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TRIAL CHAMBER II

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

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

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

Third submission of victim dossiers

With

**Eight confidential *EX PARTE* annexes available to the Registrar, VPRS, and Legal
Representatives of Victims VO1 and VO2 only,**

and

Three confidential *EX PARTE* annexes available to the Registrar and VPRS only

Source:

The Trust Fund for Victims

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

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I. Introduction

1. The Trust Fund for Victims (hereinafter “Trust Fund”) recalls and incorporates the procedural history in the present proceedings as set out in the Trial Chamber’s “Order instructing the Trust Fund for Victims to Submit Information regarding Collective Reparations¹” of 8 December 2016, the Trial Chamber’s “Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016”² of 21 October 2016, and other earlier documents in the case.
2. In particular, the Trust Fund recalls the Trial Chamber’s “Order instructing the Trust Fund for Victims to supplement the draft implementation plan” of 9 February 2016³ (hereinafter “Order of 9 February 2016”). The order, *inter alia*, instructs the Trust Fund to prepare dossiers for every potential victim⁴ for the purpose of reparations eligibility evaluation by the Chambers⁵, including an individual harm assessment, and “to submit the three Batches to the Chamber by 31 March, 15 July and 31 December 2016, respectively”. The order also instructs the Trust Fund “to transmit to the Chamber, on 31 December 2016, the overall evaluation of the extent of the harm caused to the victims, the anticipated amount of Mr Lubanga’s liability and, if necessary, the revised monetary amount that the TFV intends to complement in order to implement the Draft Implementation Plan.”
3. On 31 May 2016, after having been accorded additional time, the Trust Fund filed the “First submission of victim dossiers”.⁶ The submission transmitted 12 victim dossiers and also informed the Trial Chamber about challenges experienced whilst compiling the victim dossier. Based on the Trust Fund’s serious concerns about the implications of the victims’ identification and harm assessment process, articulated in the 9 February Order,

¹ ICC-01/04-01/06-3262.

² ICC-01/04-01/06-3252-tENG.

³ ICC-01/04-01/06-3198-tENG.

⁴ ICC-01/04-01/06-3198, para. 17.

⁵ ICC-01/04-01/06-3198, para. 14.

⁶ ICC-01/04-01/06-3208.

the Trust Fund filing contained a request for reconsideration⁷ of the Trial Chamber's Order of 9 February 2016.

4. On 14 July 2016, the TFV submitted a second batch of 11 victim dossiers of potentially eligible victims.⁸
5. On 15 July 2016, the Trial Chamber issued, *inter alia*, an order⁹ instructing the Registrar to provide aid and assistance to the Trust Fund and the legal representatives (inclusive of OPCV) in the case (hereinafter "Order of 15 July 2016"). The Trial Chamber stated that "the search for victims potentially eligible for reparations in the instant case should continue"¹⁰. According to the Trial Chamber, the purpose of the victims' identification process is "to supplement the sample already available and to better assess to what extent the list of victims identified is representative of all potential[ly eligible] victims" and to inform the Chamber's decision as to the amount of Mr Lubanga's liability for reparations."¹¹
6. On 16 September 2016, the OPCV filed a request, providing the Trial Chamber with information relevant to steps it had undertaken in response to the Order of 15 July 2016 and requesting further instructions from the Trial Chamber.¹²
7. On 3 October 2016, in accordance with the Chamber's instructions and after being accorded further time, the Trust Fund¹³ and the Registry filed observations on this request by the OPCV, followed, on 6 October 2016, by further observations by the Legal Representatives of V01 and V02 Victims, as well as the Defence.

7 First submission of Victim Dossiers with twelve confidential, ex parte annexes to the Registrar, and the legal representatives of V01 only, 31 May 2016, ICC-01/04-01/06-3208, paras 1-6.

8 Second submission of Victim Dossiers With Eleven confidential, ex parte annexes, available to the Registrar, and Legal Representatives of Victims V02 and OPCV only, 14 July 2016, ICC-01/04-01/06-3216 and 11 confidential ex parte annexes.

9 "Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations" (hereinafter "Order of 15 July 2016"), 15 July 2016, ICC-01/04-01/06-3218-tENG.

10 Order of 15 July 2016, para. 8.

11 Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016, ICC-01/04-01/06-3252-tENG, 21 October 2016, at para. 15 with further references back to the original decisions.

12 Requête afin de solliciter des lignes directrices de la Chambre suite à l'Ordonnance émise le 15 juillet 2016, ICC-01/04-01/06-3222.

13 ICC-01/04-01/06-3237.

8. On 21 October 2016, the Trial Chamber, in response to the OPCV's request and the subsequent observations, issued the "Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016". In this order, the Trial Chamber *inter alia* instructed the Trust Fund to continue the victims' identification process. The Trial Chamber also authorizes the OPCV to continue a process of identifying potential victims and instructs the OPCV to transmit to it, through VPRS, the files of such Potentially Eligible Victims as they become ready and by 31 December 2016.
9. On 28 October 2016, the Legal Representatives of Victims V01 filed a request to leave for appeal against this decision of 21 October 2016 and the decision on symbolic reparations¹⁴. On 16 November 2016, the Legal Representatives of Victims V02 filed their response to this request, and at the same time, requested the Trial Chamber's authorization to join the request for leave to appeal¹⁵. On 8 December 2016, the Trial Chamber rejected the request for leave to appeal¹⁶.
10. On 22 November 2016, the Trial Chamber requested the Government of the Democratic Republic of the Congo to submit observations, in the context of the ongoing reparations proceedings in the Lubanga case, on the participation of child soldiers in disarmament, demobilization, and reintegration programmes in Ituri¹⁷.
11. On 8 December 2016, the Trial Chamber instructed the Trust Fund to submit additional information regarding collective reparations, including information similar in structure and level of detail to the 19 September 2016 filing¹⁸ concerning symbolic reparations¹⁹ so

14 Legal Representatives VO1, "Requete du groupe de victimes V01 sollicitant l'automatisation d'interjeter appel de l'ordonnance « relative a la requete du Bureau du conseil public pour les victimes du 16 septembre 2016 » et celle « approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations », rendues le 21 octobre 2016", 28 October 2016, ICC-01/04-01/06-3254.

