these legal rules, the Trust Fund considers that from an operational perspective, in order for any organization to be able to successfully deliver the implementation of a rule 98 (4) of the Rules reparations award, the organization must fulfill certain operational and technical requirements, including in the present case an established presence in the Central African Republic which allows it access to all victims of the case who may be deemed eligible to benefit from reparation awards, as well as proven experience of working on providing suitable forms of redress to affected persons e.g. in form of administering medical, psychological, or material rehabilitation programs in a relevant context. Further, the Trust Fund will need to verify: (i) that potentially eligible parties, especially when they are (an) intergovernmental or international organization(s), can in fact agree to be engaged in accordance with rule 98 (4) of the Rules as well as regulations 73-75 of the Regulations of the Trust Fund; and (ii) whether the transactional costs of a rule 98 (4) agreement, including the organization's programme and staffing costs, are proportional to the overall value of the eventual awards.

117. In the Trust Fund's view, there are certain circumstances that generally influence whether a rule 98 (4) reparations award may seem appropriate. In particular, a rule 98 (4) reparations awards may seem an appropriate option in circumstances where the direct implementation of individual or collective awards would be very challenging for the Court and the Trust Fund. This may be for instance because the Court and the Trust Fund do not have adequate access to all potentially eligible victims or their locations. Such difficulty to access victims may be a direct result of security constraints, which may diminish the Court's capacity to establish a robust presence in the situation country. Security constraints may also negatively impact on the ability for Court and Trust Fund staff to move freely. In the Trust Fund's experience, situations arise when court staff is unable to move due to security constraints while other actors and service providers that have to follow a less stringent security protocol or that have more robust means at their disposal may still be able to reach areas that the Trust Fund and court staff are unable to access. In addition to these primarily operational considerations, rule 98 (4) awards may potentially seem to be the most appropriate avenue from a substantive perspective in circumstances where an organization exists that has an outstanding and very specialized expertise in addressing a particular form of harm that gives rise to reparation proceedings.

118. The Trust Fund observes that rule 98 (4) of the Rules requires that consultations between various stakeholders take place prior to the Trial Chamber making such an award in the order for reparations. Accordingly, the Trust Fund suggests that it begin consulting with CAR and other stakeholders, including the legal representatives of victims in this case, in order to determine whether there is a potential suitable organization. The Trust Fund will update the Trial Chamber on any developments in this regard and would appreciate if the Trial Chamber could provide it with an estimated timeframe, once one is known, for when the Trial Chamber considers that the consultations should be completed in case that it wishes to order an award pursuant to rule 98 (4) in the order for reparations.

2. The modalities of reparations appropriate in this case

119. The Trust Fund considers that lessons learned from its work with victims under its assistance mandate over the past near decade may be of assistance to the Trial Chamber regarding this issue. In the Trust Fund's experience, victims are best assisted overcoming the harm they have suffered when as wide a range as possible of services and activities are available to them. This diversity allows the victim to actively participate in deciding what services or activities will best remedy the harm they have suffered. How a person heals and is able to re-emerge as a contributing member of his or her community is deeply personal and specific to each individual. For some, it may entail receiving counseling and therapy, for others it may mean learning a new vocation that empowers them and puts them on a path to self-sufficiency, and still for others participating in commemorative ceremonies and gaining the support of their families and communities may have tremendous healing effect.

120. The Trust Fund considers that this experience under its assistance mandate is also relevant to reparations and suggests that a broad range of modalities should be included in the order for reparations. The Trust Fund observes that the Guidance Note contains similar recommendations.⁸²

121. Furthermore, while the Trust Fund defers to the views of the participants to the trial proceedings with regard to the specific harms caused, and thus how these may best be remedied, in the specific circumstances of this case, the Trust Fund nonetheless observes that

⁸² See Guidance Note, Principle 1, pp. 5-6.

based only on the Conviction and Sentencing Decisions, it is already apparent that victims have suffered and continue to suffer from *inter alia* stigma and discrimination due to the crimes committed against them, physical injury, sexually transmitted diseases, loss of members of their households, and psychological trauma. The Trust Fund submits that remedying these diverse harms indicates a need for awards under a variety of modalities of reparations, including potentially symbolic, transformative, rehabilitative, and restitution.

122. Finally, regarding symbolic reparations, the Trust Fund would call to the Trial Chamber's attention its recent proposal,⁸³ which was recently approved by the Trial Chamber,⁸⁴ for such reparations in the *Lubanga* case. Given the acute level of stigma and discrimination associated with the crime of rape at issue in the present case, the Trust Fund submits that a similar community-wide symbolic reparations programme may be appropriate in this case.

