

**Cour
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**International
Criminal
Court**



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Date: **4 December 2018**

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 Redacted document

**Further information on the reparations proceedings in compliance with the Trial
Chamber's order of 16 March 2018**

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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**Victims Participation and Reparation
Section**

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I. CLASSIFICATION OF THE PRESENT FILING

1. The Trust Fund has classified the present filing as confidential pursuant to regulation 23 *bis* (1) of the Regulations of the Court, [EXPURGE]. The Trust Fund will file a public redacted version of this submission shortly.
- 2.

II. RELEVANT BACKGROUND

3. On 15 December 2017, Trial Chamber I (“Trial Chamber”) issued a decision (“Decision of 15 December 2017”),¹ in which it, *inter alia*:
 - a) fixed the amount of Mr Lubanga’s liability for reparations in the present case to \$10,000,000 USD;
 - b) determined that 425 victims who had participated in the new reparations proceedings instituted by the Trial Chamber were eligible for the collective reparations awards ordered in the case;
 - c) determined that these 425 eligible victims constituted only a sample of the potentially eligible victims and that hundreds to thousands of additional victims had suffered harms caused by the crimes for which Mr Lubanga was convicted; and
 - d) ordered, by 15 January 2018, the Trust Fund to provide observations on the possibility of locating and identifying additional eligible victims with the assistance of the Office of Public Counsel for Victims, in its role as legal representative in the case, and the two teams of legal representatives of victims (“OPCV Legal Representative”, “Legal Representative V01”, Legal Representative V02”, and “Legal Representatives”, collectively); and
 - e) requested, by 15 February 2018, that the Trust Fund for Victims’ Board of Directors (“Trust Fund” and “TFV Board”, respectively) indicate whether, pursuant to regulation 56 of the TFV Regulations, it would provide a supplementary² complement to provide the full payment of the collective awards for reparations ordered against Mr Lubanga

¹ Corrected version of the « Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu », 21 December 2017, ICC-01/04-01/06-3379-Red-Corr, with two public annexes (Annex I and Annex III) and one confidential annex, *ex parte* Registry, Trust Fund for Victims, Legal Representatives of V01 and V02 groups of Victims and Office of Public Counsel for Victims (Annex II) and confidential redacted version of Annex II. The decision and annexes were given on 15 December 2017 and the corrected versions were filed on 21 December 2017.

² The Trust Fund’s initial complement was proposed in November 2015 for the amount of EUR 1,000,000. This amount was thus put forward before Mr Lubanga’s liability for the reparations ordered against him had been set.

or whether it would undertake activities in order to raise further funds (“Supplementary Complement Request”).³

4. On 15 January 2018, the Trust Fund submitted the requested observations.⁴

5. On 25 January 2018, the Trial Chamber directed the Trust Fund to provide further information by responding to four questions posed by the Trial Chamber on the Trust Fund’s anticipated procedure for determining potential victims’ eligibility in the collective reparations awards. (“25 January 2018 Order”).⁵

6. On 16 March 2018, the Trial Chamber issued an order, instructing the Trust Fund to provide its responses to the four questions by 21 March 2018 and to provide additional information in relation to other matters by 13 April 2018,⁶ namely the following matters:

- a) The status of discussions with the various actors concerning locating and identifying new victims;
- b) to transmit to it the TFV Board’s decision on the Supplementary Complement Request; and
- c) to submit the fourth update report on the status of the implementation of the service-based and symbolic reparations programmes.⁷

7. On 21 March 2018, the Trust Fund submitted its responses to the four questions posed by the Trial Chamber (“21 March 2018 Observations”).⁸

8. The Trust Fund hereby submits the requested information under a) and b). The fourth update report will be submitted in a separate filing.

³ Decision of 15 December 2017, pp. 124-125.

⁴ Observations in relation to locating and identifying additional victims pursuant to the Trial Chamber’s decision of 15 December 2017, 15 January 2018, ICC-01/04-01/06-3386, para. 6.

