

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/04-02/06 A4 A5**

Date: **30 September 2021**

**THE APPEALS CHAMBER**

**Before:** Judge Marc Perrin de Brichambaut, Presiding Judge  
Judge Piotr Hofmánski  
Judge Luz del Carmen Ibáñez Carranza  
Judge Solomy Balungi Bossa  
Judge Gocha Lordkipanidze

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

**IN THE CASE OF**

***THE PROSECUTOR v. BOSCO NTAGANDA***

**Public**

**Observations in relation to the ‘Defence Appellant Brief Against the 8 March Reparations Order’ and the ‘Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order’**

**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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## BACKGROUND

1. On 8 March 2021, Trial Chamber VI issued an order for reparations against Mr Ntaganda ('Reparations Order') awarding collective reparations with individualised components to direct and indirect victims of the crimes for which Mr Ntaganda was convicted, through the Trust Fund for Victims ('Trust Fund') pursuant to rule 98(3) of the Rules of Procedure and Evidence ('Rules') and assessing his liability at USD 30 million.<sup>1</sup> Further, the Trial Chamber found Mr Ntaganda indigent for the purposes of reparations at the time of the Reparations Order and encouraged the Trust Fund to complement the reparations award to the extent possible and engage in fundraising efforts to the extent necessary to complement the totality of the award.<sup>2</sup>

2. On 8 April 2021, the common legal representative of the victims of the attacks ('Legal Representative') and the Defence ('Ntaganda Defence') each filed a notice of appeal against the Reparations Order pursuant to Article 82(4) of the Rome Statute ('Statute').<sup>3</sup> On 7 June 2021, the Legal Representative and the Ntaganda Defence filed their appeal briefs against the Reparations Order.<sup>4</sup>

3. On 22 June 2021, the Trust Fund requested to make observations on a number of specific issues raised by the pending appeals.<sup>5</sup>

4. On 9 September 2021, the Appeals Chamber granted the Trust Fund's request, inviting it to make submissions of not more than 20 pages in relation to seven specific questions posed by the Appeals Chamber, and additionally of not more than 10 pages to address other matters related to the role of the Trust Fund in the implementation process, by 16h00 on 30 September 2021.<sup>6</sup>

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<sup>1</sup> [Reparations Order](#), 8 March 2021, ICC-01/04-02/06-2659, paras 249-253, 257, disposition.

<sup>2</sup> [Reparations Order](#), para. 257.

<sup>3</sup> [Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order](#), 8 April 2021, ICC-01/04-02/06-2668; [Defence Notice of Appeal against the Reparations Order](#), 8 April 2021, ICC-01/04-02/06-2669.

<sup>4</sup> [Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order](#), 7 June 2021, ICC-01/04-02/06-2674; [Defence Appellant Brief against the 8 March Reparations Order](#), 7 June 2021, ICC-01/04-02/06-2675 ('Defence Appeal').

<sup>5</sup> [Observations on the Defence Request for Suspensive Effect and Request under Rule 103 of the Rules of Procedure and Evidence](#), 22 June 2021, ICC-01/04-02/06-2679 ('Rule 103 Request').

<sup>6</sup> [Decision on Various Procedural Issues](#), 9 September 2021, ICC-01/04-02/06-2708.

## OBSERVATIONS ON APPEALS CHAMBER'S QUESTIONS

5. In accordance with the Appeals Chamber's decision of 9 September 2021, the Trust Fund hereby provides its responses to the questions posed.

