

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/04-01/06

Date: 08 April 2013

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, President
Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Anita Ušacka
Judge Ekaterina Trendafilova

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Document

Observations of the Trust Fund for Victims on the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations"

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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A. PROCEDURAL BACKGROUND

1. On 7 August 2012, Trial Chamber I issued the “Decision establishing the principles and procedures to be applied to reparations”¹ (hereinafter “Reparations Decision,” “Reparations Order” or “Trial Chamber I’s Decision”).
2. On 24 August 2012, the Office of Public Counsel for Victims (hereinafter “OPCV”) and the victims legal representative team V02 filed their “Appeal against Trial Chamber I’s Decision establishing the principles and procedures to be applied to reparations of 7 August 2012” on three grounds.
3. On 3 September 2012, the victims’ legal representative team V01 appealed the Reparations Decision on three grounds.²
4. On 17 September 2012, the Appeals Chamber issued “Directions on the conduct of the appeal proceedings”³ and invited the parties and participants to submit their views on several admissibility issues, including the nature of the Reparations Decision with regard to the admissibility of appeals and on who has standing in the Appeals. The parties and participants filed their submissions accordingly.
5. On 14 December 2012, the Appeals Chamber decided on the admissibility of the appeals and gave further directions on the conduct of the proceedings.⁴

¹ Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, 7 August 2012.

² Appeal against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparations*, ICC-01/04-01/06-2914-tENG, 03 September 2012.

³ Directions on the conduct of the appeal proceedings, ICC-01/04-01/06-2923 A A2 A3 OA21, 17 September 2012.

⁴ Decision on the admissibility of the appeals against Trial Chamber I’s *Decision establishing the principles and procedures to be applied to reparations*, ICC-01/04-01/06-2953 A A2 A3 OA 21, 14 December 2012.

6. The Appeals Chamber held that the role of a newly composed Trial Chamber as suggested in the impugned decision appears to be that of monitoring and oversight during the *implementation* phase, and considered that the Reparations Order represents the final judicial decision with regards to reparations.⁵ Thus, the Appeals Chamber held that the appeals are admissible under Article 82 (4) of the Rome Statute (hereinafter “Statute”),⁶ and rejected the appeal of Mr Lubanga under Rule 82 (1) (d) of the Statute. Furthermore, it ruled that: (i) Mr Lubanga, (ii) victims who participated in the trial as victims and requested reparations, including those whose status as victims had been rejected, (iii) victims who participated but did not request reparations (yet) and (iv) individuals who request reparations without having participated in the trial, have the right to appeal the Reparations Decision under Article 82 (4) of the Statute.⁷ The Appeals Chamber held that at this stage unidentified individuals have no standing, and rejected as inadmissible the appeal by OPCV filed on behalf of these individuals.
7. On 5 February 2013, the Defence of Mr Lubanga Dyilo,⁸ OPCV and V02⁹, and the legal representative team V01¹⁰ (hereinafter “V01”) filed their respective documents in support of their respective appeals against the Reparations Decision.

⁵ Ibid., paras. 62-63.

⁶ Ibid., para. 64.

⁷ Ibid., paras. 66, 68 and 69.

⁸ Mémoire de la Défense de M. Thomas Lubanga relative à l’appel à l’encontre de la *Decision establishing the principles and procedures to be applied to reparations*, rendue par la Chambre de première instance le 7 août, 2012, ICC-01/04-01/06-2972, 5 February 2013.

⁹ Document déposé à l’appui de l’appel à l’encontre de la *Decision establishing the principles and procedures to be applied to reparations* délivrée par la Chambre de première instance I le 7 août 2012, ICC-01/04-01/06-2970, 5 February 2013.

¹⁰ Document à l’appui de l’appel à l’encontre de la *Decision establishing the principles and procedures to be applied to reparations* délivrée par la Chambre de première instance I le 7 août 2012, ICC-01/04-01/06-2973, 5 February 2013.

8. The Appeals Chamber invited the Trust Fund for Victims (hereinafter “TFV” or “Trust Fund”) to submit observations on the appeals by 16h00 on 8 April 2013.

B. PRELIMINARY REMARKS

9. The Trust Fund for Victims feels honoured being invited to submit observations on the appeals against the Reparations Decision, which is the first ever of its kind before the International Criminal Court (hereinafter “ICC”). The Trust Fund notes that there is no precedent so far and the reparations mechanism as it is shaped in the legal framework of the Court still leaves open many substantive issues and leaves it to both the judiciary and the Trust Fund to establish, build up and design a reparations mechanism that is a real remedy for victims.
10. The Trust Fund is aware that judicial reparations within criminal proceedings, which are necessarily and genuinely linked to a conviction, have their limitations. However, the Court as well as the Trust Fund as the implementing entity must be extremely careful and sensitive to avoid any further harm, damage or discrimination caused by determining the groups of victims, beneficiaries of reparations, and the scope of the award. In doing so, the rights of a convicted person, against whom a reparations order should always be issued, regardless of his or her financial situation, must be balanced thereto.
11. In light of the Trust Fund’s continuing commitment towards victims,¹¹ the Trust Funds’ observations are submitted in the interest of victims who have already waiting for a long period of time for accessible, meaningful and expeditious reparations for the harm they suffered from the convicted

¹¹ Strengthening the International Criminal Court and the Assembly of States Parties, Assembly of States Parties, Resolution ICC-ASP/11/Res.8, 21 November 2012, para. 60.

crimes. Therefore, the Trust Fund endeavours to also draw the attention to practical and operational aspects, always keeping in mind that the security situation in the Democratic Republic of the Congo (hereinafter “DRC”) is fragile.

12. The Trust Fund observes that Trial Chamber I’s Decision is still far from bringing reparations into effect since appeals are pending and a proper implementation phase also needs time. The Trust Fund submits that it is in the interest of the victims, primarily, that the implementation of reparations awards starts with the shortest possible delay.

C. OBSERVATIONS ON THE PROCEDURE

ON THE SCOPE OF THE COMPETENCE OF THE APPEALS CHAMBER IN APPEALS AGAINST REPARATIONS ORDERS

I. THE APPELLANTS’ SUBMISSIONS ON APPEALS PROCEDURE

1. The Appeal of the Defence

13. The Defence identified in its appeal twelve specific rulings of the Reparations Order and requests the Appeals Chamber to: (i) ascertain that the Trial Chamber erred in law and (ii) vacate the reparations order in this regard.¹²
14. The Defence does not elaborate on what the precise procedure for an appeal against a reparations order is, or on the scope of competence of the Appeals Chamber. The Trust Fund notes that the Defence does not request that the Appeals Chamber replace Trial Chamber I’s Decision by an Appeals Chamber’s Decision.

¹²ICC-01/04-01/06-2970, para. 188.

2. The Appeal of V01

15. This Appellant does not specifically elaborate on the procedure of an appeal against a reparations decision. However, the Appellant demands that the Appeals Chamber not only vacate Trial Chamber I's Decision in accordance with Rule 153 of the Rules of Procedure and Evidence (hereinafter "RPE"), but that it also remands the case to the Trial Chamber to rule again on reparations and to take account of, and decide on the individual claims for reparations.¹³
16. The Appellant explicitly states that they do not find it "opportune" that the Appeals Chamber commences with reparations proceedings itself. Nevertheless they request the Appeals Chamber to: (i) set a deadline for new reparations claims for those which have yet to be completed, (ii) allow for the submission of evidence to justify the claims and (iii) decide on all claims, if necessary with the assistance of expert(s).

3. The Appeal of OPCV and V02

17. The Appellants request the Appeals Chamber to determine that the Trial Chamber erred in law with regard to three appeal grounds. They further request that the Appeals Chamber itself proceed with setting in force the reparations proceedings in accordance with the legal texts of the Court.¹⁴
18. The Appellants submit that the Statute does not provide for *proceedings* on appeals against "other decisions," including appeals against reparations orders, pursuant to Article 82 (4). They state that the RPE close this gap and stipulate in its Rule 153 (1) that the Appeals Chamber may "confirm, reverse or amend" a reparations order under Article 75 of the Statute, which means that the Appeals Chamber can replace the Trial Chamber's reparations order.

¹³ ICC-01/04-01/06-2973, para. 58.

¹⁴ ICC-01/04-01/06-2970, paras. 1 - 2 and 59-65.

19. In a next step the Appellants come to the conclusion that Trial Chamber I did not discharge itself from its obligations to issue an order on reparations. Therefore, the Appeals Chamber cannot simply replace the decision by its own reparations decision without opening proper reparations proceedings.¹⁵
20. The Appellants refer to Rule 149 of the RPE and derive from the fact that the procedural rules for the Pre-Trial Chamber and Trial Chamber apply *mutatis mutandis* to proceedings before the Appeals Chamber, that evidence can be heard to prove the submitted claims.
21. The Appellants ascertain that Trial Chamber I did not fulfil its obligations and merely limited its decision to principles and procedures of reparations proceedings, without commencing proper reparations proceedings and without determining “the scope and extent of any damage, loss and injury.”¹⁶

Therefore, it falls under the Appeals Chambers’ duty to discharge the Court from its obligation according to Article 75 of the Statute.¹⁷
22. The Appellants submit that the Appeals Chamber shall: (i) examine the reparations requests on their merits; (ii) guarantee the rights of victims, enable each applicant to present his/her case and to introduce evidence to justify their claims; (iii) set a deadline for the deposit of reparations requests including the appointment of experts and follow the procedure pursuant to Rule 97 (2) of the RPE; (iv) schedule an oral hearing on reparations and (v) set a deadline for final arguments.

¹⁵ Ibid., para. 61.

¹⁶ Ibid., para. 63.

¹⁷ Ibid., para. 64.

II. OBSERVATIONS OF THE TRUST FUND ON THE APPEALS PROCEDURE

1. The legal framework in regard to the scope of Rule 153 of the RPE

23. The Statute distinguishes between two categories of appeals: (i) appeals against 'acquittals, convictions and sentencing' in Article 81; and (ii) appeals against 'other decisions' in Article 82. Appeals against a reparations decision fall under 'appeals against other decisions' in Article 82 (4) of the Statute.
24. The Statute does determine the proceedings for appeals against acquittals, convictions and sentencing in Article 83. But this provision is 'expressed not to apply to proceedings under Article 82'.¹⁸ The Statute remains silent on proceedings on appeals against a reparations decision.
25. The plain language of the Statute that distinguishes between the two categories of appeals and regulates only and explicitly the proceedings for appeals pursuant to Article 81, i.e. appeals against acquittal, conviction and sentencing, does not draw an analogy to Article 83 to also apply to appeals against 'other decisions', including reparations decisions.
26. Rule 153 of the RPE closes this gap and determines the scope of authority of the Appeals Chamber in appeals against reparations as follows: "The Appeals Chamber may confirm, reverse or amend a reparation order made under Article 75."
27. The Trust Fund submits that this list is exhaustive and does not allow the Appeals Chamber to remand the case of reparations to a Trial Chamber, original or otherwise, as this is within the power of the Appeals Chamber only and exclusively with regard to appeals against 'acquittal, conviction and sentencing', as provided by Article 83 (2) (b).
28. The Trust Fund further notes the debate during the drafting process of the RPE where a proposal for a broader wording of Rule 153 was discussed.

¹⁸ Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court-Observers' Notes, Article by Article, (2008), Article 83, para. 2.

The suggestion to allow the Appeals Chamber to “order a new hearing” on reparations was addressed but rejected.¹⁹ During the debate of the drafting, it was held that for an appeal against a reparations order the Appeals Chamber should substitute its own findings and make its own order, rather than remitting the matter for a new hearing.²⁰

Thus, the genesis, the wording and the context on how the ICC generally deals with appeals, strongly support the submission of the Trust Fund that Rule 153 of the RPE exhaustively determines the authority of the Appeals Chamber.

2. Discussion of the appeals in regard to the appeals procedure

a) On the Defence Appeal

29. The appeal of the Defence under Article 82 (4) was declared admissible while the appeal under Article 82 (1) (d) was rejected as inadmissible.²¹ Thus, the decision of the Trial Chamber to grant the request for leave to appeal, submitted as an appeal under Article 82 (1) (d) in parts, is set aside. Therefore, the Defence is not limited in its appeal grounds as ruled by Trial Chamber I.²²
30. The Trust Fund observes that the Defence requests in its appeal only to vacate Trial Chamber I’s reparations decision with regard to alleged ‘errors in law.’ Rule 153 of the RPE encompasses the possibility to vacate the decision, and thus, explicitly allows for the Appeals Chamber to set the Trial Chamber’s Reparations Decision aside.
31. The Trust Fund submits that Rule 153 also allows the Appeals Chamber to ‘amend’ an order on reparations, and thus, to replace Trial Chamber I’s Decision by its own ruling, in parts or fully.

¹⁹ Helen Brady, Appeal, in: Lee, R. (ed.), *The International Criminal Court – Elements of Crimes and Rules and Procedure and Evidence* (2001), page 575 et seq. at pages 587-588.

²⁰ *Ibid.*

²¹ ICC-01/04-01/06-2953, para. 1 – 2 of the disposition.

²² ICC-01/04-01/06-2911.

32. The Defence leaves it open as to who has to decide on the content of the alleged 'errors in law' and does not submit a specific request in this regard. The Trust Fund notes that the Appeals Chamber is limited to the requests that are before it.²³ However, it would be overly strict to only vacate the impugned order without amending it as appropriate, if granting any of the appeal grounds. Therefore, the Trust Fund is of the opinion that the Appeals Chamber may interpret the requested relief sought, as a request for the amendment of Trial Chamber I's order.