⁵ Order Directing Further Information from the Trust Fund for Victims on the Procedure for Determining Victim Status at the Implementation Stage of Reparations, 25 January 2018, ICC-01/04-01/06-3391-tENG, para. 5.

⁶ « Ordonnance enjoignant au Fonds au profit des victimes de déposer les documents sollicités par la Chambre sur le processus de sélection des nouvelles victimes, sur l’état d’avancement des discussions avec les acteurs concernés concernant la recherche et l’identification de nouvelles victimes, sur la possibilité d’affectation d’un montant supplémentaire aux réparations et sur l’état d’avancement de la mise en œuvre des réparations », ICC-01/04-01/06-3395 (“16 March 2018 Order”).

⁷ 16 March 2018 Order, p. 7.

⁸ Observations in relation to the victim identification and screening process pursuant to the Trial Chamber’s order of 25 January 2018, ICC-01/04-01/06-3398.

III. SUBMISSIONS OF THE TRUST FUND

A. Status of discussions concerning locating and identifying new victims

9. The Trust Fund's submissions under this heading are divided into three parts: 1) information regarding the consultations held to date with the Legal Representatives and Victim Participation and Reparations Section ("VPRS"); 2) as already indicated in its 21 March 2018 Observations,⁹ two overarching issues that, in the Trust Fund's view, may impact upon the timing of the identification of new victim beneficiaries in these proceedings; and 3) the Trust Fund's submissions to the proposed next steps for the locations and identification of new victims, including timing considerations.

1. Consultations held with the various actors in the victim location and identification process

10. The Trust Fund incorporates by reference the procedural history setting out the meetings and consultations held with the Legal Representatives and VPRS from 15 December 2017 until 15 January 2018 contained in its filing of 15 January 2018.

11. On 23 January 2018, the Trust Fund met with the OPCV Legal Representative team.

12. On 27 January 2018, Trust Fund's Associate Legal Officer responsible for the *Lubanga* case left on an extended and pre-scheduled mission to the field in relation to another case at the reparations phase.

13. On 5 February 2018, the Trust Fund engaged an external legal consultant to travel to The Hague to serve as a liaison for the Trust Fund's Associate Legal Officer in conducting consultations with VPRS and the Legal Representatives.

14. On 6 and 8 February 2018, the Trust Fund met again with the OPCV Legal Representative.

15. On 7 February 2018, the Trust Fund met with VPRS and had a telephone discussion with the Legal Representative V01.

⁹ Para. 8.

16. On 13 February 2018, the Trust Fund met with one of the three legal counsels of the Legal Representative V02's team at the Bunia, DRC field office.

2. Issues affecting the timing of the location and identification of new victims

17. As already indicated, the Trust Fund herein discusses two issues, namely: 1) the deteriorating security situation in Ituri, and 2) the need to ensure the continued relevance, feasibility, and responsiveness of the Trust Fund's approved draft implementation plan (covering both symbolic and service based aspects, which were approved separately), taking into account the Trial Chamber's determination in its Decision of 15 December 2017 finding 425 individuals eligible for collective reparations in the present case.

a) The security situation in Ituri

18. The Trust Fund considers that the Trial Chamber and parties are already well informed of the current security situation in Ituri, as this has been extensively reported on in numerous public news sources, and accordingly does not detail the specific attacks, displacements, etc. that have occurred and continue to occur regularly in Ituri. Rather, the Trust Fund focusses on the effect this situation may have on undertaking a location and identification process for new victims. Should the Trial Chamber, however, wish to receive additional factual information of the situation on the ground in Ituri, the Trust Fund stands ready to assist the Trial Chamber in this regard. The Trust Fund notes that the parties also may have information in this regard that they may wish to call to the Trial Chamber's attention in their responses to the present filing. Further, should the Trial Chamber wish to receive further information in regards to an assessment of the security situation, the Trust Fund respectfully suggests that the Registry's Country Analysis Unit, as well as with the support of the Kinshasa and Bunia field offices, would be able to provide such an analysis.