15 Legal Representatives VO2, "Reponse de l'equipe V02 a la demande de l'equipe V01 sollicitant l'autorisation d'interjeter appel des ordonnances du 21 octobre 2016", 16 November 2016, ICC-01/04-01/06-3259.

16 Trial Chamber II, Décision rejetant la requête des Représentants légaux du groupe de victimes 01 sollicitant l'autorisation d'interjeter appel, 8 December 2016, ICC-01/04-01/06-3263.

17 ICC-01/04-01/06-3260.

18 ICC-01/04-01/06-3223-Conf and its confidential annex (ICC-01/04-01/06-3223-Conf-Anx); a Public redacted version has also been filed in the record of the case: (ICC-01/04-01/06-3223-Red) and its confidential annex (ICC-01/04-01/06-3223-Conf-Anx).

19 The Trust Fund's proposal for implementing symbolic reparations made on 19 September 2016 was approved by the Trial Chamber on 21 October 2016. See "Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations". ICC-01/04-01/06-3251.

as to enable the Trial Chamber to move forward with approving the draft implementation plan.

12. On 16 December 2016, the Legal Representative for Victims, VO2, requested a delay for the transmission of their additional victim dossiers to the Trial Chamber²⁰.
13. On 20 December 2016, the OPCV submitted the “Demande de prorogation du délai aux fins de dépôt des demandes en réparation supplémentaires de bénéficiaires potentiels”²¹, requesting a delay for the deposition of supplementary reparation requests from potentially eligible victims until 30 June 2017.
14. The Trust Fund submits that it is fully committed to work jointly with the Trial Chamber and all other stakeholders to make reparations to the victims in this case finally a tangible reality. Accordingly, the Trust Fund seeks to comply with the Trial Chamber’s instructions contained in the order of 9 February 2016 by acquiring the outstanding components to complete the dossiers and submitting the remaining victim dossiers resulting from its April 2016 assessment missions, as well as by responding to the other elements of the order. In particular, the Trust Fund submits, 1) the final batch of victim dossiers; 2) an overall evaluation of the extent of harm caused to the victims, 3) observations on the anticipated amount of Mr Lubanga’s liability, and 4) observations related to the question of whether it is necessary to revise the monetary amount that the Trust Fund may complement towards implementing the Draft Implementation Plan by 31 December 2016.

²⁰ ICC-01/04-01/06-3265.

²¹ ICC-01/04-01/06-3266-Red.

II. Observations

1. Transmission of additional victim dossiers

Completed assessments

15. The Trust Fund, while reiterating its concerns related the prescribed victims' identification process²², submits an additional eight dossiers of victims who may be considered eligible for reparations in the attached annexes. The Trust Fund further submits a confidential annex containing a VPRS legal analysis in the form of tables analysing a total of 26 victim dossiers, submitted on 31 May 2016, 14 July 2016 and three of the dossiers submitted as part of the present filing because the Trust Fund deems that this analysis may be useful for the Trial Chamber. The Trust Fund notes that these tables were produced by the VPRS and that the Trust Fund has not made any changes to the tables contained in the annex. The Trust Fund notes that VPRS has offered to also compile a legal analysis of the outstanding five victim dossiers in January 2017, if the Trial Chamber wishes to receive it.
16. Of the eight victims concerned, four are legally represented by the Legal Representatives of Victims V01, whilst the remaining four are legally represented by the Legal Representatives of Victims V02.
17. The Trust Fund notes that three of the victims concerned have consented to reveal their identity to the convicted person in accordance with the Trial Chamber's prerequisite of eligibility evaluation for collective reparations. Five potential victims could not consent to the prerequisite requirement because of their deeply felt fear of reprisal and concern for their safety.
18. The Trust Fund would like to reiterate its understanding that in accordance with the Trial Chamber order it is the Trust Fund's role to transmit to the Trial Chamber the victim

²² SEE, for instance, Trust Fund for Victims, 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.

dossiers, whilst the representational responsibility to advocate for the legal interests of their clients exercise of their right to reparations remains with the Legal Representatives for Victims and, where applicable, the OPCV.

19. The Trust Fund further would like to note that, as has been previous practice, the Trust Fund has not made any redactions to the attached victims' dossiers and that the legal representatives should address the Trial Chamber directly if they wish to request any redactions.

20. The Trust Fund further submits as three separate confidential annexes a legal analysis produced by the VPRS, which is presented in the form of three tables and analyses a total of 26 victim dossiers,²³ because the Trust Fund deems that this analysis may be useful for the Trial Chamber. The Trust Fund notes that the three tables produced by the VPRS out of its own initiative and that the Trust Fund transmits them without having made any modifications. The Trust Fund notes that VPRS has offered to also compile a legal analysis of the five outstanding victim dossiers in January 2017, if the Trial Chamber wishes to receive it.

Future assessments

21. With this transmission, the Trust Fund has transmitted all remaining dossiers that have resulted from its victims' assessment missions in April 2016. However, the Trust Fund has not undertaken any additional victim identification missions in preparation for this report.