Since it is within the authority of the Appeals Chamber to amend the impugned order, the Trust Fund submits that the Appeals Chamber should decide on all issues that are identified by the Defence as alleged 'errors in law' and contingent on their merits, and replace Trial Chamber I's Decision by its own ruling.

b) On the V01 Appeal

33. The Trust Fund submits that neither the Statute nor the RPE allow for re-trying the case before the original or a new Trial Chamber in the appeal proceedings against an order on reparations. Rule 153 limits the authority of the Appeals Chamber. The reading of the plain text is clear and without ambiguity. The genesis of this rule shows that the matter was debated during the drafting process but rejected.

Accordingly, the Trust Fund submits that the request of the Appellants to send the case back has no legal basis. The Appeals Chamber has to decide

²³ It can be summarized that Appeals in international criminal law need to be based on specific grounds, including issues of law and issues of fact. See: Lily O'Neill and Göran Sluiter, The right to appeal a judgment of the Extraordinary Chambers in the Courts of Cambodia, Melbourne Journal of International Law, Vol. 10, (2009), page 27. It is a common standard that the Appeals Chamber can deal only with matters that are before it and cannot act *ex proprio motu*. Rule 188 of the Rules on Procedure of the Special Court for Lebanon and Rule 118 of the ICTY/ICTR state: that the Appeal Chamber "shall render an Appeal Judgement on the basis of the record." The Special Court for Sierra Leone adds the reference to "oral arguments" in its Rule 118. The Extraordinary Chambers in the Courts of Cambodia (ECCC) clearly determine the scope of an appeal in Rule 110 (1) as follows: "The scope of the appeal shall be limited to the issues raised in the notice or in the immediate appeal."

on the merits of their appeal grounds by using their authority pursuant and limited to Rule 153 of the RPE.

c) On the OPCV and V02 Appeal

34. These Appellants note - like the Trust Fund - that the legal framework of the ICC regulates appeal proceedings in Rule 153 of the RPE. As far as the Appellants consider the Reparations Decision of Trial Chamber I to be limited to principles and procedures without determining the 'scope and extent of any damage, loss and injury,' the Trust Fund submits that this determination is not mandatory. The Statute states that the Trial Chamber *may*, and not *shall*, determine the scope and extent of damage, loss and injury.
35. Therefore, the Trust Fund is of the opinion, that through this lack of determination, the decision does not become deficient in the sense that the Court has not discharged itself from its duties. The Trust Fund submits that there is procedurally no room for a re-opening and (re-) starting of reparations proceedings. This is because the reparations decision has to be characterized as a decision in the meaning of Article 75 (2).
36. Therefore, the Trust Fund observes that the lack of a legal basis for (re-) starting reparations proceedings does not allow for this part of the relief sought by these Appellants.

III. THE NATURE OF TRIAL CHAMBER I'S DECISION DATED 7 AUGUST 2012

Before submitting observations on the grounds of the appeals the Trust Fund finds it necessary to discuss as a preliminary question the nature and character of the impugned decision with regard to its content and substance

1. Background on the nature of the decision related to admissibility of an appeal under Rule 82 (4) of the RPE

37. The Trust fund agrees with the Appeals Chamber²⁴ in that the Trial Chamber's Decision is a decision under Article 75 (1), is not binding and a fresh examination of the Decision is required.
38. Related to the question whether Trial Chamber I's Decision is a decision in the meaning of Article 82 (4) of the Statute and thus appealable, the Trust Fund and the Appellants²⁵ previously submitted their arguments concluding that this is the case.
39. The Trust Fund recalls and incorporates by reference its respective observations that the impugned decision must be regarded to constitute an order for reparations in the sense of Article 75 (2) of the Statute and hence, Article 82 (4) of the Statute should apply.²⁶
40. The Trust Fund argued that:

“The impugned decision **orders collective reparations** ‘through the Trust Fund’. Endorsing a phased approach, the Trial Chamber tasks the Trust Fund with *implementing and overseeing community-based consultations* with a view to *elaborating proposals for collective reparations*. These proposals are then to be submitted to the Chamber for its approval. Accordingly, the

²⁴ ICC-01/04-01/06-2953, para. 50.

²⁵ Observations on the appeals against the *Decision establishing the principles and procedures to be applied to reparations*, 28 September 2012, ICC-01/04-01/06-2926-tENG; V01 argues that the non-examination of individual applicants makes the order a reparations order. “If all decisions awarding reparations [...] are orders for reparations, then all decisions refusing reparations are the same”, paras. 10-13. Observations on issues concerning the admissibility of appeals lodged by the Defence, the OPCV and the V01 and V02 teams against Trial Chamber I's *Decision establishing the principles and procedures to be applied to reparations*, rendered on 7 August 2012, 1 October 2012, ICC-01/04-01/06-2928-tENG; OPCV and V02 state that the content of the decision goes beyond a decision on principles and procedures because it made a final decision on the individual applications, paras. 10-16. Defence observations pursuant to the *Directions on the conduct of the appeal proceedings* issued on 17 September 2012, 1 October 2012, ICC-01/04-01/06-2929-tENG, The Defence submits that the impugned order is an order under Article 75 (1) and thus appealable without distinguishing between a decision on principles (Article 75 (1)) and an order on reparations (Article 75 (2)), paras. 7-11.

²⁶ Observations in response to the Direction on the conduct of appeal proceedings, ICC-01/04-01/06-2927, 1 October 2012, para. 16.

impugned decision has set out **a generally defined order for reparations**, activating the implementation phase.”²⁷

The Trust Fund further considered:

“[t]hat the procedural situation that arises from Trial Chamber I’s Decision corresponds to the situation described in Regulations 54-58 of the Regulations of the Trust Fund. This section of the Regulations presupposes that an order for reparations in the meaning of Article 75 (2) has been made and is followed by the implementation phase.”²⁸

41. The Appeals Chamber holds that Trial Chamber I’s Decision is *deemed* to be a Reparations Decision in the meaning of Article 75 (2) of the Statute, and is thus, appealable pursuant to Article 82 (4).
42. In general, the Appeals Chamber observes that reparations proceedings can be divided into two parts: firstly, the issuance of an order for reparations under Article 75 (2), and secondly, the implementation phase.²⁹
43. The Appeals Chamber states that the monitoring and oversight role (which corresponds to a Trial Chamber’s role under the Regulations of the Trust Fund during the implementation phase), including the approval of the draft implementation plan, takes place *after* an order for reparations has been issued.³⁰ The Appeals Chamber emphasises that this approval decision (if approved) is not an initial decision on reparations.³¹
44. With regard to the impugned Trial Chamber I Decision, the Appeals Chamber concludes:

(a) That the Trial Chamber I Decision is the final judicial decision in respect of reparations;³²

²⁷ Ibid., para. 16.

²⁸ Ibid., para. 18.

²⁹ ICC-01/04-01/06-2953, paras. 54-55.

³⁰ Ibid., para. 63.

³¹ Ibid., para. 57. However, the Appeals Chamber did not decide on whether the approval of an implementation plan could also amount to an order for reparations appealable under Article 82 (4).

³² Ibid., para. 63.

(b) That the Trial Chamber I Decision addressed under the section on “procedure,” aspects that relate to steps to be taken both before and after the issuance of an order for reparations;³³

(c) That the Appeals Chamber distinguishes between the delegation of the Trial Chamber’s functions under Rule 97 (2) [Experts] as being part of the reparations proceedings and other tasks that the TFCV is charged with as being part of the implementation.³⁴

45. It is important to note that the Appeals Chamber considered that the tasks the Trust Fund is charged with by the Trial Chamber are part of the implementation phase.³⁵ This encompasses: (i) the determination of the appropriate forms of reparations; (ii) the execution of a five-step implementation plan, including representing proposals for collective reparations to a differently composed Trial Chamber for approval; and (iii) carrying out the assessment of harm and the identification of beneficiaries.
46. The Appeals Chamber concludes that the Trial Chamber I Decision must “be deemed” to be a reparations order within the meaning of Article 75 (2) and is thus appealable under Article 82 (4). The Trust Fund further notes that the Appeals Chamber has so far still abstained from stating that the decision is a decision under Article 75 (2).

Although all Appellants came to the conclusion that the impugned order is a reparations order and appealable under Article 82 (4), V01 and OPCV and V02, however, deviate from this conclusion in their substantive appeal arguments. In their appeals the Appellants do not characterise the Trial Chamber I’s Decision as a proper reparations order. They request either to ‘remand’ the case to Trial Chamber I to decide on the individual applications or to ‘reopen’ proper reparations proceedings before Trial Chamber I to discharge its functions under Article 75 (2)

³³ Ibid., para. 58.

³⁴ Ibid., para. 59.

³⁵ Ibid., para.60.

2. Further arguments of the Trust Fund on the character of Trial Chamber's Decision with regard to its substance

47. The Trust Fund submitted in its previous submission that the 'substance of the Decision support the interpretation that the impugned decision contains an order for reparations.'³⁶ Hence, the Trust Fund wishes to further submit the following observations on the nature of Trial Chamber I's Decision with regard to its substance.
48. The Statute requires ("*shall*") the Court to establish principles relating to reparations, (...) including restitution, compensation and rehabilitation (Article 75 (1)).
49. Furthermore, it is optional ("*may*") whether the Court is to 'determine the scope and extent of any damage, loss and injury and the principles on which it is acting [in this regard]' (Article 75 (1)).
50. Neither the Statute nor any other legal document defines 'reparations order' and its minimum content. Article 75 (2) only states: "The Court may make an order (...) specifying appropriate reparations" (*emphasis added*).
51. There is no further guidance in the legal framework governing the Court as to how detailed and concrete a reparations order should be, what the minimum requirements are, and whether an order on reparations has a different level of specificity for collective and individual awards, respectively. If the Statute, Elements of Crimes and Rules of Procedure and Evidence are silent, the Court shall act pursuant to Article 21 of the Statute:

“(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those

³⁶ICC-01/04-01/06-2927, para. 16.

principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.” [...]

52. The Trust Fund notes that applicable treaties and principles of international law do not provide any guidance on the necessary specificity or on general requirements of an order on reparations, in particular on collective reparations related to mass crimes.
53. Governing rules on requirements of reparations orders in national jurisdictions do rather deal with individual compensation and might not be relevant to refer to because they are not designed to rule on mass claims and collective reparations.
54. But the Inter-American Court of Human Rights (hereinafter "IACtHR") is another mechanism dealing with gross human rights violations. In its jurisprudence over decades, the Court itself created a new paradigm for reparations and remains at the forefront in ordering and enforcing collective and moral reparations for mass human rights violations.³⁷ Therefore, some orientation can be drawn from its practice.
55. The IACtHR has ordered a number of reparations, such as symbolic reparations, including the building of memorials, the naming of streets after victims,³⁸ access to medical and psychological care,³⁹ the provision of development plans⁴⁰ and public apologies.⁴¹ The IACtHR also requested

³⁷ Bridget Mayeux and Justin Mirabal, *Collective and Moral Reparations in the Inter-American Court of Human Rights*, Human Rights Clinic, (2009), page 1.

³⁸ IACtHR, *Case of Myrna Mack-Chang v Guatemala*, 25 November 2003, para. 286, Series C No. 101.

³⁹ See, for example, IACtHR, *Case of Children's Rehabilitation v Paraguay*, 2 September 2004, paras. 318-320, Series C No.112; IACtHR, *Case of Plan de Sanchez Massacre v Guatemala*, 29 April 2004, paras. 107-108, Series C No.105.

⁴⁰ IACtHR, *Case of Children's Rehabilitation v Paraguay*, 2 September 2004, paras. 316-317, Series C No.112.

⁴¹ IACtHR, *Case of Plan de Sanchez Massacre v Guatemala*, *supra* note 39, paras. 100-101.

the State to name a ‘well-known street or square’ in honour of the victims.⁴²

56. Furthermore, in *Plan de Sanchez*, the IACtHR ordered a development programme to be instituted. It only specified which communities were to benefit and what general measures this encapsulated, for example, the building of roads.⁴³ Also, with regard to mental health programmes, it was left to the State to instigate,⁴⁴ as well as for a monument to be built. The IACtHR only gave parameters to the State in building the monument in co-ordination with civil society.⁴⁵
57. Notably, the IACtHR issued rather general orders against the respective States, passing some burden onto States in how they implement the order.
58. The IACtHR regularly monitors the implementation of its orders and whether the respective State complies with the general framework given by the Court. These examples demonstrate that reparations orders dealing with mass crimes and mass victimisation, although in a different setting at the IACtHR, are not very specific and only determine the framework for the implementing State.
59. Therefore, the Trust Fund is of the opinion that the level of specificity of Trial Chamber I’s Decision is contingent upon the modes of reparations, in particular whether individual or collective reparations are awarded. A reparations order on collective reparations may only ‘specify appropriate reparations’ by outlining the corner stones, and is thus by nature less specific than a reparations order on individual claims.
60. Furthermore, the Trust Fund refers to Regulation 55 of the Regulations of the Trust Fund (hereinafter “RTFV”), which foresees that subject to the

⁴² Ibid, para. 286.

⁴³ Ibid., paras. 109-110.

⁴⁴ Ibid., para. 91(b).

⁴⁵ Ibid., para. 91(e).

order of the Court, the Trust Fund may be tasked with determining the nature and/or size of the awards.

