

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: French

No.: ICC-01/04-01/06
Date: 5 February 2013

THE APPEALS CHAMBER

Before:

**Judge Erkki Kourula, Presiding Judge
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 with public Annex 1

Mr Thomas Lubanga's appellate brief against the *Decision establishing the principles and procedures to be applied to reparations* issued by the Trial Chamber on 7 August 2012

Source: Defence team for Mr Thomas Lubanga Dyilo

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

Office of the Prosecutor

Ms Fatou Bensouda
Mr Fabricio Guariglia

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval
Mr Marc Desalliers
Ms Caroline Buteau

Legal Representatives of Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Paul Kabongo Tshibangu
Mr Joseph Keta

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

Ms Paolina Massidda
Ms Sarah Pellet

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Trust Fund for Victims
Mr Pieter de Baan

PROCEDURAL BACKGROUND

1. On 7 August 2012, the Trial Chamber issued its *Decision establishing the principles and procedures to be applied to reparations* (“Decision on Reparations”).¹
2. On 6 September 2012, the Defence gave notice of appeal against the whole Decision, pursuant to article 82(4).
3. On 14 December 2012, the Appeals Chamber issued its *Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings*, whereby it enjoined the legal representatives of the V01 and V02 teams, the Office of Public Counsel for Victims and the Defence to file their documents in support of the appeal by 4 p.m. on 5 February 2013.²
4. In accordance with regulation 58 of the Regulations of the Court, the Defence wishes to make the following submissions.

GROUND OF APPEAL

1 – THE PROCEDURE FORMULATED BY THE TRIAL CHAMBER VIOLATES THE RIGHT OF THE DEFENCE TO A FAIR TRIAL AND IS INCONSISTENT WITH THE STATUTORY PROVISIONS APPLICABLE TO REPARATIONS PROCEEDINGS

1.1 Applicable law

5. In accordance with Article 75 and rules 94 to 98, the Court establishes principles on reparations and, by taking into account the scope and extent of any damage, loss or injury, determines the reparations to be awarded to the victims of the crimes on which the accused was convicted.
6. The above provisions must be interpreted in the light of articles 64(2) and 67 and rule 97(3), which protect the fundamental rights of the convicted person throughout the proceedings.³ The convicted person is entitled, *inter alia*, to a

¹ ICC-01/04-01/06-2904.

² ICC-01/04-01/06-2953.

³ ICC-01/04-01/06-2800, paras. 43-48; ICC-01/04-01/06-2904, para. 255.

public hearing in a fair trial conducted impartially, as well as to adequate time and facilities for the preparation of his or her defence.

7. Reparations proceedings being an integral part of the trial,⁴ the Court has the obligation to protect the rights of the accused as guaranteed by the Statute during those proceedings.⁵ This principle has been reaffirmed by the Trial Chamber on numerous occasions.⁶
8. The founding documents make specific provision for the convicted person's participation in the reparations proceedings and respect for his or her rights at all stages of the determination of the reparations to be awarded to the victims of the crimes on which he or she was convicted.⁷

1.2 Errors of law

1.2.1 By delegating some of its judicial functions to the Trust Fund for Victims, an expert commission and the Registry, the Trial Chamber acted in violation of the provisions of the Rome Statute

9. The impugned decision provides that, in the present case, reparations are to be dealt with principally by the Trust Fund for Victims ("the TFV"), overseen by a differently composed trial chamber.⁸ The latter delegated to the TFV the task of selecting and appointing appropriate experts and overseeing their work.⁹ It also delegated to the TFV, in conjunction with the Registry, the OPCV and the experts, the task of determining which localities are to

⁴ ICC-01/04-01/06-2904, paras. 260 and 267; ICC-01/04-01/06-2800, paras. 43-48.

⁵ Articles 67 and 64(2) and rule 97(3).

⁶ ICC-01/04-01/06-2904, para. 255. The Chamber stated that in the principles established by the Decision, no provision "will prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial."

⁷ The founding documents provide, *inter alia*, that the convicted person must be provided the notifications set out in rules 94(2) and 95(1), and is therefore entitled to submit observations under article 75(3). Moreover, the convicted person may call experts to assist the Court on any matter relating to reparations and may appeal the Decision issued under article 75, thereby confirming that the convicted person is directly affected by any order under that article (article 82(4)).