22. The Trust Fund notes the Trial Chamber's instructions to continue the victims' identification process and the authorization contained in its decision of 21 October 2016 addressing the OPCV to continue identifying previously unidentified victims.

23. As regards victims who have already participated in the criminal proceedings, the Trust Fund considers the (re-)identification of those victims to be a task best performed by the

²³ The analyzed victim dossiers consist of the dossiers submitted on 31 May 2016, 14 July 2016 and three of the dossiers, submitted as part of the present filing.

Legal Representatives of Victims already representing and maintaining contact with their clients. Accordingly, the Trust Fund has been in close contact in form of meetings and regular exchange of emails with the Legal Representatives of Victims regarding more than one hundred victims that they represent and who have not yet been assessed in accordance with the instructions of the Trial Chamber, so that a joint plan to facilitate their assessment can be developed.

24. On 16 December 2016, the Legal Representatives of Victims V02, after having carried out a field mission to the Democratic Republic of the Congo from 6 to 9 December 2016 to meet their clients, submitted a “Demande de prorogation du délai initialement fixé au 31 décembre 2016 pour la transmission à la Chambre des dossiers des victim”, suggesting to conduct joint assessment missions with the Trust Fund in January, February and March 2017. The Trust Fund respectfully submits to the Trial Chamber that it is committed to work closely with the Legal Representatives of Victims V02 and their clients, should the Trial Chamber grant this request.

2. Overall evaluation of harm

25. One of the key elements contained in the order of 9 February 2016 is the instruction of the Trial Chamber to the Trust Fund to undertake a victims’ identification process and to present, by 31 December 2016, an overall evaluation of the harm as represented in the victims’ dossiers that resulted from this process.
26. In subsequent decisions, and as has already been noted in the procedural history above, the Trial Chamber further elaborated on the purpose of the victims’ identification process. The Trust Fund would like to recall these elaborations because, in its view, they are of direct relevance for understanding the purpose of the requested overall evaluation of harm.
27. In particular, the Trial Chamber stated in the Order of 15 July 2016 that further identification of victims and compilation of individual dossiers will enable the Chamber “to supplement the sample already available and to better assess to what extent the list of

victims identified is representative of all potential victims.”²⁴ Furthermore, on 26 October 2016, in its decision upon a request by the OPCV to clarify whether it would be appropriate for the OPCV to seek identifying further potentially eligible victims, the Trial Chamber found that “the search for Potentially Eligible Victims should continue in order to supplement the sample already available and to better assess to what extent the list of victims identified is representative of all potential[ly eligible] victims’ and to inform the Chamber’s decision as to the amount of Mr Lubanga’s liability for reparations.”²⁵ In this context, the Trust Fund recalls the Appeals Chamber’s determination that a “convicted person’s liability 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”²⁶. Thus, harm adduced at trial is an important element in the assessment of Mr Lubanga’s liability.

28. Against this background, the Trust Fund considers that the requested overall harm assessment should assist the Trial Chamber in its endeavour to fully appreciate the applicable scope of harm in the present reparation proceedings in general, i.e. beyond the limited number of the victims assessed. Based on the accounts of individual suffering captured in the dossiers, the Trust Fund has therefore sought to draw general conclusions and synthesise the available information.

29. The Trust Fund notes the Trial Chamber’s concern that it needs to be in a position to “assess to what extent the list of victims identified is representative of all potential[ly eligible] victims’ and to inform the Chamber’s decision as to the amount of Mr Lubanga’s liability for reparations.” (emphasis added)

30. As will be explained in the following, the Trust Fund is confident that the existing victim dossiers, whilst the Trust Fund is mindful of the sample’s limitations, are indeed

24 Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations, ICC-01/04-01/06-3218-tENG, 15 July 2016, at para. 8.

25 Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016, ICC-01/04-01/06-3252-tENG, 21 October 2016, at para. 15 with further references back to the original decisions.

26 Appeals Chamber, Amended Order, 3 March 2015, para. 21.

sufficiently representative to allow for an overall analysis that has a value beyond the limited number of case files examined.

On the representative nature of the information analysed

31. The Trust Fund recalls that it has previously noted that the victims it assessed, based on the fact that out of the sample all but two victims are in the unique position of having filed applications for participation in trial, may be considered “a particular rather than a random sample”²⁷. Moreover, as the Trust Fund has previously argued, the identification and assessment process instructed by the Trial Chamber is prone to create a gender bias, disadvantaging women and girls (as well as any other vulnerable victims suffering disproportionately from the stigma and shame often attached to their status of being victim of child soldier crimes) because “disproportionally few potentially eligible female victims will dare to come forward in such an exposed way”²⁸. Indeed, the overwhelming majority of victims, namely 30 out of the 31 victims in this group, were male. Only one potential victim (indirect) interviewed, the mother of a former child soldier, was female. The Trust Fund considers this as a direct consequence of the barrier that needs to be overcome to first apply to participate in trial and then to participate in the detailed harm assessment instructed by the Trial Chamber, a barrier which is presumably much higher for vulnerable victims, including women and girls.

32. The Trust Fund is well aware that these observations may give rise to concerns that any conclusions drawn from analysing the present, limited sample of victim dossiers may fail to fully capture the reality of potentially eligible victims beyond the sample. However, in the Trust Fund’s assessment, such concerns appear unwarranted, at least if one focuses on the above identified purpose of the overall harm evaluation. The Trust Fund submits that the various manifestations of harm documented in the individual victim dossiers that make up the present sample, both when viewed individually and when read jointly, reinforce and concretize existing findings of how harm affects victims in the present case that resulted from other, larger assessments by the Trust Fund and the Court.

²⁷ First Submission of Victim Dossiers, 31 May 2016, at para. 71.

