



CICC TRUST FUND FOR VICTIMS TEAM

Comments and Recommendations to the Board of Directors of the Trust Fund for Victims ahead of the Special Board meeting on 21-22 July 2015

16 July 2015

The Coalition's Team on the Trust Fund for Victims (Team) submits the following recommendations to the Trust Fund for Victims' (Trust Fund) Secretariat and to the Board of Directors of the Trust Fund (Board) ahead of the special Board meeting which will take place on 21-22 July 2015. At this meeting, the Board will review the development of the draft implementation plan for reparation in the *Lubanga* case following the request by the Appeals Chamber that the Fund submit a draft implementation plan for collective reparation by 3 September 2015 to a newly constituted Trial Chamber I.¹

Since the issuance of the Appeals Judgment on reparation, the Board has expressed its commitment to 'take all necessary action, in close collaboration with victims and all relevant stakeholders, for the successful implementation of the order'² and to 'consult with victims, their communities and other stakeholders in the course of drafting an implementation plan for reparations.'³ The Board has also committed to advance its resources from its reparation reserve for the purpose of reparation awards in the *Lubanga* case, in light of Mr Lubanga's current financial status.⁴

The Team commends the Trust Fund's commitment to this crucial new phase of the history of the International Criminal Court. As many observers have commented, the success of the Court and the Rome Statute system will depend to some extent on the successful delivery of reparation to victims of the crimes falling within its mandate. The Team also welcomes the Fund's indication that, in this endeavour, it will work in collaboration with all relevant stakeholders. It is in that context, that the Team submits the following comments and recommendations.

I) The Team calls on the Trust Fund to contribute to *all* forms of reparation that may be ordered by the Court

In cases where a convicted person does not have the means to pay for reparation ordered by the Court, the Trust Fund can decide to advance some of the funds from its other resources.

The Team is seriously concerned by the Trust Fund's current position that it will only contribute to collective reparation awards.⁵ The Trust Fund justifies this position on the basis of Regulation 56 of the Regulations of the Trust Fund for Victims (Regulations). In the Team's view, not only is such an interpretation a departure from the Fund's more nuanced earlier positions,⁶ but, if applied, it would also

¹ *Lubanga case: ICC Appeals Chamber amends the Trial Chamber's order for reparations to Victims*, 3 March 2015, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1092.aspx

² *TFV welcomes ICC Appeals Chamber's decision on reparations in Lubanga case*, 6 March 2015,

³ *TFV commits to draft reparations plan for victims in Lubanga case*, 23 March 2015,

<http://www.trustfundforvictims.org/news/tfv-commits-draft-reparations-plan-victims-lubanga-case-1>

⁴ *Ibid.*

⁵ In its filing on reparation in the Katanga case, the Trust Fund indicated that: "The Trial Chamber is invited to take into account that the Trust Fund's Regulation 56, which refers to Rule 98(3) and 98 (4) of the RPE, indicates that the TFV may financially complement collective reparations awards. The absence of a reference in RTFV 56 to Rule 98(2) of the RPE, concerning individual reparations awards, indicates that the "other resources" of the Trust Fund are not meant to be used to complement individual reparations awards, such as financial compensation".

⁶ In *Lubanga*, the Fund made submissions stating that its other resources 'should be *primarily* destined to collective awards or to an award to an organization' (emphasis added), para. 244, *Observations on Reparations in Response to the Scheduling Order of 14 March 2012*, <http://www.icc-cpi.int/iccdocs/doc/doc1404406.pdf>.

render meaningless any decision from Chambers as to the award of individual reparation when the convicted person is found indigent.