“Subject to the order of the Court, the Trust Fund shall take into account the following factors in *determining the nature and/or size of awards*, inter alia: the nature of the crimes, the particular injuries to the victims and the nature of the evidence to support such injuries, as well as the size and location of the beneficiary group.” (emphasis added)

61. In addition, Regulation 69 of the RTFV already considers and anticipates that a court order on collective reparations could not be specified:

“With regard to collective reparations the draft implementation plan to be issued by the Trust Fund shall set out the precise nature of the collective award(s), where not already specified by the Court.” (emphasis added)

62. This is in line with Regulations 60 and 61 of the RTFV,⁴⁶ presupposing that (only) with regard to *individual awards* to victims the reparations order defines the group of victims who are eligible in accordance with the order on reparations. However, even then, it is the task of the Trust Fund to adjust and identify unknown individuals who are eligible for reparations.⁴⁷ The RTFV suggest that even those victims benefiting from an individual award may not all be identified yet by the Trial Chamber. In this case, it is the task of the Trust Fund to determine each individual in a specific verification process.

63. In light of the aforementioned, the Trust Fund is of the view that Trial Chamber I’s Decision is sufficiently specified as a decision in the meaning of an Article 75 (1). It does not only establish general principles and

⁴⁶ See Section II of the Regulations of the Trust Fund for Victims, Regulation 60 and 61, determining the Trust Fund’s process in identifying individuals who are eligible for reparations.

⁴⁷ Regulation 60 states on individual reparations awards: “Where the names and/or locations of the victims are not known, or where the number of victims is such that it is impossible or impracticable for the Secretariat to determine these with precision, the Secretariat shall set out all relevant demographic/statistical data about the group of victims, as defined in the order of the Court, and shall list options for determining any missing details for approval by the Board of Directors.”

procedures on reparations, but also clearly outlines the principles and scope for reparations, limited to the case against Mr Lubanga.⁴⁸

64. The findings of Trial Chamber I in this case are specific and concrete enough in *the framework of collective reparations*. They sufficiently and appropriately determine the reparations award, and thus, constitute a reparations order in the meaning of Article 75 (2) 'specifying appropriate reparations'.
65. In particular, Trial Chamber I specifies: the framework, scope and modalities of reparations, as well as the composition of special victims groups and beneficiaries eligible for collective and community-oriented reparations, in the particular context and circumstances of the case against Mr Lubanga, and the specific crimes of enlisting or conscripting children under the age of 15 or using them to participate actively in hostilities.⁴⁹
66. The Trust Fund will extract below the main findings of Trial Chamber I, which so far establish the basis for the implementation of the Reparations Order, subject to any amendments and further details ruled by the Appeals Chamber:

On the composition of the group of eligible victims:

- Victims are eligible regardless of whether they participated in the trial proceedings, or applied for reparations.⁵⁰
- Direct and indirect victims and their close family members, including successors, are eligible. 'Family' must be appropriately understood in the respective culture.⁵¹

⁴⁸ ICC-01/04-01/06-2904, para. 181.

⁴⁹ *Ibíd.*

⁵⁰ *Ibíd.*, para. 187.

⁵¹ *Ibíd.*, paras. 194-195.

On prioritisation of specific groups:

- Victims who are in a particularly vulnerable situation, *inter alia*, victims of sexual and gender-based violence and victims with immediate needs for medical care, are to be prioritised.⁵²
- Enabling women's and girls' involvement in the design, implementation and monitoring of the reparation process; and that reparations are responsive to the particularities of their vulnerability and their roles vis-à-vis their communities.⁵³

On specific reparations for victims of sexual violence:

- Specific reparations take into account a 'specialist, integrated and multidisciplinary' approach together with the communities.⁵⁴
- Accessibility must be guaranteed.⁵⁵

On child victims:

- Reparations must be guided by the Convention on the Rights of the Child.⁵⁶
- That with regard to child soldiers, the development of the victims' 'personalities, talents and abilities' must be guaranteed, highlighting the importance of rehabilitating former child soldiers and reintegrating them in society, and that all measures must be approached on a gender-inclusive basis.⁵⁷

On the scope of reparations:

- That a collective approach ensures that unidentified victims are included, that collective reparations address individual and collective

⁵² Ibid., para. 200.

⁵³ Ibid., para. 209, with further references. See UN WOMEN, In Pursuit of Justice, 2011-12, Progress of the World's Women, available at <http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf>.

⁵⁴ Ibid., para. 207.

⁵⁵ Ibid., para. 208.

⁵⁶ Ibid., paras. 211-212.

⁵⁷ Ibid., paras. 213-216.

harm and that medical services are included.⁵⁸

On the modalities of reparations:

- That restitution might not be achievable in the case of former child soldiers.⁵⁹
- That compensation is to be considered when economic harm is quantifiable and when this kind of award is appropriate and proportionate.⁶⁰
- That rehabilitation includes the provision of healthcare and medical services, psychological, psychiatric and social assistance, relevant legal and social services, and that measures of reintegration into society should be included.⁶¹

67. The Trust Fund is aware and concedes that the determinations in the Reparations Order are still rather general, although they are specific enough for collective reparations. While working on such a basis, the Trust Fund would have a high level of discretion to fine-tune and specify Trial Chamber I's Decision, although any reparations awards proposed in a Draft Implementation Plan by the Trust Fund are subject to final judicial approval.

68. The Trust Fund assures its ability to start the implementation process on the given determinations, as long as sufficient financial and staff resources are allocated to it to allow for the successful accomplishment of its mandate. However, it is respectfully submitted that any further specifications by the Appeals Chamber are also appreciated.

⁵⁸ *Ibíd.*, paras. 219 and 221.

⁵⁹ *Ibíd.*, para. 223.

⁶⁰ *Ibíd.*, para. 226.

⁶¹ *Ibíd.*, paras. 233-234.

D. APPEAL GROUNDS AND OBSERVATIONS OF THE TRUST FUND

I. FIRST GROUND OF APPEAL⁶²:

THE DELEGATION OF TASKS TO THE TRUST FUND AS AN ERROR OF LAW

1. The Appellants submissions

a) *Defence*

69. The Defence submits that the mandate of the Trust Fund was established pursuant to Article 79 and is governed by the Regulations of the Trust Fund for Victims. The mandate of the Trust Fund is to implement court-ordered reparations and rehabilitation assistance programmes. Thus, the Trust Fund is not mandated to exercise the functions and powers of the Trial Chamber.⁶³
70. Furthermore, there is no provision allowing for the delegation of judicial duties to a non-judicial organ. The delegation of powers to the Trust Fund would put at risk the right of Mr Lubanga to be publicly and impartially heard.⁶⁴
71. Further, the Defence argues that the mandate of the Trust Fund is clear and neither the Statute or the Rules of Procedure and Evidence, nor any other provision allow for the delegation or transfer of judicial duties to the Trust Fund. Therefore, the ruling of the Trial Chamber is unlawful and violates the law and the rights of Mr Lubanga.⁶⁵

In addition, the Defence submits that the appointment of experts pursuant to Rule 97 (2) is a task of the Court and not of the Trust Fund. The Court is not allowed to delegate this task. The Defence submits that the States

⁶² The order of the appeal grounds in these observations is done by the Trust Fund and deviates from the order of the appeals.

⁶³ ICC-01/04-01/06-2972, paras. 9-10 and 12.

⁶⁴ *Ibid.*, paras. 11 and 14.

⁶⁵ *Ibid.*, paras. 12-13.

Parties clearly entrusted the judiciary with the determination of reparations.⁶⁶

b) OPCV and V02

72. OPCV and V02 submit that the delegation of tasks such as the appointment of experts to determine the damage, loss and injuries; the determination of forms of reparations; and the group of beneficiaries, are judicial tasks that have to be accomplished by the 'Court.' A non-judicial entity such as the Trust Fund or the Registry cannot be seized with these duties. The mandate and functions of the Trust Fund are clearly laid out in the legal framework of the Court.⁶⁷
73. The Appellants submit that the RTFV are clear and seize the Trust Fund with the implementation of a reparations order. The Trust Fund is in this regard the executing body of the Trial Chamber's order on reparations.⁶⁸
74. OPCV and V02 note that the Registry plays even less a role in the performance of judiciary tasks. The Registry is only an administrative body, which serves the Court in fulfilling its judicial functions.⁶⁹

The Appellants conclude that by delegating judicial functions to two non-judicial entities, reparations proceedings are set apart and aside from proper and judicial reparations proceedings, which deprive the victims from their right of being heard, from participating and from being able to contribute to reparations proceedings.⁷⁰

⁶⁶ *Ibíd.*, paras. 15-17 and 20.

⁶⁷ ICC-01/04-01/06-2970, paras. 45-48.

⁶⁸ *Ibíd.*, para. 50.

⁶⁹ *Ibíd.*, paras. 52-53.

⁷⁰ *Ibíd.*, paras. 54-55 and 57.

2. Observations of the Trust Fund on delegation of tasks to the Trust Fund

a) Delegation of powers under Rule 97 (2) of the RPE

75. The appointment of experts under Rule 97 (2) to assist the Trial Chamber in 'determining the scope, extent of any damage, loss and injury and to suggest various options concerning the appropriate types and modalities of reparations', is a preliminary tool for the Trial Chamber to properly assess what kind of reparations are appropriate.
76. The Trust Fund notes that the assessment of reparations may be carried out through the appointment of experts. This step is neither mandatory nor a prerequisite of a reparations order.
77. Rule 97 (2) is, in the framework of reparations proceedings, one step that may be taken by the Trial Chamber aiming at a reparations decision, but it is a tool, which is used before a reparations order is issued.
78. In the case at hand, the Trust Fund is of the opinion that the impugned decision of the Trial Chamber is a reparations decision in the meaning of Article 75 (2) of the Statute. Therefore, the Trial Chamber cannot discharge its power under Rule 97 (2), and can not delegate the respective tasks to the Trust Fund after having already issued a reparations order.

The Trust Fund observes that at this stage the delegation of this task becomes obsolete and is rendered moot. The Trust Fund, in cooperation with the Registry and any other relevant areas of the ICC, could not effectively be seized with this function as it is overdue.

b) Delegation of other tasks to the Trust Fund

79. The Trust Fund recalls that the Trial Chamber delegated the following tasks without naming it a 'delegation':

- (i) To **identify** victims and beneficiaries;⁷¹
- (ii) To **assess** the harm;⁷²
- (iii) To **determine** the appropriate forms of reparations.⁷³

80. The Trial Chamber ruled that all determinations by the Trust Fund remain preliminary and need the approval by the (newly composed) Trial Chamber that will exercise a monitoring and oversight role.⁷⁴
81. The Trust Fund will demonstrate in the following paragraphs that the implementation and *related* tasks thereto are *core* tasks and duties of the Trust Fund.⁷⁵ The Trust Fund recalls that, for the implementation plan, it has to ‘take into account factors in determining the nature and/or size of awards, inter alia: the nature of the crimes, the particular injuries to the victims and the nature of the evidence to support such injuries, as well as the size and location of the beneficiary group’.⁷⁶
82. It is further recalled that the Trust Fund is seized to ‘specify the precise nature of the collective award(s)’.⁷⁷ This allows the Trust Fund to be responsible for designing reparations with regards to those who benefit, but also related to the most appropriate modalities, which might address the harm suffered by victims.
83. The Trust Fund submits that it is clearly regulated by the RTFV and that part of the Trust Fund’s duties subject to the reparations order of the Court, are:

⁷¹ A similar authority was granted to the Inter-American Commission to determine the group of beneficiaries. It allowed the Commission, which is not a judicial body, to identify the alleged victims of a given case. See: Diana Contreras-Garduño, *Defining Beneficiaries of Collective Reparations: The experience of the IACtHR*, Amsterdam LAW Forum Vol. 4:3, at page 55.

⁷² ICC-01/04-01/06-2904, paras. 266 and 282.

⁷³ *Ibíd.*, para. 283.

⁷⁴ *Ibíd.*, para. 282. See also Regulations 57 and 58 of the Regulations of the Trust Fund for Victims.

⁷⁵ *Ibíd.*, See Regulation 54 of the Regulations of the Trust Fund for Victims.

⁷⁶ See Regulation 55 of the Regulations of the Trust Fund for Victims.

⁷⁷ See Regulation 69 of the Regulations of the Trust Fund for Victims.

- (i) to **identify and determine** the group of victims/beneficiaries;
- (ii) to **assess** their harm; and
- (iii) to **develop** the appropriate forms and modes of reparations.

84. Thus, the delegation of the tasks to the Trust Fund is not only legitimate and lawful, but these tasks even form core duties of the Trust Fund in order to develop the Draft Implementation Plan, which is then subject to the approval of the Trial Chamber.
85. Furthermore, the Trust Fund may use experts for these tasks, if necessary. The purpose is to determine the nature of the award(s) and the methods for its/their implementation. These expert consultations assist the Trust Fund in drafting the Implementation Plan.⁷⁸
86. The use of experts and/or expert organisations by the Trust Fund has to be distinguished from experts appointed under Rule 97 (2). The latter are under the oversight of the Trial Chamber, and their reports must be made available, as appropriate, to victims and the convicted person as well as interested persons and interested States who are to be invited to submit their observations.
87. The Trust Fund submits that the non-applicable Rule 97 (2) delegation by the Trial Chamber does not prevent the Trust Fund to make use of experts as appropriate.