19. In the Trust Fund's view, the security situation raises two major challenges. First, logistically, the Trust Fund's ability to travel outside of Bunia to conduct victim identification activities is subject to security restrictions that are outside of its control. At present, it is possible to go on mission to some locations outside of Bunia, however, other areas are completely inaccessible to the Trust Fund due to these security travel restrictions. From a

logistical perspective, these concerns are compounded by ongoing population displacements¹⁰ occurring in many of the areas where potential victims reside, making it very difficult to realistically map locations where victims may be *currently* located.

20. Second, and in the Trust Fund's view more importantly, even if it were able to travel to areas where potential new victims may be located, conducting identification activities in the current environment raises serious concerns regarding victim safety and well-being. [EXPURGE].

21. In conclusion, it is the Trust Fund's strongly held view that it not advisable to conduct new victim location and identification activities at the present time in light of the current security situation in Ituri. [EXPURGE].

22. The Trust Fund is closely monitoring the security situation and will keep the Trial Chamber fully apprised of any changes in this regard.

b) The continued responsiveness of the Trust Fund's draft implementation plan

23. As a preliminary matter, the Trust Fund's submissions in this section are limited to the service-based reparations programme portion of its draft implementation plan. The Trust Fund addresses the status of the implementation of the symbolic reparations programme in the separate progress report to the Trial Chamber.

24. Thus, in relation to this second matter, the Trust Fund would first recall the following relevant background.

25. On 7 August 2012, Trial Chamber I, in its original composition, issued its order for reparations in the *Lubanga* case.¹¹

¹⁰ The Trust Fund notes that civilians are fleeing villages surrounding Bunia due to being attacked, but also in anticipation of potential attacks, movements which can develop quite rapidly from the rapid spread of rumours.

¹¹ Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904. In its "Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings", ICC-01/04-01/06-2953, the Appeals Chamber rejected as inadmissible Mr Lubanga's appeal under article 82(1)(d) and found admissible the three appeals brought under article 82(4) by Mr Lubanga, jointly by the Legal Representatives of Victims V02 and the OPCV, and the Legal Representative of Victims V01, deeming, for purposes of admissibility, the decision to be an order for reparations within the meaning of article 82 (4) of the Statute.

26. On 3 March 2015, the Appeals Chamber rendered its judgment on the appeals against Trial Chamber I's order for reparations,¹² partially confirming and amending it pursuant to rule 153 (1) of the Rules of Procedure and Evidence and remanding to the then to be newly composed Trial Chamber the one outstanding element of setting of Mr Lubanga's liability for reparations ("Amended Order for Reparations"),¹³ as well as tasking the Trial Chamber with the responsibilities of approving the Trust Fund plan for the implementation of the Amended Order for Reparations ("Draft Implementation Plan"), hearing any contested issues, and monitoring and overseeing the implementation of the reparations by the Trust Fund.

27. On 3 November 2015, the Trust Fund submitted its Draft Implementation Plan,¹⁴ which was developed based on the views and proposals submitted by the then 139 victim participants in the earlier reparations proceedings, insights expressed at an expert conference held in Belfast, and the community consultations the Trust Fund undertook in Ituri.¹⁵

28. On 6 April 2017, the Trial Chamber approved the Trust Fund's programmatic framework for the service-based collective reparations,¹⁶ which the Trust Fund also submitted based on its 2015 Draft Implementation Plan and the underlying victim information informing it.

29. With this background in mind, the Trust Fund notes that the reparations proceedings instituted by the Trial Chamber and its Decision of 15 December 2017 have created a different victim and potential victim pool and a different and much more detailed victim profile of harms suffered and current needs and desires in terms of those individuals who are or may be eligible to participate in the individualised service-based collective awards ordered in this case.