²⁸ First Submission of Victim Dossiers, 31 May 2016, at para. 160.

33. In fact, the Trust Fund previously noted in its submission of the first batch of dossiers on 31 May 2016 that “the findings (...) are consistent with the outcomes of the large-scale community and victims’ consultations carried out by the Trust Fund in 2015 that informed the preparation for the draft implementation plan, which considered the views of over 2,000 persons.”²⁹

34. Furthermore, the Trust Fund recalls that the Appeals Chamber, basing itself on judicial decisions relevant to victim participation, the findings in the Conviction Decision, insofar as they relate to defining the harm caused by the crimes for which Mr Lubanga was convicted, and the Sentencing Decision,³⁰ has authoritatively defined “harm³¹” applicable to reparations in the present case. Paragraph 58 of the Amended Order for Reparations³² states:

The harm caused to direct and indirect victims as a result of the crimes for which Mr. Lubanga was convicted is defined as follows:

1. With respect to direct victims:
 - i. Physical injury and trauma;
 - ii. Psychological trauma and the development of psychological disorders, such as, inter alia, suicidal tendencies, depression, and dissociative behaviour;
 - iii. Interruption and loss of schooling;
 - iv. Separation from families;
 - v. Exposure to an environment of violence and fear;
 - vi. Difficulties socialising within their families and communities;
 - vii. Difficulties in controlling aggressive impulses; and

²⁹ First Submission of Victim Dossiers, 31 May 2016, at para. 72.

³⁰ *SEE* relevant excerpts of the Appeals Chamber judgment as cited in the Trust Fund’s First Submission of Victim Dossiers, 31 May 2015, in paras. 144 and 145, with further references.

³¹ According to the Appeals Chamber, there is a distinction to be made between identifying the harms to direct and indirect victims caused by the crimes for which the person was convicted and assessing the extent of that harm for purposes of determining the nature and/or size of reparation awards. The Appeals Chamber in its definition contained in para. 58 of the Amended Order has authoritatively defined and identified the applicable “harms”, listing possible manifestations; see AC judgment on reparations, 3 March 2015, at paras. 181-183.

³² The Amended Order for Reparations (hereinafter “Amended Order”) is contained in Annex A to the judgment on the appeals against the Trial Chamber’s “Decision establishing the principles and procedures to be applied to reparations” in the case against Thomas Lubanga Dyilo, 3 March 2015, ICC-01/04-01/06-3129-AnxA.

- viii. The non-development of “civilian life skills” resulting in the victim being at a disadvantage, particularly as regards employment.

2. With respect to indirect victims:

- i. Psychological suffering experienced as a result of the sudden loss of a family member;
- ii. Material deprivation that accompanies the loss of the family members’ contributions;
- iii. Loss, injury or damage suffered by the intervening person from attempting to prevent the child from being further harmed as a result of a relevant crime; and
- iv. Psychological and/or material sufferings as a result of aggressiveness on the part of former child soldiers relocated to their families and communities.

35. As will be further elaborated in the following, the overall harm assessment of the victim dossiers compiled by the Trust Fund is fully consistent with this definition of harm, including the manifestations of harm listed by the Appeals Chamber. Indeed, the Trust Fund submits that the fact that the “scope of harm” as defined by the Appeals Chamber and the manifestations of harm found in the Trust Fund’s overall harm assessment correspond to each other, underlines both the accuracy of the Appeals Chamber’s definition as well as the representative nature of the harms captured in the compiled victim dossiers.

On the assessment method

36. Before illustrating this consistency between the Trust Fund’s harm assessment and the Appeals Chamber’s definition of the notion of “harm” in more detail, the Trust Fund would like to briefly recall the procedure it put in place for the compilation of those individual victim dossiers. At the core, guiding all of the Trust Fund’s interactions with victims, is the principle of “do no harm”. In this vein, and as has been explained in more

detail previously³³, the Trust Fund decided to put in place a harm assessment procedure that rests not solely on statements from individual victims, but rather includes an objective third party expert assessment to confirm whether the harms alleged by the victims indeed appeared to have been suffered. The experts conducted the harm assessment in form of an interview and, where applicable, a physical examination. The expert assessors included a medical doctor, a clinical psychologist, and a socio-economist. The Trust Fund considers that an objective, third party expert documentation examining and confirming the alleged harms seemed an especially important and necessary form of certification, both from the perspective of withstanding scrutiny by the defence and from that of the victims in particular in light of the circumstances of the Lubanga case, where there have been assertions that former child soldiers are “false victims”.

Overall conclusions that can be drawn from the dossiers

37. An overall analysis of the victim dossiers demonstrates that all victims that have been assessed have suffered multiple forms of harm as a result of the crimes committed by the convicted person. Often, the manifestations of harm have made an impact on the psychological, physical, and on the material wellbeing of the victims. In some cases, only the manifestations of psychological and material harm were still observable to date.
38. During the harm assessments, the former child soldiers alleged that they were separated from their families; in some instances forced to commit war crimes, such as to participate in pillaging; in some instances forced to consume alcohol and drugs; in others instances of rape (both boys and girls); to inflict torture; in many instances victims were severely malnourished, including to the point of near starvation; in many instances victims were humiliated and intimidated, and/or subjected to physical violence such as beatings.
39. Indirect victims, i.e. close family members of a deceased child soldier, allege the psychological pain from the loss of a beloved child and the material loss that comes from

33 Trust Fund for Victims, First Submission of Victim Dossiers, 31 May 2016 as well as Observations on the “Requête afin de solliciter des lignes directrices de la Chambre suite à l’Ordonnance émise le 15 juillet 2016”, of 3 October 2016, in particular paras. 14-19.

the loss of a family member who could have materially contributed to supporting the household which is directly in line with the Appeals Chamber's "harm" definition regarding indirect victims. The Trust Fund notes, however, that within the sample of assessed victims there was no indirect victim claiming "loss, injury or damage suffered by the intervening person from attempting to prevent the child from being further harmed as a result of a relevant crime," a category of indirect victim, explicitly acknowledged by the Appeals Chamber in its definition of "harm" contained in paragraph 58 of the Amended Order.