*Q1: Can the [Trust Fund] determine the eligibility of the victims of Mr Ntaganda on the basis of the provisions of the Reparations Order? Would it require more explicit eligibility criteria in order to do so? How does the [Trust Fund] plan to proceed in implementing the mandate it has received from the Trial Chamber on this issue? Will there be oversight of this process by Trial Chamber II?*

6. The Trust Fund observes that the Reparations Order, read together with the Trial Chamber's conviction decision,<sup>7</sup> as upheld by the Appeals Chamber,<sup>8</sup> provides a firm basis for the Trust Fund to determine which victims fall within the scope of the crimes for which Mr Ntaganda was found responsible. In addition, the Reparations Order sets out the categories of victims – direct and indirect victims – who can be found eligible, by reference to each of the crimes for which Mr Ntaganda has been held responsible.<sup>9</sup> Furthermore, the Reparations Order sets out the burden of proof and the standard of proof to be applied in determining whether a person is a victim of the crimes committed by Mr Ntaganda.

7. Hence, based on the Conviction Decision and the Reparations Order the eligibility criteria appear clear and the Trust Fund is in a position to apply these criteria in order to verify<sup>10</sup> who is a victim of Mr Ntaganda's crimes.

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<sup>7</sup> [Judgment](#), 8 July 2019, ICC-01/04-02/06-2359 ('Conviction Decision').

<sup>8</sup> [Judgment on the Appeals of Mr Bosco Ntaganda and the Prosecutor against the Decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment'](#), 30 March 2021, ICC-01/04-02/06-2666-Red.

<sup>9</sup> [Reparations Order](#), paras 108-128.

<sup>10</sup> The Trust Fund notes that the terminology sometimes used (assessment or screening) must be understood to fall within the scope of the term 'verification' as used in the Regulations of the Trust Fund.

8. By way of background, the approach adopted by Trial Chamber VI is similar to the *Al Mahdi* case, in which the trial chamber provided the Trust Fund with eligibility criteria for the *individual* reparation awards in the order for reparations and left the design of the verification process to be conducted at the implementation stage to the Trust Fund. Only in the case of *Katanga* did the relevant trial chamber determine the eligibility of the victims in the actual order for reparations.<sup>11</sup>

9. Additionally, the Statute and the Rules do not regulate the eligibility process for a collective reparation award. The Regulations of the Trust Fund only address the eligibility process for beneficiaries of individual reparation awards. The eligibility process for victims falls arguably within the ‘methods for its/their implementation’ referred to in Regulation 69 of the Regulations of the Trust Fund, which need to be described in the draft implementation plan and approved by the Court. The Trust Fund observes that the Reparations Order is fully in line with this legal framework.

10. The Trust Fund is currently in the process of determining an appropriate model for the process leading to the ‘administrative eligibility assessment’<sup>12</sup> in this case. The Trial Chamber, in the Reparations Order, had instructed the Trust Fund to, *inter alia*, submit a detailed proposal “as to the way in which it expects to conduct the administrative eligibility assessment” in the Trust Fund’s draft implementation plan.<sup>13</sup> The draft implementation plan is currently due for submission to the Trial Chamber on 17 December 2021.<sup>14</sup>

11. As further background, upon consultations held with the Victims Participation and Reparations Section (‘VPRS’) and the legal representatives of victims, the Trust Fund suggested for approval of the Trial Chamber in the context of the initial draft implementation plan an eligibility assessment which focusses – as a first step – on participating victims with urgent needs

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<sup>11</sup> *But see Prosecutor v. Germain Katanga*, [Judgment on the Appeals Against the Order of Trial Chamber II of 24 March 2017 entitled “Order for Reparations pursuant to Article 75 of the Statute”](#), 9 March 2018, ICC-01/04-01/04-3778-Red, para. 1.

<sup>12</sup> See footnote 10 above regarding terminology.

<sup>13</sup> [Reparations Order](#), para. 253.