30. Put differently, when the Trust Fund was contemplating its programme of service-based collective reparations in its Draft Implementation Plan, it did not have the benefit of a

¹² Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2, ICC-01/04-01/06-3129 ("Appeals Chamber Reparations Judgment").

¹³ Appeals Chamber Reparations Judgment, paras 238-242.

¹⁴ Draft Implementation Plan for collective reparations to victims Submitted to the Amended Reparations Order of 3 March 2015 in the case against Thomas Lubanga Dyilo (ICC-01/04-01/06), ICC-01/04-01/06-3177-AnxA.

¹⁵ Amended Order for Reparations, para. 79.

¹⁶ Order approving the proposed programmatic framework for collective service-based reparations submitted by the Trust Fund for Victims, 6 April 2017, ICC-01/04-01/06-3289.

detailed appreciation of the concrete needs and wishes of the victim population affected by Mr Lubanga's crimes.

31. As such, while best efforts were made to put forward a responsive reparations programme, not having the benefit of victim-sourced information meant that the Trust Fund has since then been aware that it would eventually need to assess the relevance of its programme offering upon such information becoming available.

32. In this regard, in light of the Decision of 15 December 2017 and the very efficient and careful field work of the Legal Representatives during the recent reparations proceedings, the Trust Fund observes that it can fairly identify three discrete categories of victims and potentially eligible victims. These are namely: 1) the 425 individuals that the Trial Chamber determined are eligible for reparations¹⁷ ("Group 1"); 2) an estimated 400-800 persons who were already preliminarily located and identified before 15 December 2017 by the Legal Representatives,¹⁸ but whose files were not started or not completed by the deadline for transmission to the Court ("Group 2"); and 3) an unknown number of persons who, until today, have not been located or identified ("Group 3").

33. In relation to Group 1, the Trust Fund is aware from the submissions made to the Trial Chamber in advance of the Decision of 15 December 2017, as well as from its consultations with the Legal Representatives detailed above, that certain potential gaps have been identified in the Trust Fund's current programme framework, particularly in regards to appropriate and responsive activities for family members of child soldiers killed or seriously injured in combat as well as various vulnerable groups, such as former girl soldiers. Of particular importance to the Trust Fund is the fact that the eligible victims in Group 1 themselves have ideas and proposals as to potential projects and activities that they consider would be most responsive to the harms that they have suffered. For example, the Trust Fund has been informed of victims proactively forming informal groups to brainstorm and come up with ideas of activities that they, and others, could do in a collective manner.

¹⁷ Decision of 15 December 2017, para. 190.

¹⁸ See email communication of 19 December 2017 from the OPCV Legal Representative to the Trust Fund. The Trust Fund has also been informed by the V01 and V02 Legal Representatives that they are aware of a number of potential new victims.

34. The Trust Fund considers that this presents an important opportunity to deepen the participatory role of the victims in refining and potentially expanding the design and scope of the reparations programme. In this regard, the Trust Fund recalls that victim participation, including taking into account their “views and proposals”, in the design of reparations programmes and the nature of any proposed collective awards is a requirement of the Amended Order for Reparations.¹⁹

35. Furthermore, in relation to potential victims in Group 2, concerns about the responsiveness of the currently proposed activities have also been expressed to the Legal Representatives who informally inquired with these individuals as to their interest in coming forward to participate in the collective service-based reparations programme, views which the Legal Representatives then conveyed to the Trust Fund. The Trust Fund has understood that this concern has contributed to some potentially eligible victims expressing hesitation about coming forward and going through any eligibility process.