D. Any other issues

123. The Trust Fund welcomes the opportunity to discuss three additional issues that it considers may be of assistance to the Trial Chamber in the present reparations proceedings. These three issues are: 1) a brief explanation of the potential application of the principle of "Do no harm" in the implementation of reparations awards; 2) relevant contextual and security related matters; and 3) instructions that may need to be included in the order for reparations in the case that the initial resources available from Mr. Bemba and, if applicable, the Board of Director's complement only partially finances the reparations awards ordered in this case.

1. Application of the principle of "Do no harm"

124. Reparations proceedings should be characterized throughout the entire process by a scrupulous sensitivity to the wellbeing of victims. The Trust Fund posits that no victim should experience additional trauma as a result of their association with the reparations process from

⁸³ *The Prosecutor v. Thomas Lubanga Dyilo*, Public Redacted version of Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals, ICC-01/04-01/06-3223-Conf, 19 September 2016, ICC-01/04-01/06-3223-Red.

⁸⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations, 21 October 2016, ICC-01/04-01/06-3251.

the point of eligibility screening through to participation in the awards. Victim interaction in the reparations programme should be on a voluntary basis, one that is respectful of the victim's wellbeing.

125. The Trust Fund has adopted the “do no harm” logic, informed by more than eight years of programmatic victim assistance experience, expert advice, and the views of countless victims and affected communities in situation countries. For example, mental trauma is a common consequence of the crimes that victims experienced and it can impede their recovery in both psychologically and physically as well as materially.

126. To illustrate the application of the “do no harm” approach, the Trust Fund in the Lubanga draft implementation plan articulated a psychologically sensitive approach for the intake of victims into the reparations programme that was modeled on the intake processes for psychological rehabilitation projects under the assistance mandate. The Trust Fund and our partners have adopted a psychologically sensitive and receptive manner of dealing with victims from their first moment of contact with the awards and the Trust Fund.

127. Psychological rehabilitation does not start with meeting the victims. It starts with community engagement and sensitisation, in which the Trust Fund and our partners engage with community leaders and trusted stakeholders to discuss the programme and process with them. This community engagement model was extensively discussed in our *Lubanga* symbolic reparations project framework⁸⁵ and in the draft implementation plan submitted in the *Lubanga* case. It is crucial for the success of any programme that the community be consulted, local leaders, cultural leaders, religious leaders, civil society, and trusted stakeholders should be informed of the objectives and modalities and that we seek their support and their co-ownership in the implementation and dissemination of information about the awards.

128. Building trust and confidence with the community improves victim mobilization and identification efforts. It dispels myths and rumours about the awards, and promotes public information and understanding for the awards, including the beneficiary selection process.

⁸⁵ *Supra* footnote 83.

129. A victims' first encounter with the reparations programme may occur in their domicile or in their community through a brief introductory conversation with a specially trained local counsellor. The counsellors may discuss the awards with the victim, the process, and the types of services available through the programme, in addition to collecting basic information from the victim in a conversational non-threatening environment.

130. During those conversations the counsellor learns of the particular experiences of the victim and what coping strategies he or she has developed and whether they are harmful. It is through this process that victim information is collected and eligibility assessed in a therapeutic atmosphere and the process of reparation is pursued.

131. In the Trust Funds view it is important to respond to the psychological needs of victims first to improve their clarity of thought and improve their coping capacity so that they can take full advantage of other reparative services. In our experience victims that are troubled by trauma cannot take full advantage of socio-economic or medical services.

132. Therefore, the Trust Fund has structured its programme and project intake processes to best enable a successful victim experience and to give them the tools they require for reparation. Local counsellors will be able to mentor the victim throughout the process and lend support to the victim as they make use of the rehabilitative services.

2. Security and Contextual matters

133. The Trust Fund considers that the security situation including in regards to the locations mentioned in the verdict of this case (namely Bangui, PK12, PK22, Bozoum, Damara, Sibut, Bossangoa, Bossembélé, Dékoa, Kaga Bandoro, Bossemptele, Boali, Yaloke and Mongoumba) continues to be highly challenging.⁸⁶

134. The Trust Fund also considers that before any reparations can be implemented, the Court and the Trust Fund need to have a better understanding of the present location of potentially eligible victims. The Trust Fund notes that there has been and continues to be massive displacement in CAR. The Trust Fund therefore suggests that the Court conducts a victim mapping exercise so that it can better understand where the victims of the case are presently

⁸⁶ The Trust Fund notes, for example, that recent incidents of violence prompted the United Nations Secretary-General Ban Ki-moon to issue a public statement. *See* <http://www.un.org/apps/news/story.asp?NewsID=55396#.WBb2K3eZOt9>

located because it is likely that a majority of the victims have been displaced since the events that gave rise to the conviction. In terms of the timing of such a mapping exercise, further to the experience of the Trust Fund and the Court in the Lubanga case, the Trust Fund considers that it would be of most relevance if it were conducted immediately following the order for reparations in order to assist in the development of the draft implementation plan. The Trust Fund would therefore suggest that the Trial Chamber consider including the Registrar to this effect in the order for reparations.