<sup>14</sup> See [Decision on the Trust Fund for Victims’ Request to Vary the Time Limit to Submit Draft Implementation Plan](#), 23 July 2021, ICC-01/04-02/06-2697.

and on an ‘urgency screening’ required to have victims enrolled in a programme expeditiously.<sup>15</sup> The Trust Fund is involved in intensive discussions with VPRS, other Registry sections and the legal representatives of victims in order to fully comply with the Trial Chamber’s stated view that “the administrative eligibility assessment should be harmonised, centralised, and similar for all the victims, to avoid a potential different treatment of the victims of the case and inconsistencies of approach”.<sup>16</sup> Constructive discussions were held and good progress has been made and the Trust Fund is confident that it can suggest a system in line with the Trial Chamber’s instructions. Furthermore, once the process is set out in the draft implementation plan, all parties and participants will presumably be able to submit their views to the Trial Chamber before the Trial Chamber issues its decision on whether and to what extent to approve the proposed eligibility assessment.

12. In relation to judicial oversight of the administrative eligibility process, the Trust Fund recalls that the entire process is overseen by the Trial Chamber as set out in the Regulations of the Trust Fund.<sup>17</sup> The upcoming draft implementation plan will be scrutinised and assessed by the Trial Chamber and, if found suitable, ultimately approved by it. The Regulations of the Trust Fund provide two tools of communication for the Trust Fund and the trial chamber: regular update reports to the trial chamber and the opportunity for the Trust Fund to address the trial chamber on any issue arising in the implementation (Regulations 57 and 58 of the Regulations of the Trust Fund).

13. The Trust Fund also observes that the Appeals Chamber stated in the *Lubanga* case that,

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<sup>15</sup> Trust Fund First Progress Report on the Implementation of the Initial Draft Implementation Plan and Notification of Board of Director’s Decision pursuant to Regulation 56 of the Regulations of the Trust Fund, 23 September 2021, ICC-01/04-02/06-2710-Conf (‘IDIP Progress Report’), paras 39-40.

<sup>16</sup> [Decision on the TFV’s Initial Draft Implementation Plan with Focus on Priority Victims](#), 23 July 2021, ICC-01/04-02/06-2696 (‘23 July 2021 Decision’), para. 37.

<sup>17</sup> See Regulations 57-58, 69 of the Regulations of the Trust Fund.

the relevant legal provisions – article 75(1) of the Statute, rules 94-98 of the Rules [...] and the Regulations of the TFV – do not stipulate who should assess eligibility in cases where collective reparations are awarded nor how exactly this should be done.<sup>18</sup>

14. In relation to individual awards for reparations, the Appeals Chamber held in the *Al Mahdi* case that,

the Trial Chamber did not err when it delegated the particular aspects it did, relating to the administrative screening of the applications for individual reparations, to the TFV. It is within the discretion of a trial chamber to request, on a case-by-case basis, the assistance of, for example, the TFV to undertake the administrative screening of beneficiaries of individual reparations meeting the eligibility criteria set out by the trial chamber. To this extent, the LRV's arguments are rejected. At the same time, however, the Appeals Chamber finds that it is for the Trial Chamber, in the exercise of its judicial functions, to make final determinations on individual victim applications where administrative decisions of the TFV are contested or *proprio motu*. Therefore, victim applicants, who are not found eligible for individual reparations, are entitled to request that the Trial Chamber review any such decision.<sup>19</sup>

15. The current proceedings do not relate to individual reparation awards but to a collective reparation award, *i.e.* the Court has not yet expressed itself as to whether victims are entitled to request a judicial review of administrative decisions. In that respect, the Trust Fund recalls that the *Al Mahdi* reparation order also contains a collective reparation award.

16. In sum, pursuant to this jurisprudence, it appears that the Trial Chamber has broad discretion in moulding its judicial oversight role in relation to the eligibility assessment of beneficiaries for collective reparations, keeping in mind that the Regulations of the Trust Fund provide for the basic parameters of such oversight.

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<sup>18</sup> *Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the Appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'](#), 18 July 2019, ICC-01/04-01/06-3466-Red ('Lubanga Appeal Judgment Size of Award'), para. 138.

<sup>19</sup> See *Prosecutor v. Ahmad Al Faqi Al Mahdi*, [Judgment on the Appeal of the Victims Against the "Reparations Order"](#), 8 March 2018, ICC-01/12-01/15-259-Red2, para. 72.