36. In light of the above, it is the Trust Fund’s view that its foremost priority at the present time is to undertake a review of its service-based reparations programme, the goal of which is three-fold: firstly, to take the requisite steps to get reparations programmes delivered as soon as possible for the benefit of victims in Group 1; secondly, to elicit the active participation of the Group 1 victims in the further refining of the service-based programme; and thirdly, to ensure that the reparations programmes are responsive to the harms suffered and current wishes and needs of victims in Group 1. This means that there is a need for fine-tuning and expansion of the current envisioned programme, including the concrete activities to take place under each modality awarded in the Amended Order for Reparations based on input from various profiles of beneficiaries – commencing with the concerns and wishes of victims in Group 1 – so as to ensure that the service-based reparations are met with a high-level of satisfaction among the beneficiaries.

37. In addition, it is the view of the Trust Fund that at the start of program delivery to beneficiaries in Group 1, it is appropriate to commence its victim identification and verification activities for persons in Group 2 and then shortly thereafter Group 3. This will

¹⁹ See Amended Order for Reparations, paras 70, 79.

permit individuals determined to be eligible in Groups 2 and 3 to quickly roll into an ongoing service-based reparations programme, thereby eliminating a potential delay between being found eligible and the provision of services. The Trust Fund considers that ensuring that eligible victims in these latter Groups are able to be quickly integrated into active projects is important to preventing any conflict or misunderstanding between beneficiaries in Group 1 and those in Groups 2 and 3. It is also the Trust Fund's view that the refinements made to the reparations programme in relation to the views of the victims in Group 1 will also by default benefit the eligible victims in Groups 2 and 3 in terms of programme responsiveness. However, the Trust Fund will continue to actively monitor the responsiveness of its projects and activities within the reparations programme as victims are filtered into the programme and will continue to make refinements and additions based on any changes in the victim harm and needs profile emerging from new victims in these latter Groups.

3. The Trust Fund's proposed next steps

38. In light of the above two considerations, the Trust Fund has engaged with VPRS and been informed that, following the practice developed in the *Katanga* case, VPRS is available to extract summary-form data from the victim dossiers stored in the VAMS and place this data in a manipulable format for the Trust Fund in respect of the 425 victims in Group 1. Based on the Trust Fund's experience using similar data extractions in *Katanga*, it estimates it will need approximately [EXPURGE] to conduct this review to determine what programming updates are required to its Draft Implementation Plan. The Trust Fund will also at the same time review in detail the submissions of the Legal Representatives that have been filed since the Trial Chamber's approval of the Draft Implementation Plan as regards the programming needs and wishes of victims. Furthermore, security permitting and if considered to be of potential utility following an initial review of the already available victim information, in addition to this desk-work that will be conducted in The Hague, the Trust Fund also intends to undertake joint missions with the Legal Representatives to consult in person with their clients in Group 1.

39. The Trust Fund considers that this review can start at [EXPURGE] and would accordingly take [EXPURGE].

40. In regards to how this might affect the tender process of the service-based reparations programme, the Trust Fund consulted on this point with the Procurement Unit. As is explained in further detail in the separate progress report, the period of time for potential bidders to respond to the expression of interest (“EoI”) [EXPURGE]. Procurement has clarified for the Trust Fund that changes can be made to the scope of work up until the request for proposal (“RFP”), which will contain the scope of work, is provided to the organisations determined to be qualified from the EoI process. Accordingly, the refinement process laid out above will be directly translated into the scope of work provided in the RFP to the qualifying organisations.

41. In light of the current security situation constraints, the Trust Fund respectfully submits that the above described activities will permit it to nonetheless advance the reparations implementation process in [EXPURGE].

B. The Supplementary Complement Request

42. The Trust Fund hereby informs the Trial Chamber that the TFV Board has decided as a matter of principle of its intention to complement the full amount of the Supplementary Complement Request. However, due to its available reparations reserve resources, the TFV Board is not currently in a position to guarantee that it will be able to complement the full \$10,000,000 amount of reparations awarded in this case. But, the TFV Board has decided and committed to undertaking fundraising activities in order to raise the needed funds to meet the Request.

FOR THE FOREGOING REASONS

The Board of Directors respectfully submits the requested additional information.

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

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

Dated the 4 of December 2018

At The Hague, The Netherlands