40. The harm that direct and indirect victims have suffered, even though it stems from crimes that were committed more than a decade ago, continues to manifest itself today in ways that directly affects their daily lives. The Trust Fund considers that, as a result, all victims interviewed require at present some form of redress and in most cases, several forms of redress, such as medical and psychological rehabilitation and material support.

41. The Trust Fund would like to recall in this context that, as it has previously noted, "Trust Fund staff present at the interviews expressed deep discomfort at the reactions that they observed from victims as the interviews progressed. For example, staff reported that potential victims began to shield their faces, began to fidget nervously and display other physical indications of emotional distress, began to cry, and at certain moments stopped speaking and responding to enquiries. Trust Fund staff also observed that certain victims began to give less detail as the interviews progressed, some asserting that it was too painful for them to recall the events in detail. In the experience of the Trust Fund staff, often a lack of detail can be associated with an attempt by the person to avoid recalling traumatic events."³⁴

Manifestations of harm

42. An overall analysis of the victim dossiers shows that each and every victim has suffered from some form of psychological harm, albeit to varying degrees and that the manifestations of psychological harm coincide with manifestations of such harm listed by

³⁴ Trust Fund for Victims, First submission of Victim Dossiers, 31 May 2016, at para. 50.

the Appeals Chamber in paragraph 58 of its Amended Order. This finding of the pervasiveness of psychological harm in the examined victim population supports the Trust Fund's submission in the draft implementation plan of 3 November 2015 that the Court should work on the basis of a presumption of psychological harm³⁵.

43. The manifestations of psychological harm reported in the harm assessment interviews, include:

- Severe psychological trauma and disorders;
- Difficulties in socializing with family and community;
- Lasting psychological impact resulting from an exposure to a climate of violence and fear;
- Difficulties in controlling aggressive impulses;
- Possible PTSD and depression.

44. The Trust Fund notes that a significant number, but not all assessed victims allege to have suffered from various manifestations of physical harm. The following manifestations were concretely identified during the harm assessments and confirmed through medical examinations:

- Physical impairment resulting from war injuries and assault and battery;
- Negative health effects from the abuse of drugs and alcohol; and
- On-going medical problems due to diseases and malnutrition experienced during the time as child soldier compounded by lack of access to adequate health care at that time and/or subsequently.

45. The Trust Fund submits that the individual dossiers underline that the majority of direct victims have suffered from loss of schooling and/or the non-development of civilian life skills, two categories of harm listed by the Appeals Chamber in its definition of scope of harm for direct victims. The Trust Fund submits that this, in turn, has often affected their ability to find gainful employment and therefore negatively affects their economic status

³⁵ SEE Trust Fund for Victims, Filing on Reparations and Draft Implementation Plan", ICC-01/04-01/06-3177-Red. , 3 November 2015 (hereinafter "Filing on reparations of 3 November 2015"), and in particular at paras271 ff.

presently. The Trust Fund considers that the experienced economic problems are in many cases further compounded by the physical and psychological harm suffered – for instance, victims may be too traumatized to maintain steady employment or their physical disability may affect their ability to do physically strenuous kinds of work.

46. Furthermore, these harm-induced economic problems usually affect not only the former child soldier as a direct victim him or herself but also his or her family and community. In fact, several direct and indirect victims explicitly noted that the harm that they suffered has a direct negative impact on their lives and availability of household income.

Conclusions on the overall harm assessment

47. In conclusion, an overall harm assessment based on an examination of the individual victim dossiers demonstrates that the victims in this case, former child soldiers, and, as indirect victims their close family, continue to suffer today from the impact of the harm inflicted upon them by the crimes committed by the convicted person. The dossiers also show that this suffering is significant and continues to require redress.
48. The Trust Fund submits to the Trial Chamber that the individual stories recorded in the victim dossiers concur with the findings of the Trust Fund's large-scale communities' and victims' consultations and the findings of the Appeals Chamber (which were based on the Court's assessment of evidence presented during the criminal trial, including during the sentencing phase) even if not all types of harm listed by the Appeals Chamber can be found in the sample examined. While the Trust Fund is mindful of the limitations of the sample and the fact that the evidence collected may be imperfect despite the Trust Fund's care in devising an appropriate and victims-sensitive process, it therefore submits that the sample may be regarded as being reflective of the harm suffered by broader victim populations in this case. The Trust Fund would further like to note that, in making this submission, the Trust Fund is not able to consider the results of the OPCV identification efforts and the terms of harm that may result from that process. The Trust Fund regards the OPCV and the Trial Chamber to be best placed to do so.

3. Anticipated amount of Mr Lubanga's liability

49. In its order of 9 February 2016, the Trial Chamber instructed the Trust Fund to make a submission on the “anticipated amount of Mr Lubanga’s liability”. As it has previously noted, the Trust Fund views that setting the anticipated monetary amount for Mr Lubanga’s liability is properly is within the judicial discretion of the Court³⁶. That notwithstanding, in the following the Trust Fund will seek to provide the Trial Chamber with considerations that may be helpful to the Court in determining the anticipated monetary liability.