*Q2: From the perspective of the [Trust Fund], can the Defence and/or the legal representatives of victims challenge the choice of victims entitled to the benefit of reparations which the [Trust Fund] has been tasked to provide? Can the Defence and/or the legal representative of victims do so before Trial Chamber II? At what stage of the proceedings would this occur?*

17. According to the jurisprudence of the Court, the process of enrolling victims in reparation programmes is an administrative process, which in the view of the Trust Fund requires that an aggrieved party is given the right to challenge an adverse decision. Accordingly, the Trust Fund intends to propose to the Trial Chamber an eligibility process whereby a victim found ineligible by the Trust Fund can – personally or through a legal representative – petition the Trust Fund for an administrative review of this determination. The issue of the judicial oversight and/or judicial review has been addressed under question 1 above. In line with the Trial Chamber’s orders, the Trust Fund will make available any information that the Trial Chamber considers necessary to fulfil its oversight role. At a minimum, the Trust Fund will provide the Trial Chamber in its progress updates with information about the progress made in the verification of beneficiaries and numbers related thereto.

18. The jurisprudence of the Court for collective reparations has clarified in 2015 that the convicted person can challenge the criteria “for an individual’s eligibility in a collective award” but found it sufficient that the convicted person is heard on the procedures that will be established during reparation implementation pursuant to Rule 98(3) of the Rules and the Regulations of the Trust Fund.<sup>20</sup> The jurisprudence does not establish a role for the convicted person in the implementation of such procedures, *i.e.* – in relation to the issue under discussion – the eligibility process.

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<sup>20</sup> *Prosecutor v. Thomas Lubanga Dyilo*, [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 A A 2 A 3 (‘Lubanga Reparation Principles Appeal Judgment’), paras 165-168.

19. In the circumstances of the *Ntaganda* case, the Trust Fund underlines that, in accordance with the relevant jurisprudence, the Ntaganda Defence has, in the appeal at hand, the right to challenge the issues determined by the Trial Chamber in the Reparations Order. The Ntaganda Defence also already exercised the right to challenge Mr Ntaganda's conviction. Accordingly, the Ntaganda Defence had the right, and exercised it, to fully challenge the *criteria* by which an administrative body will determine whether a victim can be considered a victim of the crimes for which Mr Ntaganda has been convicted. In addition, the Ntaganda Defence will presumably have the opportunity to submit observations on the draft implementation plan and therefore be heard by a judicial authority on the *process* relevant to the eligibility assessment. The Trust Fund observes that during the implementation, the Ntaganda Defence will be kept informed through the Trust Fund's progress updates to the Trial Chamber, which will include information about the eligibility process.

20. As for the stage of proceedings, the Trust Fund considers that the reparation implementation stage has started with the issuance of the Reparations Order, which may become final upon a judgment on the pending appeals. As set out in its submissions before the Trial Chamber, the Trust Fund considers that a decision on enrolment in a programme should be taken as closely as possible in time to when the victim is actually to receive reparations.<sup>21</sup>

*Q3: Can the [Trust Fund] identify and determine the specific modalities of the reparations to be implemented on the basis of the Reparations Order? Can the Defence make submissions in this regard?*

21. The Trust Fund considers that the Reparations Order allows it to identify and determine the specific modalities of the collective reparations award with individualised components ordered by the Trial Chamber. In particular, the Reparations Order contains the essential elements as

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<sup>21</sup> [Trust Fund for Victims' Observations relevant to Reparations](#), 28 February 2020, ICC-01/04-02/06-2476, paras 30-33; [23 July 2021 Decision](#), paras 19, 33.

required by the Appeals Chamber's jurisprudence. In respect of the determination required in relation to the modalities for reparations, the Appeals Chamber held previously that,

in the order for reparations, at a minimum, the Trial Chamber must identify those modalities of reparations which it considers appropriate based on the circumstances of the specific case before it. The Trust Fund shall design awards for reparations on the basis of all or some of those modalities and should link the relevant modalities to the award for reparations in its draft implementation plan, in order for the Chamber to review the determinations made in this respect.<sup>22</sup>