The Team considers this interpretation of Regulation 56 as being too narrow

Regulation 56 provides that: *“The Board of Directors shall determine whether to complement the resources collected through awards for reparations with “other resources of the Trust Fund” and shall advise the Court accordingly. Without prejudice to its activities under paragraph 50, subparagraph (a), the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under rule 98, sub-rules 3 and 4 of the Rules of Procedure and Evidence and taking particular account of ongoing legal proceedings that may give rise to such awards.”*

Regulation 56’s first sentence is very general in scope and does not limit the use of the "other funds" of the Trust Fund to collective reparation. This interpretation is confirmed by Regulation 48 of the Trust Fund Regulations, setting out that *“[o]ther resources of the Trust Fund shall be used to benefit victims of crimes as defined in rule 85 of the Rules of Procedure and Evidence”*. It does not limit the use of these other funds to groups of victims who would be the beneficiaries of collective reparation. Furthermore, Regulation 56 should be interpreted consistently with the Rome Statute which, in Article 75(2), states that the Court may order that an award for reparations be made through the Trust Fund, without distinguishing between individual and collective reparation. The Rome Statute and the Rules of Procedure and Evidence set out that the *Chambers* of the Court can order individual or collective reparation, or both. The Appeals Chamber of the Court recently recalled this principle.⁷ Regulation 56 should thus be interpreted in a way that gives effect to the Court’s reparation scheme as defined by the Rome Statute.⁸ There is thus no other reasonable interpretation but to conclude that Regulation 56 indeed allows for the Trust Fund to complement both individual and collective awards for reparation.

The Team considers this interpretation of Regulation 56 contrary to the delivery of meaningful reparation

The new strategic plan for the Trust Fund sets out that *“Delivering meaningful reparation will be fundamental for the ICC’s credibility in the eyes of victim communities and the public at-large.”* It also sets out that *‘[r]eparations to or in respect of victims can take many different forms, including restitution, compensation and rehabilitation. This mandate leaves room for the ICC to identify the most appropriate forms of reparation in light of the context of the case and the rights and wishes of the victims and their communities [emphasis added]’*.⁹

The Team considers that the current Trust Fund interpretation of Regulation 56 is not consistent with this strategic plan as it does not allow for the identification of *‘the most appropriate forms of reparation in light of the context of the case’*. It also ignores the fact that victims will often have suffered multifaceted harm, and will thus be likely to require a combination of various forms and modalities of reparation, including individual measures as appropriate, to be fully redressed. In that respect, it is important to recall the recent Appeals Chamber’s findings that reparation is intrinsically linked to the harm, injury, loss and damage as established by the Court.

The Trust Fund’s interpretation also appears to ignore the wishes of and is likely to greatly disappoint victims. In the *Katanga* case, victims consulted by the Registry have expressed their overwhelming

⁷ While clarifying that only collective reparation was being ordered in that case, the Appeals Chamber endorsed the principle that *‘Individual and collective reparations are not mutually exclusive, and they may be awarded concurrently’*.

⁸ Such interpretation is also developed in depth in the Defence for Mr Katanga in *Defence Consolidated Response to the Parties, Participants and Other Interested Persons’ Observations on Reparation*, para 104, <http://www.icc-cpi.int/iccdocs/doc/doc1997243.pdf>.

⁹ Trust Fund for Victims Strategic Plan 2014-2018, at 18, available at http://trustfundforvictims.org/sites/default/files/media_library/documents/pdf/TFV_Strategic_Plan_2014_2017__approved.pdf

preference for individualised measures of reparation. In the *Lubanga* case, a number of victims have expressed their disappointment at the decision to order collective reparation only¹⁰. Such dissatisfaction has also been witnessed in relation to reparation awards ordered by the Extraordinary Chambers before the Courts of Cambodia where only symbolic and collective reparation awards can be ordered.¹¹

The Team thus calls on the Trust Fund to recognise its ability to contribute to both individual and collective reparation awards.

II) The Team calls on the Trust Fund to ensure adequate communication around and access to the consultations on the draft implementation plan in the *Lubanga* case

In March 2015, the Appeals Chamber confirmed the Trust Fund for Victims' mandate in the implementation of reparation in the *Lubanga* case. Under this Order, the Trust Fund for Victims is tasked with submitting a draft implementation plan for reparation in the *Lubanga* case – based on the modalities for reparation identified by the Chamber – by 3 September 2015 to a newly constituted Trial Chamber I.