50. The Trust Fund recalls that it has discussed its understanding of how Mr Lubanga’s liability ought to be assessed in the filing of 3 November 2015, accompanying the Draft Implementation Plan³⁷, as well as in subsequent filings³⁸.

51. In the following, the Trust Fund would like to reiterate several key points already made:

- ***Proportionality between the harm caused by the crimes (and participation) and liability***

The Trust Fund recalls that the Appeals Chamber Amended Reparations Judgment articulated the following principle relevant to imposing liability: “Reparations orders are intrinsically linked to the individual whose criminal responsibility is established in a conviction and whose culpability for the criminal acts is determined in a sentence. The 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 guilty³⁹”. In consequence, liability directly flows from and corresponds to the facts adduced at trial and the harm caused by the crimes for which the person was convicted and sentenced.

³⁶ Filing on reparations of 3 November 2015 , at para. 214.

³⁷ Filing on reparations of 3 November 2015”, at paras.236 ff.

³⁸ SEE e.g. Trust Fund for Victims, First Submission of Victim Dossiers, 31 May 2016.

³⁹ Appeals Chamber, Amended Order, 3 March 2016, at paras. 20 and 21.

- ***The obligation to pay for reparations lies with the convicted person and the imposition of liability is independent of the availability of financial means of the convicted person***

The Trust Fund has consistently argued that the legal obligation to pay for the reparation award resides with the convicted person⁴⁰. The Trust Fund also respectfully would like to reaffirm its full agreement with the Appeals Chamber's finding that the indigence⁴¹ of Mr Lubanga (whether presumed or real), is of no relevance to the imposition of liability.⁴²

- ***The Trust Fund's ability to "complement" under reg. 56 of the RTFV and to what amount it may do so and the anticipated amount of monetary liability of the convicted person must be clearly distinguished. The complement that the Trust Fund may offer in this and in other cases (due to the limitations of available Trust Fund resources) is likely to be significantly less than the eventual liability of the convicted person.***

According to regulation 56 of the RTFV, the Trust Fund is able to "complement the resources collected through awards for reparations" (i.e. resources collected as a result of a Court order against the convicted person imposing monetary liability on him) with its own "other" resources derived from voluntary contributions and donations. In other words, the Trust Fund, using its own resources, may assist with complement funding towards the implementation of reparation awards ordered against the convicted person. The term "complement" in regulation 56 of the RTFV, reflects firstly, the discretionary nature of a financing decision under the authority of the Trust Fund's Board of Directors and secondly, the fact that the Trust Fund is not conceived to be a guarantee fund.

However, the possibility of acquiring Trust Fund resources to "complement" the available financial resources of the convicted person does not diminish the convicted

40 Trust Fund, Filing on reparations of 3 November 2015, at para. 99.

41 Second order on the financial situation of Thomas Lubanga Dyilo, ICC-01/04-01/06-3192-Conf-Exp-tENG 03-03-2016, wherein the Trial Chamber considers Mr Lubanga to be indigent for purposes of reparations.

42 Appeals Chamber, Judgment on reparations, 3 March 2015, paragraph 105.

person's financial liability in any way: he or she remains financially liable for all Court ordered reparations and for the total amount that their full implementation would cost.

As the Trust Fund noted in its 3 November 2015 submission, "Mr Lubanga is obliged to redress all harm caused by his crimes to all victims as defined by the Court. The draft implementation plan developed as part of this submission, however, limits itself to seeking to provide some redress for many of these victims and for various forms of harm without, however, (due to the limited availability of funds) pretending to be able to achieve full redress for all eligible victims and for all forms of harm and their consequences. The Trust Fund was forced to make difficult choices to suggest a realistic draft implementation plan."⁴³ (*emphasis added*)

In consequence, the amount of 1 Million Euro indicated by the Trust Fund's Board of Directors in the 3 November 2015 submission to be potentially available for financing reparations through the "other resources" of the Trust Fund is neither equivalent to the amount of monetary liability of Mr Lubanga, nor is it providing an upper ceiling of his monetary liability. On the contrary, the Trust Fund considers that 1 Million Euro is necessary to provide "some redress to many victims" and that it will cost (significantly) more to provide full redress to all of the victims harmed by his crimes. The Trust Fund recalls that the representative of the Women's Initiative for Gender Justice during the public hearing on reparations has called the suggested amount of the €1 Million complement to be "manifestly insufficient"⁴⁴ in light of the dire need of victims to receive redress.

In this context, the Trust Fund would like to note that once the Trial Chamber has set an amount for Mr Lubanga's monetary liability, the Trust Fund intends to initiate a fundraising effort based on the Court's order and the eventual approval of detailed awards resulting from the Chamber's order of 8 December 2016, which will provide

⁴³ Trust Fund, Filing on reparations of 3 November 2015, at paras. 216 and 147.

⁴⁴ SEE <http://www.4genderjustice.org/pub/Presentation-to-TC-II-Reparations-Hearing-October-2016.pdf>.

donors with a concrete funding objective, so that additional resources may become available to further expand the reparations programmes in the present case.

- ***The Trial Chamber can base itself on a range of information sources for determining the monetary liability of the convicted person. These sources include most importantly the findings of the Court in the criminal trial and sentencing decision. However, the findings contained therein may be supplemented by information available from third parties, such as the government of the DRC and other stakeholders, including international and non-governmental organisations and the Trust Fund for Victims.***

The Trust Fund respectfully submits that the key elements for establishing the amount of Mr Lubanga's monetary liability have already been presented to the Trial Chamber or have been established in the course of the criminal trial that gave rise to these reparation proceedings.