In order for the process to be transparent and open, the Trust Fund suggests that any expert opinions and assessments will be made available to the parties and participants as an annex to the Draft Implementation Plan, which is to be submitted by the Trust Fund to the Trial Chamber via the Registrar, and subject to protection measures. The Trial Chamber may invite observations to this submission as appropriate

⁷⁸ Regulation 61(c) of the Regulations of the Trust Fund for Victims refers to expert consultation for individual awards, and Regulation 70 of the Regulations of the Trust Fund for Victims for collective awards.

3. Observations of the Trust Fund on Appeal Ground One

88. Following the general observations of the Trust Fund on the delegation of the appointment of experts under Rule 97 (2), as opposed to the consultation by the Trust Fund with experts under RTFV Regulations 61(c) and 70, the Trust Fund submits that the Trial Chamber's ruling to delegate the functions under Rule 97 (2) is irrelevant to the question at hand. Consequently, the appeals by the Defence and OPCV and V02 in this regard are also ungrounded.
89. The Trust Fund further delineates that the Appellants do not demonstrate that the Trial Chamber committed an *error of law* by delegating several tasks to the Trust Fund. As has been demonstrated above, the delegated tasks are core tasks of the Trust Fund clearly envisaged by the RTFV. Seizing the Trust Fund with these tasks is legitimate and lawful.
90. Any necessary support by the Registry for these tasks is also lawful and appropriate because of their nature.
91. The Trust Fund sees the entire reparations implementation phase as a participatory process that serves *as such* the goal, to strengthen victims and their communities and to provide them with sufficient understanding of the potential scope of reparations as well as their limitations. Consulting with them is one of the crucial elements of the process. It serves also the purpose of empowering them to come to appropriate effective reparations proposals that are a remedy for victims, are non-discriminatory and respectful in nature; and attempt to avoid as much as possible any detrimental effects.
92. Therefore, the entire process will be conducted in a manner that potential victims and beneficiaries are involved to be identified as being eligible for reparations. What forms of reparations would be appropriate for them must also be carefully examined taking into account the fact that more than ten years have passed since the crimes were committed.

93. The Trust Fund further submits that this process, and any criteria created thereto, is to be made transparent and accessible, and only subject to redactions for any necessary security and protection measures.

II. SECOND GROUND OF APPEAL:

A NEWLY CONSTITUTED CHAMBER AS AN 'ERROR IN LAW'

1. The Appellants submissions

a) *Defence*

94. The Defence submits that the Trial Chamber erred in law by delegating judicial oversight to a newly constituted Chamber because reparations proceedings are an integral part of the process against Mr Lubanga and still belong to the first instance of the trial.⁷⁹
95. Furthermore, the Defence notes that none of the unique exceptions under Rule 38 are met in order to change the composition of a Chamber, and that therefore, the same Chamber must be seized with the further process on reparations. The end of the term of judges is not one of the reasons to replace them in an on-going case.⁸⁰

The Defence adds that only Trial Chamber I is familiar with the case, having heard all evidence and having conducted the evaluation of all victims' requests.⁸¹

b) *OPCV and V02*

96. These Appellants, like the Defence, submit that the Trial Chamber committed an error of law by seizing a newly composed Chamber with the remaining process on reparations.⁸² They emphasise the integrity of the

⁷⁹ ICC-01/04-01/06-2972, paras. 1-25.

⁸⁰ *Ibíd*, paras. 27-28.

⁸¹ *Ibíd*, para. 30.

proceedings and that reparations are an integral part of the process and must therefore be decided by the same Chamber.⁸³

97. Furthermore, they recall that Trial Chamber I stated that the three Judges of the Chamber hear and assess all evidence and submissions on all proceedings in a case.⁸⁴ Only the same composition of the Chamber guarantees that the rights of victims are not compromised. There is the risk that new judges could omit relevant pieces of evidence, which were produced before Trial Chamber I, and which would have importance and relevance for reparations.⁸⁵

2. Observations of the Trust Fund on appeal ground two

98. The Trust Fund notes that Trial Chamber I's Decision is the Reparations Order. The fact that the Trial Chamber did not conduct hearings on reparations, seek expert advice on any matter while assessing reparations, nor inviting representations from the parties before making a reparations order, does not lead to a different conclusion. Therefore, the Trust Fund is of the opinion that Trial Chamber I complied with the requirements of the Statute and the Rules by issuing the reparations order by the same Chamber I conducting the case.
99. The Trust Fund holds that the remaining tasks fall into the implementation of Trial Chamber I's Reparations Order and are only related to oversight, monitoring and final approval functions. Since this is not part of the integral process that should and must be run by the same Chamber, there is no discernible error in law that can be identified.

⁸² ICC-01/04-01/06-2970, para. 32.

⁸³ *Ibíd*, paras. 33-36.

⁸⁴ *Ibíd*, paras. 40-41.

⁸⁵ *Ibíd*, para. 42.

III. THIRD GROUND OF APPEAL:

NOT ORDERING MR LUBANGA TO PAY REPARATIONS AS AN ERROR IN LAW

1. The Appeal of V01

100. V01 submits that the Trial Chamber erred in law by exempting the convicted person from any obligations with regard to reparations. The Appellants hold that this is a violation of Article 75 (2) of the Statute, pursuant to which the reparations order is directed against the convicted person and; as the case may be, through the 'intermediary' Trust Fund. The Appellants note that all expenses by the Trust Fund are at the expense of the convicted person.⁸⁶
101. The Appellants further observe that Rule 98 (1) and 98 (3) also supports their submission. Pursuant to these rules 'individual awards shall be made against the convicted person' and that 'the award against the convicted person' may be made through the Trust Fund.⁸⁷
102. In addition, the legal framework does not foresee that a reparations order has to consider the current financial situation or the eventual enforceability. The Appellants emphasise the difference between the Reparations Order and the execution of this order, which is normally shifted to the State Party according to Article 75 (5). Failing to order Mr Lubanga to pay for reparations makes it impossible for State Parties to enforce an order by discovering assets at a later stage and disregards any potential future change of the financial situation of the convicted person. The order for reparations would not prevent the Trial Chamber to seize the Trust Fund with the implementation of the Reparations Order.⁸⁸

⁸⁶ ICC-01/04-01/06-2973, paras. 28-30.

⁸⁷ *Ibid.*, paras. 31-32.

⁸⁸ *Ibid.*, paras. 37-38.

2. Observations of the Trust Fund on appeal ground three

103. The Trust Fund observes that the Appellant correctly refers to the existing legal framework, and the clear and plain reading of the relevant provisions of the Statute and the Rules envisaging that reparations orders, as a matter of principle, are to be issued against a convicted person. The Trust Fund agrees that the possibility to do this **through** the Trust Fund on the implementation level does not exempt the convicted person from being ordered to pay for reparations.
104. Furthermore, the Trust Fund agrees with the Appellants' observations that the legal framework does not support the Trial Chamber's view that an order to pay reparations is contingent upon the financial situation of a convicted person. There is no legal basis for this view.
105. The Trust Fund further submits that the Trial Chamber's findings on this matter do not correspond with the nature of reparations in a criminal setting, where the criminal responsibility of an individual against individuals is dealt with. An award for reparations is not punitive in nature. It is clearly not a fine and not listed under Article 77 as a potential penalty and thus, does not appear under part 7 of the Statute, but can be found under Part 6.⁸⁹ The placement within the Statute already demonstrates the nature of a reparations award, distinct from a penalty.⁹⁰
106. This view is also supported by the negotiations of the Rome Statute regarding the understanding of reparations and their shifting from punitive reparations award to a distinct element. Reparations, which were previously listed as an applicable penalty, were moved to a different

⁸⁹ Conor Mc Carthy, Victim Redress and International Criminal Justice – Competing Paradigms, or Compatible Forms of Justice? *Journal of International Criminal Justice* Vol. 10 (2012), at page 361.

⁹⁰ ICC-01/04-01/06-2872, para. 234. The Trust Fund emphasised that an award for reparations 'arises from the convicted person's liability to repair the harm caused by him.' See also paras. 12-14.

section of the Statute and the possibility of a fine was instead included under 'penalties.'⁹¹

107. The Trust Fund reiterates its legal opinion that a reparations order has to be directed against the convicted person regardless of his or her financial situation.⁹² That the Trust Fund plays only an intermediary role to implement the order against the convicted person is very clearly stated in the French version of Article 75 (2), second sentence: "Le cas échéant la Cour peut décider que l'indemnité accordée à titre de réparation est versée par **l'intermédiaire** du Fonds visé à l'article 79." (*emphasis added*)
108. If the Trust Fund plays the role of an intermediary, an order for reparations is the prerequisite for the implementation through the Trust Fund and this order must be made against somebody, which necessarily means in the current setting of the Statute, an order against the convicted person.
109. In addition, the Trust Fund's position is also supported by the fact that a reparations decision cannot stand without a convicted person. The case of acquittal or a process otherwise ending without conviction does not allow for reparations.⁹³ In other words, the Court cannot issue a *reparations* order to, or in respect of, victims without issuing an ordering against whom the order is directed, this is clearly the convicted person. This does not exclude the possibility that the Trust Fund steps in to complement reparations awards with its resources⁹⁴ originating from voluntary contributions and private donations.
110. The Trust Fund observes that the high significance of a Court decision should not be underestimated for both the convicted person and the

⁹¹ Conor Mc Carthy, supra note 89, at pages 361-362 with further references.

⁹² Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations', ICC-01/04-01/06-2803, 23 March 2012, paras. 85-87.

⁹³ Eva Dwertmann, The Reparation System of the International Criminal Court- Its Implementation, Possibilities and Limitations, (2010), pages 68-71.

⁹⁴ See Regulation 56 of the Regulation of the Trust Fund for Victims.

victim. Civil liability for reparations is of high symbolic value for victims,⁹⁵ because this clearly sends the message that the convicted person is obliged to remedy the harm caused. A reparations order by the Court would also mobilise State Parties to give effect to the order. Beside a conviction and a punishment, it is also of high importance to have the burden of a reparations order rest on the shoulders of the convicted person, reminding him or her that the reparations order was issued against him or her, and that he or she remains liable even if reparations were advanced by the Trust Fund. It could also be a measure which aims at future reconciliation if, even at a later stage, the convicted person fulfils this part of the Court's order.

111. To conclude, the Trust Fund fully supports the appeal ground of the Appellant V01 and observes that Trial Chamber I committed an error of law by failing to order Mr Lubanga to pay for reparations. The Appeals Chamber should amend the decision in this regard.

IV. FOURTH GROUND OF APPEAL:

THE NON-EXAMINATION OF INDIVIDUAL APPLICANTS AS AN ERROR IN LAW

1. The Appellants' submissions

a) VO1

112. The Appellants note two ways to trigger a reparation process: (i) by submitting a request in writing pursuant to Rule 94 or (ii) by initiating the process on the Court's own initiative. In both situations the Trial Chamber makes the determinations on the reparations request pursuant to Rule 95, which refers to the same determination process like specified under Rule

⁹⁵ See Ruben Carranza, Summary of the submission of the International Center for Transitional Justice (2012), at para. 23, available at <http://ictj.org/sites/default/files/ICTJ-DRC-Reparations-Recommendations-ICC-2012-English.pdf>.

94. They emphasise that a determination of the reparations request is required to be done by the Court.⁹⁶

The Appellants submit that the non-examination and non-determination of the requests, including their transferral for determination to the Trust Fund, is thus a violation of the Statute and the Rules, including the general guarantee under Rule 97 (3) that victims' rights are respected. The Statute and Rules require a determination of individual requests by the Trial Chamber.⁹⁷

b) OPCV and V02

113. These Appellants also refer to the two ways to start the reparations process, which are either individual requests submitted to the Court, or under exceptional circumstances, driven by the own initiative of the Court.⁹⁸

114. They also derive the obligation to examine claims for reparations from Article 75 (1), which states that 'the Court may determine the scope and extent of damage, loss and injury [...] and indicate the principles on which it is acting.'⁹⁹

115. The Appellants note that the Trial Chamber, by transferring their requests to the Trust Fund, deprives the applicants from having their requests for reparations properly examined and resulting in a judicial decision. The transfer to the Trust Fund without examination is not foreseen in the legal framework.¹⁰⁰ Furthermore, the Appellants raised that the Chamber did not specify the exceptional circumstances pursuant to Article 75 (1).¹⁰¹

116. The Appellants submit that each request submitted to the Court needs to be dealt with and that all applicants have the right to decisions on their

⁹⁶ ICC-01/04-01/06-2973, paras. 13-16.

⁹⁷ *Ibíd.*, paras. 19-20 and 24-26.

⁹⁸ ICC-01/04-01/06-2970, paras. 23-24.

⁹⁹ *Ibíd.*, para. 24.

¹⁰⁰ *Ibíd.*, para. 25.

¹⁰¹ *Ibíd.*, para. 25.

individual requests, following international jurisprudence. In addition, the lack of consultation and participation in the reparations proceedings may compromise the realistic expectations, which have not been properly taken into account.¹⁰²

By not examining the requests and forwarding those to a non-judicial body the Chamber violated the rights of the applicants.

c) Defence

117. The Defence submits that the non-examination of the reparations requests contradicts the legal framework of the Court. The provisions do not foresee a process such as forwarding requests to the Trust Fund. It is necessary that the request-driven approach following Rule 94 is to be continued and respected.¹⁰³

Only when this process is followed, the Defence is in the position to submit comments and observations and thus is legally heard. All those who request reparations must establish a link between their harm suffered and the respective convicted crime. This can only be tested if the Defence has the occasion to have access to the requests and to be involved in the proceedings around them. Through transferring the applications to the Trust Fund, they are taken away from any considerations by the Defence, which is a violation of the relevant law and their right to be legally heard.¹⁰⁴

2. Observations of the Trust Fund on appeal ground four

118. The Trust Fund recalls and reminds that the legal framework takes into account the possibility of collective reparations, which could appear as a

¹⁰² *Ibíd.*, paras. 26-27 and 29.