In its Order, the Appeals Chamber placed consultations with victims and communities at the centre of this process to be conducted by the Trust Fund. Specifically, the Appeals Chamber held that:

- Victims of the crimes and their families and communities who meet the criteria of eligibility for reparation should be able to participate throughout the reparation process;¹²
- The design of the awards will be informed by views received during consultations with victims, members of the affected communities, as well as potentially experts, which the Trust Fund will undertake prior to submitting its draft implementation plan;¹³ and
- when deciding on the nature of the awards for reparation, the Trust Fund is instructed to take into account the views and proposals of victims regarding the appropriate modalities of reparations and programmes that in the view of the Trust Fund should be a part of any reparation awarded on a collective basis.¹⁴

In the Team's view, these core principles set out by the Appeals Chamber are essential to ensuring a process that is legitimate, empowering and thus ultimately in itself reparative.

The Team notes and welcomes the Trust Fund's indication that consultations are already underway on the draft implementation plan. Whilst it is known in the field that these consultations are ongoing, the feedback received from victims and concerned communities in contact with some Team members, reveal a paucity of information on the actual modalities of the current consultations. This is creating a rising level of anxiety for some victims and/or concerned groups. Some believe that they should be consulted do not know whether they meet the criteria for inclusion in the consultation process and fear they may miss out on the opportunity to be heard. This situation also leaves room for misinformation and rumours to spread.

¹⁰ Olivia Bueno, Local Communities Divided on the Question of Reparations in the Lubanga Case, <http://www.ijmonitor.org/2012/11/local-communities-divided-on-the-question-of-reparations-in-the-lubanga-case/>; See also Roundtable 23 March 2015 - Reparations and the ICC: The Lubanga Judgment and Future Prospects for Victims, Presentation by Ms Paolina Massidda, <http://youtu.be/vw7TxpWw5Ns>

¹¹ Kuch Naren and Holly Robertson, 'Victims Call for Money From ECCC', (17 October 2014) *The Cambodia Daily*, at www.cambodiadaily.com/news/victims-call-for-compensation-from-eccc-70135/; It is worth noting that the Committee against Torture also expressed concerns at the fact that the Internal Rules of the ECCC only provide for moral and collective reparation, precluding individual financial compensation and had called on the ECCC to amend its Internal Rules to permit reparation to victims consistent with article 14 of the Convention, including, as appropriate, individual financial compensation, CAT/C/KHM/CO/2, 20 January 2011.

¹² Amended reparation order at para 29.

¹³ Reparation appeals Judgment para 201 and Amended reparation order para 70.

¹⁴ Ibid para 79.

The Team acknowledges that the current consultations are linked to a judicial process and, as a result, the Trust Fund may not be able to disclose all information relating to them at this stage. There may also be security issues which would make the release of such information problematic for the communities consulted. However, the Team calls on the Trust Fund to take all adequate measures to ensure that victims and affected communities are able to:

- 1) Understand the general process of the ongoing consultations;
- 2) Understand which aspects of the draft implementation plan actors are consulted on;
- 3) Understand the general criteria used to select those who are currently being consulted;
- 4) Understand how they can seek to be included in the consultations if they think they ought to be;
- 5) Understand whether there will be further opportunities to be consulted. .

III) The Team calls on the Trust Fund to ensure caution with the *Community Based Process* and to ensure that individual victims are enabled to freely voice their views

Finally, the Team notes that the ‘community-based process’ endorsed in the *Lubanga* case can lead to a situation whereby the voice of direct and indirect victims of the crimes for which Mr Lubanga was convicted may be silenced by communal/community concerns and needs. In addition, many former child soldiers are in conflict with their communities and/or families and, as a result, are likely to have different views as to what collective reparation should look like.¹⁵ They may also no longer live within their communities.¹⁶ We thus call on the Trust Fund to ensure that individual *victims themselves*, as the ultimate beneficiaries as well as the right holders of reparation, are adequately consulted and enabled to freely voice their views.

¹⁵ See <http://www.theguardian.com/global-development/2012/apr/12/congo-reparations-lubanga-child-soldiers>

¹⁶ Roundtable 23 March 2015 - Reparations and the ICC: The Lubanga Judgment and Future Prospects for Victims, Presentation by Ms Paolina Massidda, <http://youtu.be/vw7TxpWw5Ns>