Relevant available information on the number of victims

52. As the Trust Fund has previously noted⁴⁵, the Appeals Chamber found that it was established beyond reasonable doubt, in the Conviction Decision, which was also relied upon in the Sentencing Decision, that the crime of recruitment of individuals under the age of fifteen was “widespread” and that “a significant number” of individuals below the age of fifteen were used to participate actively in hostilities⁴⁶. Furthermore, the Appeals Chamber observed that the finding relevant to the widespread nature of the involvement of individuals under the age of fifteen was challenged on appeal and confirmed by the Appeals Chamber in that judgment.

53. The Trust Fund considers the fact that the crime was “widespread” and affected a “significant number” of individuals has a direct bearing on the establishment of Mr Lubanga's monetary liability. The Trust Fund also observes that the Trial Chamber in the

⁴⁵ SEE e.g. Trust Fund for Victims, First Submission of Victim Dossiers, 31 May 2016, at para 142 with further references.

⁴⁶ Depending on how close the relationship between direct and indirect victims has to be, one may argue that there are exponentially more indirect victims than direct victims.

first instance held that due to the “significant number” of victims and the “widespread” nature of the crimes that collective reparations were an appropriate form and modality of reparations and this determination was affirmed by the Appeals Chamber.

54. For planning purposes, the Trust Fund in the draft implementation plan utilized an estimated number of 3,000 potentially eligible victims that may benefit from collective reparations, accompanied by the caveat that a final determination of the number of eligible victims will be made in the course of implementation itself. The Trust Fund’s estimation, covering both direct and indirect victims but with an emphasis on direct victims, was based on information available in the public domain, such as reports of humanitarian and human rights organisations, e.g. the Human Rights Watch report “Ituri: ‘Covered in blood’”⁴⁷, a Global Report published by the NGO Child Soldiers International⁴⁸. This information was supplemented by the VPRS mapping report of 2015, by information obtained during the Trust Fund’s victim and community consultations during May and June 2015, as well as by information gleaned from programming in the context of its assistance mandate.

55. Because the number of victims affected by the harm caused as a result of the crimes committed is of direct consequence for the setting of monetary liability⁴⁹, the Trial Chamber may wish to have as accurate a number of potential victims as possible. The Trust Fund therefore welcomes the Trial Chamber’s request to the government of the Democratic Republic of the Congo on 22 November 2016⁵⁰, which, as the Trust Fund hopes, will bring further clarity on this matter.

Relevant available information on the harm suffered

56. As discussed above, the Appeals Chamber has bindingly defined “harm” for the purpose of reparations in this case whilst leaving a determination of the extent of harm for the

⁴⁷ The Human Rights Watch report “Ituri: Covered in Blood” is electronically available at <https://www.hrw.org/sites/default/files/reports/DRC0703.pdf>.

⁴⁸ For more details, see Trust Fund for Victims, at para. 245 with further references.

⁴⁹ Trust Fund for Victims, Filing on reparations of 3 November 2015, at para. 237 ff.

⁵⁰ ICC-01/04-01/06-3260.

purposes of determining the nature and/or size of reparation awards still open for determination.⁵¹

57. The overall evaluation of harm, discussed above, in the Trust Fund's assessment confirms that even though the experience of harm is something individual and manifests itself in different consequences for each and every victim, one can conclude that all victims appear to have suffered significant harm. Furthermore, victims continue to suffer the negative consequences at present and require redress in the form of physical, psychological, and material support as well as through symbolic interventions. Predominant manifestations of harm include psychological harm, a form of which affects all of the victims evaluated, and harm related to loss of schooling and non-development of civilian life skills, which in turn negatively affect the economic situation of victims. The Trust Fund considers, as has been explained in more detail in the draft implementation plan, that psychological rehabilitation, followed by educational, literacy, vocational, and micro-loan programmes may alleviate some of the harm consequences observed. The Trust Fund further notes that a significant number of victims suffered physical harm that requires medical rehabilitation. The Trust Fund notes that this form of redress, which, in some instances, may be particularly costly or require sustained intervention (e.g. in case of prosthesis). The Trust Fund further notes that the crimes committed by the convicted person have caused types of harm calling for symbolic reparations, such as stigma and social marginalization of victims as well as harm to the social fabric extending beyond the individuals and their families and into the victim communities.

58. The Trust Fund recalls that in its submission of 3 November 2016, it provided the Trial Chamber with concrete information, based on its assistance mandate, of what service delivery to victims in Ituri may cost.⁵²

⁵¹ *SEE* AC Judgment on Reparations, 3 March 2015, at paras 181 and 183, cited above.

⁵² *SEE* Trust Fund for Victims, Filing on reparations of 3 November 2015, at paras. 266 ff.

59. The Trust Fund further notes that in the response to the Chamber's rule 103 order⁵³ of 15 July and during the public hearing on reparations of 11 October 2016, civil society organizations submitted useful information in this respect.
60. In particular, the international NGO Child Soldiers International reporting on a program for the reintegration of girl former child soldiers, stated that "an average annual budget of €360 per individual will cover school fees, transport, a uniform, schools and books, as well as cover coordination and monitoring from local child protection actors" and that "for girls attending literacy and numeracy classes, a budget of €2,600 provides the classes including transport for a group of ten girls from the same village for a period of one year, as well as coordination and monitoring from local child protection actors".
61. The Women's Initiative for Gender Justice proposed, based on its experience of activities it supports in the field, that the reparations programme should be implemented over five years (rather than three, as proposed in the Trust Fund's Draft Implementation Plan) with the first three years as a substantive period of its implementation and that the fourth and fifth year allowing for a transition period in which local or international partners could start taking over the programmes so as to allow for continuity. The Women's Initiative for Gender Justice projected the costs of the symbolic, preventative and transformative programmes that it deemed appropriate in the present case to be in the range of €200,000 to €300,000 a year, while the restitution, rehabilitation and compensation programme to be in the vicinity of a million €1.3 or €1.5 million a year, for the next three to five years. Thus, their overall estimate of the financial costs for reparations is in the range of €4.5 million⁵⁴ up to €9 million⁵⁵.
62. In conclusion, the Trust Fund would like to reiterate that setting the amount of liability is a task properly within the judicial discretion of the Chambers. Indeed, the Trust Fund

53 "Ordonnance rendue en application de la règle 103 du Règlement de procédure et de preuve" ICC-01/04-01/06-3217, 15 July 2016.