¹⁰³ ICC-01/04-01/06-2972, paras. 33- 35.

¹⁰⁴ *Ibíd.*, para. 40.

more appropriate mode in a given case and it lies in the discretion of the Court to order collective or individual or both forms of reparations.

119. If the Appellants ground of appeal is granted, it means all applications must be thoroughly examined on their merits by the Appeals Chamber, even if the Appeals Chamber is of the view that a collective award for most of the victims is more appropriate in this case.¹⁰⁵ The assessment of individual applications by the Appeal Chamber will necessarily be a rather lengthy and complex process with few tangible legal results. Human and financial resources required to complete this process will also be substantial. Therefore, the Trust Fund wishes to submit that the examination of individual applications will significantly prolong the time until victims who have waited already long enough can ultimately benefit from reparations, let alone requires significant amount of resources of the court and relevant parties.
120. The Trust Fund turns now to the legal question of whether the Trial Chamber **did take** a decision on the applications by transferring them to the Trust Fund to be considered in collective reparations programmes as appropriate, without excluding the possibility of individual reparations award.
121. The Trial Chamber ruled that:

“In light of the above, the Chamber considers that the individual application forms for reparations received thus far by the Registry should be transmitted to the TFV. If the TFV considers it appropriate, victims who have applied for reparations could be included in any reparations program that is to be implemented by the TFV.”¹⁰⁶

¹⁰⁵ ICC-01/04-01/06-2904, paras. 219-221. Other general considerations of the Chamber frame the parameters of reparations, in particular collective reparations.

¹⁰⁶ *Ibíd*, para. 284.

The Chamber decided:

“...not to examine the individual application forms [...] and instructs the Registry to transmit all the individual application forms [...].”¹⁰⁷

122. Rule 95 (2) (a) states that requests for reparations, triggered by the initiative of the Court, will be **determined** in the same manner as those who went through the request procedure. The Trust Fund already argued that the Decision of Trial Chamber I is a reparations decision in the meaning of Article 75 (2).
123. The Trust Fund notes that the legal framework of the Court does not provide any details on how a decision on applications, submitted under Rule 94 or even under Rule 95 (Court triggered) are to be made, what the minimum standards and requirements are, if any, and who would have to decide on them.
124. The Trust Fund also notes that, in the absence of any minimum standards, and in light of the submissions and conclusions above regarding the characterisation of the Trial Chamber’s Order, seizing the Trust Fund with specifying parameters given by the Trial Chamber must be seen and interpreted as a reparations decision also on the *individual applications*.
125. In this regard, it is recalled that the Trust Fund, ‘subject to the order of the Court, shall take into account in determining the nature/size of awards, inter alia: the nature of the crimes, the particular injuries [...]’ (emphasis added).¹⁰⁸
126. This allows for the conclusion that in light of the Court’s power to seize the Trust Fund with the implementation of an award, a Trial Chamber could limit itself to order reparations to be made through the Trust Fund and

¹⁰⁷ Ibid, para. 289.

¹⁰⁸ Regulation 55 of the Regulations of the Trust Fund for Victims.

leave it to the Trust Fund to determine damage, loss and injury.¹⁰⁹

127. Thus, the Trust Fund concludes that Trial Chamber I' s Order indicates the important and sufficient **determination** on reparations, which is that collective reparations are to be prioritised without excluding the consideration of individual reparations claims where appropriate in the given circumstances. Therefore, the Trust Fund is of the opinion that the Trial Chamber met its obligation to '*determine*' the applications pursuant to Rule 95 (2) (a) and 94.
128. Anything beyond that which is required for the implementation of the reparations order would then fall under the mandate of the Trust Fund and is at the heart of the implementation of the order. It is to be recalled, however, that an Implementation Plan must be approved by a Trial Chamber and thus ensuring a judicial approval on all the significant aspects of the implementation of a reparations order.
129. In conclusion, the Trust Fund notes that Trial Chamber I's decision on collective reparations for the individual applicants will be implemented by the Trust Fund. The individual applicants will be consulted including on the substance of their applications in line with the prioritised collective reparations framework.
130. To summarize, the Trial Chamber inherently decided on the individual applications by deciding that collective reparations are preferable and transmitted them to the Trust Fund to implement this order. There was no error of law and the Appellants appeal ground is unfounded.

V. FIFTH GROUND OF APPEAL:

¹⁰⁹ Eva Dwertmann, *supra* note 93, at page 64.

THE TRIAL CHAMBER I'S RULING WITH REGARD TO THE COMPOSITION OF THE GROUP OF VICTIMS AND/OR BENEFICIARIES ELIGIBLE FOR REPARATIONS AS AN ERROR IN LAW

1. The Appeal of the Defence

131. The Defence recalls that reparations are limited to victims in the meaning of Rule 85, which requires a link between the harm suffered and the convicted crime.¹¹⁰

132. The Defence submits that Trial Chamber I unlawfully enlarged the group of victims/beneficiaries eligible for reparations, by not requiring the existence of personal, actual and not yet repaired harm and by including:

- (i) Victims of sexual violence;
- (ii) Communities;
- (iii) Localities, which are not mentioned in the judgment.¹¹¹
- (iv) In addition, the Defence claims that all applications need to be disclosed in order to ensure that the Defence can be legally heard.¹¹²

(i) The inclusion of victims of sexual violence

133. The Defence argues that Mr Lubanga is not convicted of any crime of sexual violence. Furthermore, the Prosecution deliberately did not charge him with any of such crimes, but charged him for enlistment, conscription and the use of child soldiers under the age of 15 during the hostilities. Therefore, victims of sexual violence cannot benefit from reparations

¹¹⁰ ICC-01/04-01/06-2972, paras. 117-121.

¹¹¹ *Ibid.*, paras. 122-123. The ground of standard of causation will be examined below.

¹¹² *Ibid.*, paras. 48-78.

because of the lack of a link between the convicted crimes and the harm resulting from potential crimes of a sexualized nature.¹¹³

Furthermore, the Defence holds that the crime under Article 8 (2) (e) (vii) of the Statute of which Mr Lubanga is convicted and its elements, do not make any reference to sexual violence and do not establish any link between the recruitment as a child soldier and the commission of sexual violence in the course of recruitment or use of these children in the hostilities. The same applies to any international convention or national rule.¹¹⁴

(ii) The inclusion of broader communities

134. The Defence submits that the Chamber unlawfully allowed the inclusion of broader communities into collective reparations. By doing so the members of these communities would not be individually identified as victims under the definition of Rule 85. The group of beneficiaries is not linked to the convicted charges.¹¹⁵

135. The Defence notes that there is no difference between individual or collective reparations and that both require the determination of each individual as a victim in the meaning of Rule 85 (a) or as an affected community in the meaning of Rule 85 (b).¹¹⁶

136. The Defence does not oppose any additional programme under the assistance mandate of the Trust Fund, but not as judicial reparations against Mr Lubanga.¹¹⁷

(iii) The inclusion of localities not mentioned in the Judgment

137. The Defence submits that Trial Chamber I unlawfully extended

138.

¹¹³ Ibid., paras. 125-137.

¹¹⁴ Ibid., para. 135.

¹¹⁵ Ibid., paras. 138-143.

¹¹⁶ Ibid., paras. 144- 147.

¹¹⁷ Ibid., para. 148.

reparations by allowing reparations also for those who live in other communities from those listed in the Judgment. In the view of the Defence this forms a violation of the rights of Mr Lubanga.¹¹⁸

Extending the group of beneficiaries of reparations to other possibly affected communities would create new facts that were not debated in the proceedings and thus not subject to examination by Mr Lubanga.¹¹⁹

(iv) Disclosure of all applications and the right to be legally heard

139. The Defence submits that they know only about one out of 85 current reparations applications. In order to guarantee the rights of Mr Lubanga they have to scrutinize and verify the facts submitted. Any anonymous applications for reparations do not allow for this important examination. As it has been demonstrated during trial, the status of 9 of the victims was withdrawn because they were not credible.¹²⁰

140. In particular, the Defence demands the disclosure of personal identity information of the applicants, the crime and harm description, identities of any person acting on behalf of the victim, assisting the victim and any intermediaries in contact with the victim.¹²¹

2. Observations of the Trust Fund on appeal ground five

141. The Trust Fund's observations on this appeal ground take into account: (i) that a reparations order should be directed against a convicted person who bears the burden of reparations, whether the person is indigent or not, (ii) that its mandate to implement Court-ordered reparations by definition is more limited in scope than its assistance mandate, and (iii) that the

¹¹⁸ Ibid., paras. 180- 182.

¹¹⁹ Ibid., para. 183.

¹²⁰ Ibid., paras. 48-58.

¹²¹ Ibid., paras. 61-77.

language of the legal framework (Statute, RPE and RTFV¹²²) provides for reparations to, or in respect of, victims, including their families.

142. The Trust Fund agrees with the Defence that **reparations** in a given case should only address the harm suffered resulting from a crime of which a person was convicted. The definition of the term ‘victim’ is contained in Rule 85 and requires a link between harm and convicted crime(s).¹²³

143. This view is supported by the Regulations of the Trust Fund, which refer to both individual and collective reparations for ‘victims’ who can benefit from reparations.

On the determination of collective reparations, Regulation 70 states:

“The Board of Directors may consult victims as defined in rule 85 of the Rules of Procedure and Evidence and, where natural persons are concerned, their families, as well as their legal representatives, and may consult any competent expert or expert organization on the nature of the collective award(s) and the methods for its/their implementation.”
(emphasis added)

On individual reparations where the beneficiaries are, or are not yet identified, Regulations 59 and 60 refer to the term ‘victim’ which must be understood in the meaning of Rule 85:

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

¹²² For example: Regulation 48 of the Regulations of the Trust Fund for Victims states: “The resources of the Trust Fund shall be for the benefit of victims of crimes within the jurisdiction of the Court, **as defined in rule 85** of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families.” Rule 49 stipulates: “The Board of Directors may consult **victims as defined in Rule 85** of the Rules of Procedure and Evidence and, where natural persons are concerned, their families as well as their legal representatives and may consult any competent expert or any expert organisation in conducting its activities and projects.”

¹²³ Eva Dwertmann, *supra* note 93, at pages 77, 91 and 92, noting that the definition in Rule 85 must be interpreted according to the relevant stage of proceedings which is at the reparations stage the harm that was caused by a person convicted by the Court for that crime. Further, at page 109, stating that it is “[a] legal requirement that victims can only receive reparations for harm caused by the specific crimes a person was convicted for.”

any procedures that the Trust Fund intends to employ to collect missing details, and methods of disbursement.

60. Where the names and/or locations of the victims are not known, or where the number of victims is such that it is impossible or impracticable for the Secretariat to determine these with precision, the Secretariat shall set out all relevant demographic/statistical data about the group of victims, as defined in the order of the Court, and shall list options for determining any missing details for approval by the Board of Directors. (emphasis added)

144. Therefore, a certain causal link standard must be established by those who are to benefit from reparations even if a group/collective benefits from reparations. This is true since the convicted person should and must be held responsible and liable for having caused harm, loss and injuries and consequently ordered reparations.
145. In this context it might be distinguished between: (i) individual reparations, (ii) collective reparations that have an individual component and (iii) collective reparations that are by their nature community-oriented.
146. In light of the foregoing, the Trust Fund submits that - as a primary rule - only those who comply with the requirements of Rule 85, and establish at least on a *prima facie* basis that the convicted crime is a *proximate* cause of the harm they suffered, are eligible for reparations.
147. In accordance, the general rules of the Court and the Trust Fund should apply, which are: (i) to avoid additional harm, (ii) to act in a non-discriminatory manner and (iii) to consider all internationally recognised rights of victims, community-oriented collective reparations also must and will have to include broader communities in order to remedy the damage that affected the communities and society as a whole. For these types of collective reparations, which necessarily include broader and larger

communities/groups, the beneficiaries do not need to establish the requirements of Rule 85.¹²⁴

148. Trial Chamber I distinguished between *victims* (including direct, indirect victims and legal entities), and *beneficiaries* of the collective reparations programmes; and noted that beneficiaries will not have victim status pursuant to, and in, the meaning of Article 85.¹²⁵
149. Consequently, with regard to the civil liability of the convicted person, the Trust Fund submits that Mr Lubanga would not have to pay, and would not be held liable for those reparations where other beneficiaries are included; except in so far as victims pursuant to Rule 85 participate in these programmes, and as it is possible, to identify the specific part of costs that their participation in these reparation programmes/measures causes.
150. With regard to collective reparations awards, which have an individual component,¹²⁶ it must be assessed on a case-by-case basis whether they are limited to victims in the meaning of Rule 85, or include other beneficiaries contingent on the respective programme.

The convicted person can be held liable only for those reparations, which are for victims in the meaning of Rule 85. Others might and should benefit in order to address the collective harm but the convicted person cannot be held liable for these reparations awards.

¹²⁴ The approach of the Inter-American Court of Human Rights with regard to developing distinction between victims, injured parties and also addressing communities/societies as a whole, could add to further discussion of the suggested categories of victims/beneficiaries within the ICC's reparations framework. See further details: Clara Sandoval-Villalba, The Concepts of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations, in: Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, (2009), at pages 243-282.