22. The legal framework, *i.e.* the Regulations of the Trust Fund, confirms that the Trust Fund is intended to have a say in how the reparations are designed and implementation-related methods devised. Examples are Regulation 66 of the Regulations of the Trust Fund which provides that the "Trust Fund shall determine the modalities for the disbursement of reparations awards to beneficiaries taking into account their present circumstances and locations" and Regulation 63 of the Regulations of the Trust Fund which provides the Board of Directors with the authority to determine the standard of proof for verification purposes in case of individual reparation awards, in case of lack of guidance by the relevant trial chamber.

23. In relation to collective reparations, Regulation 69 of the Regulations of the Trust Fund stipulates that it is for the Trust Fund in the draft implementation plan to "set out the precise nature of the collective award(s), where not already specified by the Court, as well as the methods for its/their implementation", including after consultations with victims, their families, the legal representatives of victims, and any competent expert or expert organisation. Overall, Regulations 68 to 71 show that it is the Trust Fund's role to design the collective reparation awards, subject to the approval of the trial chamber. However, the Trust Fund also notes that the Regulations of the Trust Fund foresee that an order for reparations may also determine certain matters, such as the standard of proof or the precise nature of the reparation awards and require the Trust Fund to adhere to the determinations set out in the order for reparations.

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<sup>22</sup> [Lubanga Reparation Principles Appeal Judgment](#), para. 200.

24. On the concrete relationship between a trial chamber and the Trust Fund during the implementation of reparations, the Statute and the Rules are silent. Their regulatory framework ends with the issuance of the order for reparations and the appeal against such an order.<sup>23</sup> However, the Regulations of the Trust Fund highlight three areas: (1) submission to and approval by the Trial Chamber of the draft implementation plan (Regulation 57); (2) updates to the trial chamber on progress in the implementation of the award (Regulation 58); and (3) at the end of the implementation period, submission of a final narrative and financial report to the trial chamber (Regulation 58). In addition, the Trust Fund can address the relevant chamber, ‘as appropriate, with any questions that arise in connection with the implementation of the award’ (Regulation 57). Regulation 74 of the Regulations of the Trust Fund refers to the Court’s role as “overall oversight”. The Trust Fund considers that these provisions set out the legal framework for the oversight and monitoring role of a trial chamber, to which this Trial Chamber fully adhered when issuing the Reparations Order.

25. Based on the Reparations Order, the Trust Fund is engaged in intense consultations with different stakeholders to design the award for reparations and will make its submissions in this regard in the draft implementation plan. As already set out above, the Ntaganda Defence and the legal representatives of victims will then presumably have the opportunity to make submissions thereon.

*Q4: Can the [Trust Fund] allocate the reparations between the child soldiers and the victims of the attacks on the basis of the Reparations Order?*

26. To date, the Trust Fund has notified the Trial Chamber of a first allocation of funds towards the full complement of the collective reparation award in the instant case.<sup>24</sup> The further allocation of funds will be a matter of time and continued fundraising. The Trust Fund will keep the Trial

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<sup>23</sup> The only exception is the regulation of the enforcement of a reparation order in Rule 218 of the Rules.

<sup>24</sup> See IDIP Progress Report, paras 61-64.

Chamber updated about any additional Board decisions on complementing the payment of the award and their subsequent decisions on allocating funds to the case of *Ntaganda*, as well as on earmarked donations to the case of *Ntaganda*.