54 Assuming that there are costs of €200,000 for symbolic reparations and €1.3 Mio for rehabilitation for a period of three years.

55 Assuming that there are costs of €300,000 for symbolic reparations and €1.5 Million for rehabilitation for a period of five years.

considers that there is no one mathematical formula or algorithm that can measure the price of a lost childhood or the lasting trauma of the crimes.⁵⁶

63. The overall harm assessment confirms that the manifestations of harm continue to directly and negatively affect the lives of victims presently and that the victims are in need of redress. The Trust Fund considers that the €1 million it has indicated it may complement from its “other resources” towards financing the draft implementation plan of reparations may facilitate the provision of “some redress to many victims” but that it will cost (significantly) more to provide full redress to all victims. In fact, and without wanting to prejudge the accuracy of this estimate, the Trust Fund recalls that the representative of the Women’s Initiative for Gender Justice on 11 October 2016 at the Trial Chamber’s public hearing on reparations has called the amount of €1 Million “manifestly insufficient” and suggested that instead financial resources needed to implement reparations in this case should be in the range of €4.5 to €9 million.

64. In short, the Trust Fund submits that the Trial Chamber should set Mr Lubanga’s liability to be substantially higher than the 1 Million Euros that the Trust Fund has indicated it may complement at this stage.

4. The “complement” in accordance with regulation 56 of the RTFV

65. Finally, the Trial Chamber has requested the Trust Fund to inform it in the present submission, if necessary, of “the revised monetary amount that the TFV intends to advance in order to execute the Draft Implementation Plan.”

66. The Trust Fund respectfully submits that since the order’s issuance on 9 February 2016, there have been significant developments that directly affect the request by the Trial Chamber, namely the Trial Chamber’s approval of the implementation of symbolic

⁵⁶ The Trust Fund recalls that this same point was made by the legal representative of victims VO1 during the public hearing on 11 October 2016, when he remarked: “How can one calculate the price of lost youth? Is it worth a million, half a million, €100,000, €200,000 or €1,000?”.

reparations of 21 October 2016⁵⁷ and the decision of 8 December 2016⁵⁸ instructing the Trust Fund to submit additional information regarding collective reparations along the lines of the process concerning symbolic reparations so as to enable the Trial Chamber to move forward with approving the draft implementation plan for non-symbolic service-based reparations.

67. The Trust Fund recalls that in the Draft Implementation Plan submitted on 3 November 2016, indicated that full implementation of the proposals contained in the plan would cost an estimated €1 million over three year, and that, should the Trial Chamber approve the plan in its entirety, this may be the amount that the Board of Directors is prepared to approve to complement the payment for collective awards for reparations in accordance with regulation 56 of the Regulations of the Trust Fund. The Trust Fund further recalls that in its submission on symbolic reparations it indicated that part of the reparations contained in that proposal would cost €170,000 that would be deducted from the €1 Million complement total⁵⁹.

68. The Trust Fund emphasises that, and as has been confirmed by the Appeals Chamber, the setting of an amount that the Trust Fund may complement towards funding a reparations award out of its own voluntary resources, is at the discretion of the Trust Fund's Board of Directors.

69. The Trust Fund submits that the proposal to complement €1 million for the implementation of collective reparations as articulated in the Draft Implementation Plan continues to stand at present. As noted above a portion of the proposed complement has already been set aside for the implementation of the approved symbolic reparations plan. In light of the ICC's other cases currently at the reparations stage (Katanga, Bemba, and Al Mahdi) and the limitations of the Trust Fund's reparations reserve, the Trust Fund submits that any increase of this sum would be contingent on the Trust Fund's ability to successfully fund raise against the eventual approval of a reparations plan. In fact, the

⁵⁷ Trial Chamber, "Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations". ICC-01/04-01/06-3251, 21 October 2016.

⁵⁸ Trial Chamber, Order instructing the Trust Fund for Victims to Submit Information regarding Collective Reparations, 8 December 2016, ICC-01/04-01/06-3262.

⁵⁹ Trust Fund for Victims, Filing on Symbolic Reparation, ICC-01/04-01/06-3223-Conf and its confidential annex (ICC-01/04-01/06-3223-Conf-Anx), 19 September, para. 65.

Trust Fund considers that the €1 million could act as “seed money” to start the implementation of reparations for the victims of this case so that further funding may be attracted.

III. CONCLUSION

70. The Trust Fund reiterates its commitment to jointly working with the Trial Chamber, parties, and stakeholders to these proceedings, so as to fulfil the promise of reparations set out in the Rome Statute in such a manner as to ensure equity and responsiveness to the rights of victims and the convicted person.

71. The Trust Fund also wishes to inform the Trial Chamber of its willingness and commitment to provide any further information in relation to this submission that the Trial Chamber deems necessary.

FOR THE FOREGOING REASONS

The Board of Directors respectfully submits this filing and the third set of potential victim dossiers in response to the Trial Chamber’s order of 9 February 2016.



Pieter W.I. de Baan

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

Dated this 22 December 2016

At The Hague, The Netherlands