¹²⁵ Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations, 29 August 2012, ICC-01/04-01/06- 2911, para. 29.

¹²⁶ This encompasses for example individuals benefit from a mental-health programme designed for a group (collective) of victims.

(i) On the inclusion of victims of sexualized violence¹²⁷

151. With regard to reparations, the Trust Fund notes that the distinction must be made between the legal qualification of the facts and thus the crimes of which Mr Lubanga was held guilty and subsequently sentenced on one hand; and on the other hand, the harm and injuries that resulted from these crimes and which are an inherent and integral part of these crimes.
152. The Trust Fund notes that the harm that child soldiers suffered is multi-faceted. To be recognised as a result of the commission of the convicted crimes, it is sufficient for the purpose of reparations that the harm is related to the course of the recruitment or use in active participation in hostilities. There is no need to have the factual situation of sexualized violence captured by specific crimes.
153. The standard test is, whether during the course of those facts that are the basis of the charges, namely enlisting or conscripting or using children to participate actively in the hostilities, acts of sexualised violence were committed that are directly linked to, and are a component of, the acts and facts underlying the charges. In this regard, sexualised violence is one of the accompanying and inherently linked factual situations that are part of the reality of child soldiers. Sexual abuse, enslavement and exploitation are frequent occurrences in the course of the recruitment and use of child soldiers in hostilities. Thus, the harm caused through acts of sexualized violence is inherently connected to underlying facts of the charges, regardless of whether sexualized violence and sexual exploitation are specifically charged.
154. The offences of Article 8 (2) (e) (vii) of the Statute are continuous crimes in nature. Trial Chamber I stated that “these offences end only when the child

¹²⁷ The Trust Fund advocates for the use of the term “sexualized” instead of “sexual’ violence to reflect the fact that rape is not an aggressive manifestation of sexuality, but rather a sexual manifestation of aggression.

reaches 15 years of age or leaves the force or group[...].”¹²⁸ Therefore, it is characteristic for these on-going offences that during the entire time of being directly or indirectly aligned with the armed forces, recruited children perform a wide-range of activities and fulfil many different duties. All of what the recruited children faced during their time with the armed group may cause a specific and multi-faceted harm that is thus directly linked to the continuous crimes under Article 8 (2) (e) (vii), whether or not additional and more specific crimes are or could have been cumulatively charged. As long as the harm suffered results from the facts that are underlying the charges under Article 8 (2) (e) (vii), the victim/survivor can establish their status as a victim pursuant to Rule 85.

155. It is internationally and broadly acknowledged that child soldiers are used for different tasks and are not only used for the narrow meaning of combat, but also for support tasks. Mainly girls are, in addition, sexually abused, sexually enslaved, raped, impregnated and infected with sexually transmitted diseases.¹²⁹
156. The Trust Fund wishes to emphasise the high prevalence of sexualized violence against child soldiers.¹³⁰ A study conducted by the Trust Fund among former child soldier beneficiaries of the assistance projects highlighted the sexualized violence suffered by former child soldiers during their conscription, enlistment and/or participation. Over 48% of former child soldiers (of which 66.7% were girls and 32.2% boys) interviewed in 2010 declared that they had been victims of sexualized

¹²⁸ ICC-01/04-01/06-2842, para. 618.

¹²⁹ See for example, Child Soldiers Global Report 2008, Coalition to Stop the Use of Child Soldiers, with further references available at http://www.childsoldiersglobalreport.org/files/country_pdfs/Congo,%20Democratic%20Republic%20of.pdf, reporting that girl soldiers “performed combat duties and portering, provided medical assistance and carried out domestic labour. Thousands were raped, resulting in serious and permanent injuries; many had children as a result of rape.”

¹³⁰ ICC-01/04-01/06-2803, in particular para. 163.

violence. And 35% of former child soldier boys interviewed affirmed that they had been forced to commit sexualized violence.

157. Evidence heard during the trial also showed that sexualized violence was systematic in the camps of the UPC.¹³¹ Witness P-0046 testified that all the girls at the demobilisation centres, except for a few, were sexually assaulted by commanders and soldiers.¹³²
158. The Trust Fund submits that victims who suffered harm from sexualized violence occurring during their enlistment, conscription or use to participate actively in hostilities as children under the age of 15 are entitled to reparations addressing this specific harm.
159. As a supplemental supporting argument for the eligibility of victims/survivors of sexualized violence for reparations, the Trust Fund submits that based on a broader interpretation of the “being used to participate actively,” standard sexualized violence may properly be included within the scope of “using children under the age of 15 to participate actively in hostilities” as a matter of law.
160. Further, it should be noted that certain international instruments include girls recruited for ‘sexual purposes and for forced marriages’ within the definition of child soldiers.¹³³
161. In fact, the delegations to the Rome Conference opted for a broader interpretation of “actively participating.” The *travaux préparatoires* clarify that the drafters of the Rome Statute intended the concept of active participation to be broader and more inclusive.¹³⁴

¹³¹ ICC-01/04-01/06, T-207-Red2ENG, page 31, lines 4-6.

¹³² ICC-01/04-01/06, T-207-Red2-ENG, page 30, line 14 to page 31, line 1.

¹³³ Cape Town Principles and Best Practices., 27-30 April 1997, Cape Town, South Africa, page 12. See also, United Nations, Operational Guide To The Integrated Disarmament, Demobilization, And Reintegration Standards, available at <http://unddr.org/uploads/documents/Operational%20Guide.pdf>.

¹³⁴ Draft Statute for the International Criminal Court, contained in Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc.A/CONF.183/2/Add.1, 14 April 1998, at pages 21-23. See also W.A. Schabas, The

162. Following the submission of the United Nations Special Representative of the Secretary General on Children and Armed Conflict and other international documents,¹³⁵ the Trust Fund agrees, in respect to reparations the conclusions of the Special Representative with regard to the interpretation of “used to actively participate,” namely that combatant and non-combatant children are covered.¹³⁶ This includes, but is not limited to: cooks, porters, nurses, spies, messengers, administrators, translators, radio operators, medical assistants, public information workers, youth camp leaders, and girls or boys used for sexual exploitation.¹³⁷
163. The Special Representative argued that the relevant question for the Court is to assess “whether the child’s participation served as an essential support function to the armed force or armed group during the period of conflict.”¹³⁸ Furthermore, she held that any activities that put the recruited child at specific risk in combat fall under the element of “used to actively participate,” referencing the Special Court of Sierra Leone.¹³⁹

International Criminal Court: A Commentary on the Rome Statute (2010), at page 253 and M. Cottier, Article 8: War Crimes, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2008), at page 468, marginal note 227. Roman Graf, The International Criminal Court and Child Soldiers, an appraisal of the Lubanga Judgment, *Journal of International Criminal Justice* Vol. 10 (2012), pages 945-969, at pages 960-962. In the same line is the Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803, paras. 261-263. The Pre-Trial Chamber found that also combat related activities fall under active participation. However, the Pre-Trial Chamber ruled that activities, which are not related to the hostilities such as domestic work or food deliveries to an airbase, would not fall under the provision.

¹³⁵ See Written submission of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict submitted in application of Rule 103 of the Rules of Procedure and Evidence, 18 March 2008, ICC-01/04-01/06-1229-AnxA. This interpretation is in line with UN policies for DDR, see the Operational Guide and the Paris principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007.

¹³⁶ *Ibid.* para. 18.

¹³⁷ *Ibid.*, para. 23.

¹³⁸ *Ibid.*, para. 21.

¹³⁹ In *Prosecutor v. Brima, Kamara, Kanu (AFRC)*, 20 June 2007, SCSL-2004-16-T, paras. 736-737 the Chamber stated “using children to participate actively in the hostilities encompasses putting their lives directly at risk in combat.... [a]ny labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation.”

164. The Chamber held that:

“Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an “indirect” role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target.”¹⁴⁰

165. Hence, the Trial Chamber identified and focused on two elements that are relevant in determining whether the individual was actively involved and participated: (i) the child’s support and (ii) the level of consequential risk.¹⁴¹

166. The Trust Fund submits that this broader interpretation of ‘being used to actively participate’ allows for the inclusion of those who were either, in addition to combat related tasks, or exclusively, sexually enslaved and abused, into the group of victims, eligible for reparations. They were aligned with combatants and thus exposed to a high level of risk during combat. By being “wives” of commanders and forced to provide sexual services to them they supported them in their cause.

Consequently, the Trust Fund submits that victims/survivors of sexualized violence in the course of their recruitment, or use to actively participate, can demonstrate that the harm they suffered is caused through the commission of crimes of which Mr Lubanga is convicted and would therefore qualify to be addressed through reparations. Therefore, it is the opinion of the Trust Fund that this appeal ground has no merits.

¹⁴⁰ Ibid., para. 628.

¹⁴¹ This should not be interpreted to mean ‘lawful target,’ meaning that the child loses his or her protection as a civilian under International Humanitarian Law. There is thus no inevitable inconsistency between the broad protection afforded to civilians and the broad protection against children being used in hostilities.

(ii) On the inclusion of broader communities

167. The Trust Fund wishes to recall that widespread human rights violations cause harm not only to individuals but also to the communities and society as a whole. In order to repair, remedy and, if possible, to undo the collective harm, experience shows that reparation measures that involve the society as a whole will strengthen the meaningfulness and appropriateness of collective awards.
168. Principles of non-discrimination, doing no/less harm and aiming at reconciliation, measures that include education on the root and underlying causes of the conflict, background of crimes and conflict, as well as measures that aim at guaranteeing non-repetition of the crimes, necessarily and genuinely need to include broader communities. They would even be detrimental if the communities were disregarded, which should be avoided by all means.
169. In addition, the consultation process that involves broader communities will assist in determining meaningful reparations programmes which address not only the individual but also collective harm. The consultation process will also work to mitigate risks of misunderstanding or misrepresentation within communities of reparations awards; and of jealousy and stigmatisation by the communities against victims. The Trust Fund includes, by reference, its previous submissions on the effects of the crimes on the communities.¹⁴²
170. Therefore, the Trust Fund notes that collective reparations as prioritised by Trial Chamber I in the given case have to include programmes that address the collective harm done to the communities. In line with Trial Chamber I,¹⁴³ the Trust Fund suggests distinguishing between victims and beneficiaries. Once they are identified after consultation as being affected

¹⁴² ICC-01/04-01/06-2872, para. 154.

¹⁴³ ICC-01/04-01/06-2911, para. 29.

by the convicted crimes, members of the communities may be beneficiaries of a reparations programme along with direct and indirect victims. Beneficiaries do not need to establish that they qualify as victims in the narrow understanding of Rule 85, pursuant to which they would have to establish a causal link between the harm and the convicted crimes.

171. Extending the eligibility for collective reparations to beneficiaries, namely communities, is not only justified but is the only way by which collective reparations may become meaningful for cases of mass atrocities which fall under the jurisdiction of the Court. Members of the relevant communities have been affected and suffered collective harm by the enlisting, conscripting of children under the age of 15 and their use in active participation in the hostilities committed by Mr Lubanga.

172. However, with regard to the civil liability of Mr Lubanga, he should be ordered only to bear the costs of reparations for direct and indirect victims and their families.

Therefore, by granting collective reparations and including beneficiaries who do not fall under the category of victims in the meaning of Rule 85, Mr Lubanga's rights are not violated nor prejudiced.

(iii) On the inclusion of localities not mentioned in the Judgment

173. The Trust Fund takes note of the Judgment of Trial Chamber I: the 18 localities that are listed are not exhaustive and do not exclude other localities where the enlistment and conscription of children under the age of 15 and their use to participate in the hostilities took place. The Chamber holds that:

“[B]etween 1 September 2002 and 13 August 2003, the armed wing of the UPC/FPLC was responsible for the widespread recruitment of young people, including children under the age of 15 [...].”¹⁴⁴ (*emphasis added*)

¹⁴⁴ ICC-01/04-01/06- 2842, para. 911.

The Chamber further finds that:

“[C]hildren under 15 were “voluntarily” or forcibly recruited into the UPC/FPLC and sent to either the headquarters of the UPC/FPLC in Bunia or its training camps, including at Rwampara, Mandro, and Mongbwalu.”¹⁴⁵ (emphasis added)

“[C]hildren were deployed as soldiers in Bunia, Tchomia, Kasenyi, Bogoro and elsewhere, and they took part in fighting, including at Kobu, Songolo and Mongbwalu (...).”¹⁴⁶ (emphasis added)

174. The Trust Fund submits that the language used by the Trial Chamber demonstrates that the listed localities are only examples. By using “widespread,” “elsewhere” and “including,” the localities are not limited to those mentioned. Any other locality where the enlistment, conscription and use of children under the age of 15 to actively participate between 1 September 2002 and 13 August 2003 under the responsibility of Mr Lubanga took place, are localities to which reparations programmes for the benefit of victims can and should be implemented.

The Trust Fund submits that Trial Chamber I did not violate the rights of Mr Lubanga by extending the scope of reparations to other localities than those explicitly named and listed. Therefore, in the opinion of the Trust Fund this ground of appeal should have no merits.

(iv) On the right to be legally heard

According to Article 75(3) of the Statute, the Court *may* invite and shall take into account representations from, or on behalf of, the convicted person, victims, other interested persons or interested States before

¹⁴⁵ Ibid., para. 912.