27. The Appeals Chamber’s question relates to the grounds of appeal raised in relation to the amount of liability. As also addressed under question 6 below, in the experience of the Trust Fund victims will continue to come forward, in particular once a specific reparation programme commences. The Trust Fund considers it essential for the credibility of both the Court and the Trust Fund that the Trust Fund’s reparation programmes remain accessible to the victims in particular once such a programme starts. The Trust Fund recalls that the issue of the number of victims underlying a determination of the amount of liability has been addressed by the Appeals Chamber holding that “limiting the reparations process [...] to those who have applied for reparations would serve no apparent purpose”.<sup>25</sup> Accordingly, when determining the amount of liability in the order for reparations, the final number of victims will, as a rule and in particular in the large-scale cases before the Court, remain unknown. Hence, insofar as such numbers of individuals are deemed important for the determination of the amount of liability, those numbers will need to be subject to estimates.

28. The Trust Fund started its consultations with communities and victims in the field but cannot provide any additional facts or information that would assist the Chambers in such estimates. The Trust Fund, however, shares the assumption of the Trial Chamber, given the information available in the case record, that it is likely that there will be more victims of the attacks than child soldiers.

29. Devising the reparation measures is a matter not so much of numbers of victims, but of the effect of the measures on the victims and their communities. In that regard, the Trust Fund seeks to put in place effective reparation measures that can reach a wide array of persons. As reparation measures will need to be implemented by a phased approach, as permitted by the Reparations Order, the Trust Fund considers that the estimates of costs and their division within the amount of liability relevant to the two groups – child soldiers and victims of the attacks – may also change

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<sup>25</sup> [Lubanga Appeal Judgment Size of Award](#), para. 82.

over time and adapt to the realities in the field. However, the Trust Fund starts from the prognosis of having to address in total more victims of the attacks than child soldiers.

*Q5: Does the [Trust Fund] intend to request Trial Chamber II for further clarity on some of the aforementioned issues? What modality of dialogue with Trial Chamber II does it envisage?*

30. At this stage, the Trust Fund has no intention to seek clarification from the Trial Chamber, as the Reparations Order is sufficiently clear for it to proceed. However, should specific matters arise that require clarification, in the course of the preparation of the draft implementation plan or of the implementation itself, the Trust Fund will approach the Trial Chamber. For the time being, the Trust Fund submits bi-monthly reports on the implementation of reparations for priority victims, thus keeping the Trial Chamber updated on this implementation process.<sup>26</sup>

31. As for the modality of dialogue, as set out above, the Regulations of the Trust Fund provide for regular progress updates to the trial chamber and the opportunity for the Trust Fund to address the trial chamber on any issue arising in the implementation.

*Q6: Is it of any consequence that Mr Ntaganda is not of Hema ethnicity in relation to the process of identification of child soldiers in terms of the number of child soldiers that might come forward in this case?*

32. By way of background, the Trust Fund's experience working with victims and reparation programmes has shown that there are various stages when potential beneficiaries come forward. One such stage is during an outreach campaign of identifying potential beneficiaries, which in the present proceedings is still to be conducted. Another stage is when beneficiaries actually start

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<sup>26</sup> [23 July 2021 Decision](#), disposition.

receiving reparations and are enrolled in reparation programmes. This may have a tremendous effect on victims and the wider victim community. As soon as some victims receive reparations, others may realise that the programmes are operational and also come forward. This prospect makes it difficult to speak in advance of a specific number of victims and reinforces the need for all stakeholders to work on the basis of estimates in relation to reparation awards and reparation programmes, in particular when collective reparations were awarded.

33. As far as the impact of Mr Ntaganda's ethnicity on the number of potential beneficiaries is concerned, specifically the group of former child soldiers, the Trust Fund cannot report on any direct contact with potential further former child soldier beneficiaries on the matter or with other persons it had contact with during the consultations it held in May and June 2021. The Trust Fund also cannot refer the Appeals Chamber to sources that it could make available to it in the matter. The Trust Fund nevertheless gives credit to the idea that Mr Ntaganda's ethnicity and his level of influence within the Hema community should not prevent victims from coming forward to benefit from reparations, keeping in mind that it has been challenging in the *Lubanga* case to convince victims to be involved both at the trial and reparation stage.