135. The Trust Fund further recalls that in its needs assessment undertaken in the context of the assistance mandate in 2009, it noted the particular weakness of existing local capacities in CAR to deliver service-based rehabilitation. Because of subsequent conflicts, this may or may not have changed.⁸⁷ The Trust Fund is considering undertaking another needs assessment in the foreseeable future that could also serve to inform the present reparation proceedings. The Trust Fund will keep the Trial Chamber apprised of any developments in this regard.

3. Availability of only initial partial funding

136. The final matter that the Trust Fund would like to call to the Trial Chamber's attention is the potential that the initial resources available, i.e. resources from Mr. Bemba and the amount of the Trust Fund's complement if applicable, fall below the amount of liability for the reparations awards ordered against Mr. Bemba. In such a scenario, the Trust Fund considers that clear instructions from the Trial Chamber in the order for reparations regarding whether certain awards should receive the initial funding (for example, only collective awards, awards to a sub-set of victims, or awards within each of the ordered modalities, to the extent possible) would be of assistance to the Trust Fund, particularly for purposes of preparing the draft implementation plan. Such instructions need not necessarily be contained in the reparations award. Alternatively, the Chamber may review and approve the prioritization of initial funding as proposed by the Trust Fund in the draft implementation plan, as this will have been developed on the basis of a carefully researched and in-depth understanding, including through local consultations, of all relevant parameters.

⁸⁷ The UN Population Fund, in a report dated 22 October 2016, notes a "recent continuing deteriorating of security and the massive withdrawal of international NGOs that have been affected by violent activities of armed groups". See <http://reliefweb.int/report/central-african-republic/unfpa-car-grant-4-000-delivery-kits-and-1700-post-rape-kits-victims>.

137. In this respect, the Trust Fund would also like to take this opportunity to explain what would take place procedurally if this scenario were to occur. Once seized pursuant to regulation 50 (b) of the Regulations of the Trust Fund, the Trust Fund would prepare a draft implementation plan responding to all of the types and modalities of reparations awarded in the order for reparations that it considers it can implement within the total amount of liability, bearing in mind the potential number of victims who may benefit from the awards and relevant administrative costs. The draft implementation plan would also be structured to take into account any instructions or preferences expressed by the Trial Chamber regarding which awards should be implemented first.

138. Recalling the provisions of articles 75 (4) and 93 (1) (k) and regulation 117 of the Regulations of the Court,⁸⁸ the Trust Fund notes that possibility that additional assets that may be used for purpose of reparations may become available at a later point in time. In this case, these assets would go towards funding any awards for which financing was not initially available and not to reimbursing the Court for the Trust Fund's complement.

139. While Mr. Bemba remains liable for the payment of all of the reparations awards ordered, and thus is not absolved of liability by the Trust Fund's Board of Directors deciding to complement a payment, the Trust Fund considers itself to be last in line in terms of the eventual repayment of the complement it puts forward. In brief, until the entirety of the reparations awards are financed up to the amount of the liability imposed in the order for reparations, assets and resources will be directed to financing and implementing the outstanding awards. Only once the total amount of funds used for implementing reparations awards equals the amount of liability will any additional assets of Mr. Bemba's be used to repay the Court, in which case they will ultimately be returned to the Trust Fund's reparations reserve for use to complement the payment of awards arising in other cases.

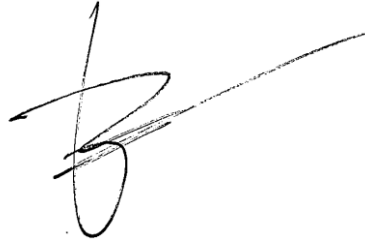
III. Conclusion

140. The Trust Fund wishes to reiterate its willingness to make further submissions on any issue discussed herein or any other that the Trial Chamber considers may be of assistance to these proceedings.

⁸⁸ See in this regard *Lubanga* Reparations Judgment, paras 102-104.

FOR THE FOREGOING REASONS

The Board of Directors respectfully submits its observations.

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

Pieter W.I. de Baan
Executive Director of the Secretariat of the Trust Fund for Victims,
on behalf of the Board of Directors of the Trust Fund for Victims

Dated this 31 October 2016

At The Hague, The Netherlands