¹⁴⁶ Ibid., para. 915.

making a reparations order. It is therefore within the discretion of the Court to invite and take into account the observations submitted. In this case, the Trial Chamber invited the Defence (and participants) to submit their views on the principles and procedures with regards to reparations.

175. If the Appeals Chamber upholds Trial Chamber I's Decision, the specification of the Reparations Order lies with the Trust Fund alone. The determination of the eligible individual/groups, the applied methodology, including the standard of proof and causation that has to be applied, is to be decided by the Trust Fund.
176. The Defence claims that it must have the right to scrutinize each of the applications for reparations¹⁴⁷ and any other future applications whether the applicant is eligible for reparations, i.e. who can establish the link between harm suffered and the crimes of which Mr Lubanga is convicted.
177. The Trust Fund notes that there are no relevant provisions in the ICC's legal framework which support the Defence' claim in an explicit manner. The way of involving the Defence and the Victims in the implementation process is subject to Rule 97(3), which provides "In all cases, the Court shall respect the rights of victims and the convicted person."
178. The Trust Fund suggests that the relevant Chamber should decide on the balance between the need to avoid undue delay in the implementation process of reparations awards, and the opportunity for the Defence and the Victims to comment on the Draft Implementation Plan and have their observations considered.
179. In this regard, the Trust Fund does not oppose that the Defence shall have an opportunity to review the process of screening of victims (not of beneficiaries) for the purpose of reparations awards, subject to any protective measures.

¹⁴⁷ ICC-01/04-01/06-2972, paras. 61- 78.

180. In addition, victims who were previously admitted for the purpose of participation but whose status was withdrawn by the Trial Chamber should not necessarily be excluded from reparations as victims.

To conclude, this appeal ground has no merits.

VI. SIXTH GROUND OF APPEAL:

TRIAL CHAMBER I'S FINDING ON THE STANDARD OF CAUSATION AS
PROXIMATE CAUSE STANDARD AS AN ERROR OF LAW

1. The Appeal of the Defence

181. The Defence submits that the *proximate cause* standard and the 'but/for' test that the Trial Chamber determined to be the sufficient test to assess whether a link between harm and convicted crime exists, is vague, imprecise, abstract and hypothetical, and contingent on the subjective view of the person who applies this standard.¹⁴⁸

182. Furthermore, the Defence objects to the Chamber's conclusion that there is no settled international standard and refers to the standard applied by the Extraordinary Chambers in the Courts of Cambodia (hereinafter "ECCC"), the European Court for Human Rights (hereinafter "ECHR"), the IACtHR and The United Nations Compensation Commission (hereinafter "UNCC").

183. The Defence concludes that all international bodies apply for the determination of the causal link between harm and crime the standard that it must be *direct* and *immediate*.¹⁴⁹

¹⁴⁸ Ibid., paras. 172-173.

¹⁴⁹ Ibid., paras. 174-179.

2. Observations of the Trust Fund on appeal ground six

184. The Trust Fund notes that the legal framework of the ICC is silent on the subject matter of causation, namely the causal link between harm and (convicted) crime. Thus it is left to the Judges to determine the standard of causation.
185. The Trust Fund submits that the “proximate cause” standard does not have a clear and precise definition but neither does the standard of “directness” suggested by the Defence.
186. “Direct” and “proximate cause” are often used interchangeably, and are always subject to the individual or body that applies it in a concrete given case. The Trust Fund notes that, in general, each and every causation standard will be open to discretion and interpretation.
187. The International Law Commission’s commentary on the Articles on State Responsibilities for reparations notes that causation is a necessary but not sufficient condition for reparations and that the injury might be too remote or indirect to be attributable. Additionally, and among other factors, criterion such as foreseeability, proximity or directness may also be used in order to exclude speculative and remote damages and injuries.¹⁵⁰
- However, the International Law Commission did not further define the element of causation and did not deal with the complexities related thereto, but left the determination to practitioners.¹⁵¹
188. Similarly, the Special Rapporteur on State Responsibility stated on the matter of causation that it is impossible to develop concrete criteria - a

¹⁵⁰ Draft articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-Third Session, UN Doc. A/56/10 (2001). The report, which also contains commentaries on the draft articles, appears in: Yearbook of the International Law Commission, (2001) Vol. II, Part Two, as corrected. Commentaries, Art. 31, para. 10. Relevant Article 31 reads: 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

¹⁵¹ Dinah Shelton, Righting Wrongs: Reparations in the Articles on States Responsibility, in International American Journal of International Law Vol. 96 (2002), page 833 seq., at page 846.

formula which would take into account and address all circumstances of a given case.

“The determination will be made “[O]nly on the basis of the factual elements and circumstances of each case, where the discretionary power of arbitrators or the diplomatic abilities of negotiators will have to play a decisive role in judging the degree to which the injury is indemnifiable. This is especially true whenever the causal chain between the unlawful act and the injury is particularly long and linked to other causal factors.”¹⁵²

Thus, first and foremost it is the judge, arbitrator or commissioner who determines all factors and the chain that caused the injury “*in the normal course of things*, and decide whether, according to *normality* the injury is attributable to the act in question. This calls for a choice, a selection and an assessment of the facts.”¹⁵³

189. In many cases, direct and proximate causation standards are treated as synonymous; both attempt to limit liability. According to Cheng, “in the majority of cases in which the epithets, direct and indirect, are applied to describe the consequences of an unlawful act, they are in fact being used synonymously with proximate and remote.”¹⁵⁴

190. Proximate cause is generally considered to be a relative term meaning “near” or “not remote.”¹⁵⁵ Using proximate cause theory is thinking in terms of whether the alleged loss can be reasonably considered to be the defendant’s fault. It seems to be the most commonly used test to determine whether the wrongful act was the “proximate” cause or too remote for

¹⁵² Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur A/CN.4/425 & Corr.1 and Add.1 & Corr.1, in: Yearbook of the International Law Commission, 1989, Vol. II (1), at para. 46

¹⁵³ Ibid.

¹⁵⁴ Bin Cheng, General Principles as applied by international Courts and Tribunals, (1953) reprinted (2006), at page 243.

¹⁵⁵ Arthur W. Rovine and Grant Hanessian, Toward a Foreseeability Approach to causation questions at the United Nations Compensation Commission, in Richard B. Lillich (ed.), *The United Nations Compensation Commission* (Thirteen Sokol Colloquium) (1995), page 235 et seq., pages 240-244.

liability.¹⁵⁶ It is used to break a factual chain of causation at a certain point in order to prevent infinite liability.

191. The concept of *direct* and *indirect* loss has been attributed to the Alabama claims arbitration¹⁵⁷ where claims simply were rejected because they were characterised as *indirect* without further explanation or criteria. 'Practical Politics' are widely believed to be responsible for this ruling.¹⁵⁸

192. It appears to be a common opinion that "[t]he international cases interpreting the terms direct and indirect damages have provided little, if any, guidance to tribunals."¹⁵⁹

This is more than convincing when eventually practical policy considerations continue to be an essential and decisive factor that draws the line between what is direct/proximate or indirect/remote.

193. Commentators go even so far to state that "[t]he distinction sought to be made between damages which are direct and indirect is frequently illusory and fanciful and should have no place in international law."¹⁶⁰

194. It is noted that different international courts and arbitral tribunals, as well as international claims commissions, by applying the directness standard and distinguishing between direct and indirect harm, did not come to consistent results, even when deciding on similar circumstances. This was also observed by the Special Rapporteur on State Responsibility who stated that this distinction "has given doubts because of the ambiguity and scant utility."¹⁶¹

¹⁵⁶ Norbert Wühler, Causation and Directness of Loss as Elements of Compensability before the United Nations Compensation Commission, in Richard B. Lillich. (ed.), *The United Nations Compensation Commission* (Thirteen Sokol Colloquium) (1995), page 207 et seq., pages 232-233.

¹⁵⁷ John Basset Moore, *International Arbitration* 646 (1898), material of the case can be found at Marjorie M. Whiteman, *Damages in International Law* 1772-78 (1943).

¹⁵⁸ Rovine & Hanessian, *supra* note 155, at page 236 and with further references. It is reported that England had threatened to abandon the arbitration if the claims were not dismissed.

¹⁵⁹ *Ibid.*, at page 242.

¹⁶⁰ War Risk Insurance Claims, Administrative Decision and Opinions of a General Nature and Opinions and Decisions in Certain Individual Claims (1923), pages 62-63.

¹⁶¹ Second report on State responsibility, *supra* note 152, at para. 36.

195. The main criteria to implement the proximate cause test are foreseeability and temporal proximity. Foreseeability is defined as *reasonable* anticipation of the possible results of an action. That is, if a subsequent harm is naturally expected from the original act in the sense that it is foreseeable, and there is no independent cause of the subsequent harm, the original actor is responsible for the ultimate harm.¹⁶²
196. In several cases decided by international claims commissions or arbitration cases, the element of reasonable foreseeability was used to determine, but also to limit, to a certain extent, liability. In the following, the Trust Fund provides some examples for both:
197. The Samoan Claims Commission adopted the foreseeability standard and ruled: “Damages for which a wrongdoer is held liable are the damages [...] which a reasonable man in the position of the wrong-doer at the time would have foreseen as likely to ensue from his action.”¹⁶³
198. In the *Lighthouse* arbitration¹⁶⁴ between France and Greece, the claim for the loss of the property of the firm through a fire was held to be not foreseeable in the normal course of the wrongful eviction of that firm. The Court held that:
- “Les dégâts n’étaient ni une conséquence prévisible ou normale de l’évacuation, ni attribuables à un manque de précaution de la part de la Grèce. Tout lien adéquat de causalité fait défaut et [...] doit être rejeté. ”
199. The United States – Venezuelan Mixed Claims Commission similarly awarded compensation for those losses that were “[p]resumptively foreseeable by the parties committing the wrongful acts.”¹⁶⁵

¹⁶² Rovine & Hanessian, *supra* note 155, at pages 235, 240-244.

¹⁶³ Joint Report No. 2 of 12 August 1904, of the American and British Commissioners quoted in Whiteman, *supra* note 157, at 1779-80.

¹⁶⁴ 12 R.I.A.A., at page 217 (1956).

¹⁶⁵ Jackson H. Ralston, *Venezuelan Arbitrations of 1903* (1904), at page 142.

200. The Portugo-German Arbitral Tribunal in the *Angola* case, ruled that Germany was liable to Portugal, the colonial power, for losses resulting from an uprising in Angola following an unjustified German military incursion into the area. The Tribunal stated that it cannot be left for the injured party, which was for Germany foreseeable, and perhaps even intended.¹⁶⁶

201. This approach was also adopted in the Decision of the Eritrea-Ethiopia Claims Commission:

“Given this ambiguous terrain, the Commission concludes that the necessary connection is best characterized through the commonly used nomenclature of “proximate cause.” In assessing whether this test is met, and whether the chain of causation is sufficiently close in a particular situation, the Commission will give weight to whether particular damage *reasonably* should have been *foreseeable* to an actor committing the international delict in question. The element of foreseeability, although not without its own difficulties, provides some discipline and predictability in assessing proximity. Accordingly, it will be given considerable weight in assessing whether particular damages are compensable.”¹⁶⁷

202. The UNCC applied the approach of *directness*. However, it also incorporated the standard of foreseeability. The UNCC concluded, in the case of Egyptian workers, on the matter of causation:

“Usually the criterion is indicated by the presence of a clear and unbroken causal link between the unlawful act and the injury for which damages are being claimed. The causal link is presumed to exist when, in the natural course of events, the damage could have been foreseen.”¹⁶⁸

¹⁶⁶ 2 R.I.A.A., at pages 1011, 1031 (1928).

¹⁶⁷ Eritrea-Ethiopia Claims Commission, Decision 7, 27 July 2007, para. 13 , available at http://www.pca-cpa.org/showpage.asp?pag_id=1151.

¹⁶⁸ Report and Recommendations of the Panel of Commissioners Concerning the Egyptian Workers Claims, 12 October 1995, UNCC, S/AC.26/1995/R.20/Rev.1, para. 217.

203. The Trust Fund notes that the standard of ‘reasonably foreseeable’ has been suggested as being ‘more meaningful and with a moral component’ and ‘firmly rooted in both common and civil law countries’.¹⁶⁹
204. Therefore, it can be concluded that settled criteria are proximity, directness and reasonable foreseeability of the harm. In addition other considerations might also come into play such as the nature of the loss, the gravity of the respective wrong-doing and policy arguments, based on reasonableness and justice.¹⁷⁰
205. The Trust Fund concludes that all criteria remain to a certain extent general, and that they can all be affected by political policy considerations and driven by external influences. This is also valid for the foreseeability standard.
206. Bearing in mind that in cases of mass crimes, in which a large number of individuals are affected, it has been suggested that any chosen approach should be kept simple and thus practicable instead of applying any complex causation theory.¹⁷¹
207. The Trust Fund agrees and emphasises that the core element for a satisfactory reparations process is that the process is transparent, participatory and that sufficient information about applied standards are provided. To do no/less harm through reparations should guide the Court and the Appeals Chamber when ruling on the appeals.
208. The Trust Fund submits that the *proximate cause* standard as ruled by the Trial Chamber can be found in most reparations and compensation settings. The criteria of directness and foreseeability could further assist in determining the causal link between harm and convicted crime. However, all criteria, including those suggested by the Defence as ‘direct’ or

¹⁶⁹ Rovine & Hanessian, *supra* note 155, page 249.

¹⁷⁰ Eva Dwertmann, *supra* note 93, at pages 94-95.