*Q7: How does the [Trust Fund] intend to implement the Trial Chamber's determination to "adopt, for the purposes of reparations in this case, the reparation programmes ordered by Trial Chamber II in the Lubanga case, in relation to the overlapping victims and harms of both cases"? How will it take into consideration the finding of the Trial Chamber that both convicted persons are jointly and severally liable for the overlapping victims?*

34. Mr Ntaganda has been held liable for all the crimes committed by Mr Lubanga and in addition thereto also for other crimes. Accordingly, the victims of some of their crimes overlap.

As a result, the Trial Chamber determined that the *Lubanga* reparation programmes should be adopted for the purposes of the *Ntaganda* reparations proceedings.<sup>27</sup>

35. The finding of the Trial Chamber relevant to the liability of Mr Lubanga and Mr Ntaganda, severally and jointly, is important because it forms the foundation for allowing the Trust Fund to use the existing *Lubanga* reparation programme for the purposes of the case of *Ntaganda*, insofar as victims and harm overlap. Should either or both convicted persons not be considered indigent anymore,<sup>28</sup> *i.e.* assets be discovered, and the Presidency be in a position to enforce the payment of the collective order for reparations and channel the proceeds to the Trust Fund, the Trial Chamber clearly stated in the Reparations Order that Mr Ntaganda and his co-perpetrators, including Mr Lubanga, are “all jointly liable *in solidum* to repair the full extent of the harm caused to the victims. Responsibility in solidum [...] entails the corresponding right for any of the co-perpetrators who may have repaired, in full or in part, the harms caused to the direct and indirect victims, to seek to recover from the co-perpetrators their proportionate share”.<sup>29</sup>

36. In sum, for the purpose of addressing the harm of child soldiers in the *Ntaganda* case (without the specific additional harms recognised only in the *Ntaganda* case), the Trust Fund will propose to the Trial Chamber to make use of the existing *Lubanga* collective service-based reparation programme according to a methodology to be set out in the draft implementation plan.

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<sup>27</sup> [Reparations Order](#), para. 220.

<sup>28</sup> [Reparations Order](#), para. 254; *Prosecutor v. Thomas Lubanga Dyilo*, Second Order on the Financial Situation of Thomas Lubanga Dyilo, 25 January 2016, ICC-01/04-01/06-3192-Conf-Exp-tENG, disposition; *Prosecutor v. Thomas Lubanga Dyilo*, [Notification of the Board of Directors’ Decision on the Trial Chamber’s Supplementary Complement Request pursuant to Regulation 56 of the Regulations of the Trust Fund for Victims](#), 2 October 2018, ICC-01/04-01/06-3422; *Prosecutor v. Thomas Lubanga Dyilo*, [Notification d’un complément additionnel en vertu de la règle 56 du Règlement du Fonds au profit des victimes](#), 12 December 2018, ICC-01/04-01/06-3432; IDIP Progress Report, paras 61-64.

<sup>29</sup> See [Reparations Order](#), para. 219.

## **GENERAL OBSERVATIONS ON THE TRUST FUND'S ROLE IN THE IMPLEMENTATION PROCESS**

37. Most of the issues relevant to the Trust Fund in the appeal have been addressed in the questions raised by the Appeals Chamber and answered above.

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

39. The role of the Trust Fund as well as that of the trial chamber in the reparation implementation is primarily dependent on how a trial chamber wishes to exercise its discretion in overseeing and monitoring the reparation implementation that the Regulations of the Trust Fund provide for. The Appeals Chamber has held that "trial chambers have a large degree of discretion in deciding how to conduct reparations proceedings".<sup>30</sup>

40. Given the Court's jurisprudence on the roles of the trial chamber and the Trust Fund in reparations proceedings, as set out above, there may be very little to settle judicially. A trial chamber's determination of its own role could only be found in breach of the Court's jurisprudence if it abused its discretion and, as the Ntaganda Defence seems to argue, fully extracted itself from any responsibility, 'handing it all' to the Trust Fund. That, however, clearly did not occur. As set out above, the Reparations Order is fully in line with the Court's jurisprudence and the Regulations of the Trust Fund. It sets out the required main elements of an order for reparations and in certain aspects even goes beyond what is required at a minimum. In addition, the Trial Chamber demonstrated, in the litigation of the initial draft implementation plan, that it is closely monitoring the Trust Fund's activities and exercises its role as the authority approving the implementation plan and eligibility process.