¹⁷¹ *Ibíd.*, at page 95.

‘immediate,’ allow a flexible approach. They should be applied in the best and most reasonable way to respond to the harm of victims. Overall, it must be understandable and based on consultation that the criteria for determining causation are perceived as just and satisfactory.

VII. SEVENTH GROUND OF APPEAL:

THE TRIAL CHAMBER I’S DETERMINATION ON THE STANDARD OF PROOF
AS AN ERROR OF LAW

1. The Appeal of the Defence

209. The Defence submits that Trial Chamber I’s Decision to allow the Trust Fund to apply a wholly flexible standard of proof when reparations are provided by the Trust Fund is too broad and thus violates the rights of the convicted person.¹⁷²
210. The Defence notes that victims who apply for reparations should at least have to comply with the evidentiary standard of *preponderance of probabilities*. According to the Defence, the *prima facie* standard is not sufficient in the phase of reparations where the claimant has to prove the facts on which his/her claim is based. These are the injuries, loss or damages and the causal link between harm and convicted crime. The difficulty to obtain the necessary evidence cannot be a reason to lower the standard of proof. It is recognised that in all systems, be it common or civil law, the burden of proof falls on the claimant. The Trial Chamber cannot ignore this standard.¹⁷³

¹⁷² ICC-01/04-01/06-2972, paras. 79-80, 82

¹⁷³ *Ibid.*, paras. 83-84, 89-92.

211. The Defence further submits that the Trial Chamber violates the law by linking the standard of proof to the question of financial capacity of the Accused. To apply a lower standard and namely a wholly flexible standard of proof in case of the indigence of the convicted person, and thus the Trust Fund which provides reparations, violates the rights of the convicted person. The standard of proof is and cannot be subject to the question of who bears reparations.¹⁷⁴
212. Furthermore, the Defence argues that the difficulty of victims to obtain evidence cannot be a valid criterion to lower the standard of proof. This is not justified in cases where the conflict occurred a long time ago and, the Defence already had demonstrated that, even despite the conflict situation in Ituri, it was possible to find evidence.¹⁷⁵

The Defence submits that it is unable to contest or comment on the vague, *wholly flexible* approach that the Trust Fund should apply, according to the impugned Decision. In addition, only by application of a *preponderance of probabilities* standard, the Defence is in a position to respond to reparations claims.¹⁷⁶

2. Observations of the Trust Fund on appeal ground seven

213. As a preliminary remark, the Trust Fund notes that the legal framework of the ICC does not provide any guidance with regard to the applicable standard of proof related to reparations.¹⁷⁷ The Trust Fund further notes the challenge with regard to reparations in finding a balance between the rights of victims and beneficiaries on one hand, and the convicted person on the other hand:

¹⁷⁴ Ibid., paras. 85-88.

¹⁷⁵ Ibid., paras. 98-104.

¹⁷⁶ Ibid., paras. 105-109.

¹⁷⁷ The drafters of the Rules accepted that the standard of proof with regard to reparations is lower. Since there was not consensus on this point, no provision has been included.

- (i) providing meaningful collective reparations without doing harm and in a non-discriminatory manner, taking into account that reparations programmes are more community-oriented, and thus address not only victims in the narrow meaning of Rule 85;
- (ii) that reparations should be ordered against a convicted person whether or not the convicted individual is held indigent;

214. It has been recognised that the standard of proof with regard to reparations is lower than the standard of proof with regard to a conviction, the latter of which is *beyond reasonable doubt*.¹⁷⁸

215. The Trust Fund submits that in the absence of generally applicable principles of standards of proof before the ICC, the Trust Fund's observations refer only to the circumstances of this specific case.¹⁷⁹

216. The Trust Fund suggests that the standard and burden of proof be flexible. In this regard, different practices and experiences from mass claims proceedings should also provide guidance and be used, although they must always be balanced between the rights of the convicted person and the victims.

217. The Trial Chamber held that collective reparations are to be prioritised. With regard to the standard of proof, the Trust Fund submits that those individual applicants, who were admitted on a *prima facie* standard for the purpose of participation, should be eligible on the same basis also for the purpose of reparations. They have already established and proven, at least

¹⁷⁸ See previous submissions by the Trust Fund, ICC-01/04-01/06-2872, paras. 50-52 with further references and ICC-01/04-01/06-2803-Red, paras. 49-51. See also Eva Dwertmann, *supra* note 93, at pages 227-233 and 242-244. See also Conor McCarthy Reparations and victims support in the International Criminal Court, (2012), at pages 220-224.

¹⁷⁹ The ECCC Appeals Judgement on "Case 001" provides detailed analysis and arguments on the standard of proof in deciding admissibility of civil party applications and their eligibility for reparations. Although there is a need to take into account that victims' participation and reparations before the ECCC are as civil parties, there are common factors between the ICC and the ECCC in addressing this subject. KAINING Guek Eav alias Duch, Appeal Judgement, 3 February 2012, 001/18-07-2007-ECCC/SC, Doc.No. F28, pages 237-252.

on a *prima facie* basis, their identity, that they suffer(ed) harm and that this harm is linked to the (convicted) charges.

218. With regard to those applicants whose status was withdrawn, a new assessment of their reparations claims has to be conducted.

219. In order to increase victim's capacity to prove the damage suffered but also to deal efficiently with a potentially high number of claims, the Trust Fund suggests that complementing to the standard of *balance of probabilities*, assumptions¹⁸⁰ and circumstantial evidence, in addition to direct evidence, might be used.¹⁸¹

220. However, the IACtHR also ruled that "even where the existence of the practice is proved beyond doubt, corroborative evidence is required to link an individual claimant to the practice."¹⁸² This demonstrates that presumptions and circumstantial evidence are not sufficient as such and that the link to the given case must be established.

221. Other mass claims commissions and truth commissions have also used presumptions. Dependent on the more collective or individual claim, they have given due considerations to the particular circumstances and have applied different standards of proof, such as the standard of credibility or plausibility.¹⁸³

¹⁸⁰ The IACtHR made for example the assumption that the next to kin had suffered, see for example for the parents of the victims in *Aloeboetoe et al. v Suriname*, Judgment of September 10, Reparations and Costs, at para. 76, stating that 'It can be presumed that the parents have suffered morally as a result of the cruel death of their offspring, for it is essentially human for all persons to feel pain at the torment of their child'.

¹⁸¹ In general the IACtHR used assumptions and circumstantial evidence. See for example: IACtHR, *Gangaram Panday v. Suriname*, Judgment of January 21, 1994. Series C No. 16, para. 49, stating: 'the Court may, in certain circumstances, make use of both circumstantial evidence and indications or presumptions on which to base its pronouncements when they lead to consistent conclusions as regards the facts of the case'.

¹⁸² IACtHR, *Fairén-Garbi and Solís-Corrales v. Honduras*, Judgment of 15 March 1989 (Merits), paras. 157-9. In this case the claim was rejected. The Court ruled that 'There is insufficient evidence to relate the disappearance of Francisco Fairén Garbi and Yolanda Solís Corrales to the governmental practice of disappearances'.

¹⁸³ See for further references REDRESS, *Justice for Victims: The ICC's Reparations Mandate*, May 2011, available at

222. The Trust Fund takes note of the following Regulations of the RTFV:

Regulation 55: "Subject to the order of the Court, Trust Fund shall take into account the following factors in determining the nature and/or size of the awards, *inter alia*: the nature of the crimes, the particular injuries and the nature of the evidence to support such injuries., as well as the size and location of the beneficiary group."

Regulation 63 states on the verification process for individual awards: "Subject to any stipulations set out in the order of the Court, the Board of Directors shall determine the standard of proof for the verification exercise, having regard to the prevailing circumstances of the beneficiary group and the available evidence."

223. The Trust Fund submits that Regulation 55 of the RTFV already addresses the need to consider the evidence that is available and the appropriate use of standards of proof. This is even more the case for individual awards (less likely in the given case) where, pursuant to Regulation 63, the Trust Fund is seized with the establishment of the standard of proof by taking into account all necessary circumstances.

224. Taking all the aforementioned into account, the Trust Fund agrees, and so does the Defence,¹⁸⁴ that for those victims and beneficiaries who are not yet admitted for participation purposes, the standard of *balance of probabilities* should, in principle, apply. This is true in so far as the convicted person is to be held liable for remedying the harm and injuries caused and thus should be ordered reparations.

225. However, the Trust Fund submits that, due to the long time since the commission of the crimes, the on-going conflict in Ituri, and the fact that mainly collective awards will be implemented, the standard of proof may be lowered and/or require a more flexible approach which also allows the

http://www.redress.org/downloads/publications/REDRESS_ICC_Reparations_May2011.pdf. See also Heike Niebergall, Overcoming Evidentiary Weaknesses in Reparation Claims Programs, in: Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, (2009). Niebergall gives a comprehensive overview about different approaches of programmes to address claimants' potential problems to prove their claims.

¹⁸⁴ ICC-01/04-01/06-2972, para. 83.

use of assumptions, circumstantial evidence and assess the claim(s), as well as a *prima facie* standard.

226. The Trust Fund further suggests that a variety of evidence should be accepted, tailored to the circumstances in the situation.

227. The Trust Fund further submits that many forms of collective reparations include by nature not only victims in the narrow meaning of Rule 85 but also beneficiaries. The requirements and standards of proof for the two distinct groups, victims and beneficiaries, are completely different.

228. The Trust Fund notes that any requirements to prove the injuries and the link to the convicted person should be incumbent upon the direct or indirect victims only, and do not fall on potential beneficiaries of the programmes.

229. The Trust Fund summarizes as follows:

(i) Direct and indirect victims who already applied and are admitted for participation are also eligible for reparations;

(ii) For newly applying or newly identified potential victims, as a general rule, the standard of *preponderance of probabilities* as a primary standard should apply. In cases where this is not possible, the standard of other courts, tribunals or claims commissions may also be used to compensate any evidentiary difficulties, bearing in mind that the rights of the convicted person is guaranteed;

(iii) Beneficiaries are included into any reparations programmes if they are in a broader sense affected by the convicted crimes.

230. The Trust Fund asserts that the convicted person is sufficiently protected with regard to the applicable standard of proof when he is held liable for reparations that are provided to victims in the meaning of Rule 85.
231. The holding of the Trial Chamber that a wholly flexible approach should be taken when reparations are borne by the Trust Fund should become moot when the Appeals Chamber overturns the Trial Chamber I's ruling, and decides that the convicted person is liable for reparations for victims regardless of his current financial situation.

E. CONCLUSION OF THE TRUST FUND'S OBSERVATIONS

232. The Trust Fund wishes to summarize and conclude its observations on the Appeals as follows:

- (i) The Appeals Chamber may only confirm, reverse or amend a reparations order and cannot order a new decision to be issued by Trial Chamber I or a new Trial Chamber;
- (ii) The impugned Decision is not only for procedural matters but also with regard to its content of a Reparations Order in the meaning of Article 75 (2) of the Statute;
- (iii) The Trust Fund notes that the delegation of tasks pursuant to Rule 97 (2) is moot because the reparations order is issued. The delegation of other tasks to the Trust Fund is lawful and legitimate. The delegated tasks form core functions of the Trust Fund;
- (iv) The shift of monitoring, oversight and final approval of reparations proposals to a newly established Trial Chamber is legitimate because the reparations proceedings ended with the issuance of a Reparations Order. For the implementation phase, a

new Chamber may monitor the enforcement of the Reparations Order through the Trust Fund;

(v) The Trust Fund is of the opinion that the failure to order Mr Lubanga to pay for reparations is not in accordance with the legal framework or the spirit of the ICC and should be overturned. Accordingly, the grounds for appeal of V01 should be granted;

(vi) The non-examination of the individual applications for reparations does not form an error of law. The Trial Chamber decided inherently within its Reparations Decision on the applications by ordering preferably collective reparations to be dealt with by the Trust Fund;

(vii) The Trust Fund notes that victims/survivors of sexualized violence in the course of their recruitment, or use to actively participate, can demonstrate that the harm they suffered is caused through the commission of crimes of which Mr Lubanga is convicted and would therefore qualify to be addressed through reparations.

The Trial Chamber is correct in extending reparations also to other localities than only those listed in the Judgment;

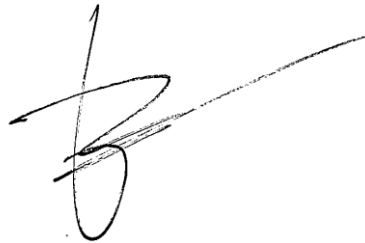
The inclusion of communities will require distinguishing between 'victims' in the meaning of Rule 85 and 'beneficiaries.' The convicted person may only be held liable for reparations to direct or indirect victims;

(viii) The Trust Fund observes that the different concepts of standards of causation are not consistent. However, the most appropriate standard seems to be assessing whether a causal link test can establish the proximity, directness and foreseeability between harm and convicted crime;

(ix) The standard of proof should be primarily the *preponderance of probabilities*. However, those who are already admitted for the purpose of participation should be eligible for reparations. In addition, presumptions and circumstantial evidence as well as other standards applied in mass claims may also be accepted alongside direct evidence. Also, a broad variety of evidence should be accepted due to potential difficulties of the claimants.

FOR THE FOREGOING REASONS

The Board of Directors respectfully submits its observations and informs the Chamber of its willingness and availability to appear on any specific issue addressed in this filing and/or on any other issue the Chamber deems necessary.



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 08 April, 2013

At The Hague, The Netherlands.