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<sup>30</sup> See [Lubanga Appeal Judgment Size of Award](#), para. 142.

41. In this context, the Trust Fund recalls that recommendation 352 of the report<sup>31</sup> of the Independent Expert Review (‘IER’)<sup>32</sup> reads as follows:

R352. The ASP, the Court and the TFV should consider a more clearly defined demarcation of the respective roles and responsibilities between the Chambers, as the judicial oversight and monitoring authority for the implementation of reparations plans and projects, and the TFV as an independent implementing agency, and a subsidiary body of the ASP, in particular during the final stages of the execution of reparations projects.

42. Recommendation 352 clearly addresses the Chambers’ oversight and monitoring role as a matter of institutional governance, mindful of the independence of both the judiciary and the Trust Fund, beyond the realm of judicial determination in case proceedings *per se*, and including a role for the Assembly of States Parties (‘ASP’). The review mechanism established by the ASP in the context of the IER report scheduled the assessment of this recommendation for the second half of 2021.<sup>33</sup>

43. The Trust Fund has welcomed recommendation 352 and its call for a process of consideration by ASP, Court and Trust Fund of more clearly defined roles and responsibilities. This consideration process alone may lead to efficiency gains in particular in terms of the use of resources, be it time or staffing, as well as to more expeditiousness in making the Court’s justice tangible for the victims by bringing them reparations.

44. This is not to say that the appeals cannot be decided; to the contrary: the current legal framework, as set out above, provides for broad discretion and the Trust Fund observes that the Trial Chamber exercised its discretion within the limits of the law and prior jurisprudence. The Trust Fund merely points out that whatever judgment is taken by the Appeals Chamber may

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<sup>31</sup> [Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report](#), 30 September 2020.

<sup>32</sup> [Review of the ICC and the Rome Statute system, ICC-ASP/18/Res.7](#) (2019).

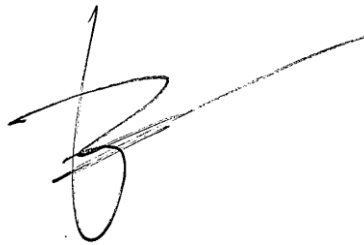
<sup>33</sup> [Review Mechanism: Comprehensive Action Plan for the Assessment of the Recommendations of the Group of Independent Experts, including Requirements for Possible Further Action](#).

influence the wider discussion under the review mechanism. This is also the reason why the Trust Fund considered it important to be heard on these matters in this appeal litigation.<sup>34</sup>

45. Irrespective of the exact delineation of roles of the Trial Chamber and the Trust Fund, it is essential to understand that the Trust Fund, together with all stakeholders in the process, is seeking to ensure that the Reparations Order of the Trial Chamber is implemented and that the harm of the victims is repaired. In this respect, since the issuance of the Reparations Order, the Trust Fund has held numerous meetings and consultations with organs of the Court and other stakeholders in the reparation proceedings. The Trust Fund is seeking to find with all stakeholders the most resource-efficient and effective approach to the implementation of the Reparations Order.

## **RELIEF SOUGHT**

46. The Trust Fund hereby respectfully submits its observations in response to the Appeals Chamber's questions and more generally on the Trust Fund's role in the implementation process.




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

Dated this 30th Day of September 2021

At The Hague, The Netherlands

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<sup>34</sup> [Rule 103 Request](#).