⁸ ICC-01/04-01/06-2904, para. 261.

⁹ ICC-01/04-01/06-2904, paras. 265.

participate in the reparations programme.¹⁰ Finally, it delegated to the TFV¹¹ the task of assessing the harm suffered by victims,¹² determining the type of appropriate reparations¹³ and identifying the beneficiaries thereof.¹⁴

10. Such delegation of its judicial powers by the Trial Chamber is a breach of the statutory and regulatory provisions applicable to the procedural regime governing reparations proceedings.
11. The power to issue reparation orders rests solely with the trial chamber which is conducting the trial. A trial bench seised of a case may not delegate to a non-judicial body the power to rule on matters falling within its exclusive powers.
12. The TFV was established by decision of the Assembly of States Parties pursuant to article 79. It is governed by the Regulations of the Trust Fund for Victims, which set out the rules governing the work of the TFV in the discharge of its dual mandate of (1) implementing the reparations awarded by the Court and (2) establishing programmes to assist the physical and psychological rehabilitation of victims and/or providing any material support they may need.¹⁵
13. The statutory and regulatory provisions pertaining to the work of the TFV envision its primary role as managing the resources earmarked for the payment of awards for reparations ordered by the Court. For example, the Court may order that the monies obtained by way of fine or forfeiture be

¹⁰ ICC-01/04-01/06-2904, paras. 282-285.

¹¹ ICC-01/04-01/06-2904, para. 282.

¹² ICC-01/04-01/06-2904, para. 285.

¹³ ICC-01/04-01/06-2904, para. 282.

¹⁴ ICC-01/04-01/06-2904, paras. 283 and 284.

¹⁵ <http://www.trustfundforvictims.org/legal-basis>; Regulations of the Trust Fund for Victims, articles 42 *et seq.*

deposited with the TFV¹⁶ or that the award for reparations be made through the TFV.¹⁷

14. No provision of the Statute allows the TFV to perform judicial functions. Similarly, no statutory or regulatory provision envisions any power or function which allows the TFV to determine beneficiaries, the scope and extent of any damage or the nature of reparations. Moreover, the Court itself specified the TFV's functions, in stating that: "when Article 75(2) of the Statute provides that an award for reparations may be made 'through' the Trust Fund, the Court is able to draw on the logistical and financial resources of the Trust Fund in implementing the award."¹⁸ Clearly, such logistical or financial support must not be confused with the exercise of judicial powers. In particular, the mandate given by the Assembly of States Parties to the trust fund established for victims does not guarantee Mr Thomas Lubanga that his case will be heard in a public trial conducted impartially (articles 64(7) and 67(1)). With respect to the TFV's work, no statutory or regulatory provisions offer the accused the same safeguards as those afforded to him before the Trial Chamber (articles 67(1) and 64(2); rule 97(3)).
15. Moreover, assessment by a group of experts appointed by the TFV of the harm suffered by the applicants without the participation of the convicted person¹⁹ is not only contrary to the procedure laid down in rule 97(2), but is also a breach of the convicted person's rights (rule 97(3)).
16. Instead the relevant texts provide that "the Court" shall determine the scope and extent of any damage, loss and injury to the victims and their beneficiaries,²⁰ that "the Court" may make an order for reparations against the convicted person, and that "the Court" may seek measures under article 93(1)

¹⁶ Article 75(2); rule 98(2); regulation 118(2).

¹⁷ Rule 98(3); rule 98(4); regulation 118(2).

¹⁸ ICC-01/04-01/06-2904, para. 270.

¹⁹ ICC-01/04-01/06-2904, paras. 282 and 283.

²⁰ Article 75(1).

“to give effect to an order which it may make under this article”.²¹ Furthermore, Rule 218(3)(c) states that orders for forfeiture and reparations must specify “the scope and nature of the reparations ordered by the Court [...]”. Finally, rule 97 provides that it rests with the Court to appoint experts and to establish the procedure to be followed by “the Court” in assessing the reparations to be awarded in the event of a conviction.

17. This therefore leaves no doubt that the States Parties vested the Court alone with the power to determine the beneficiaries of reparations, as well as the scope and nature of such reparations at the end of judicial proceedings;²² the Chamber has reaffirmed this stance, stating that tasks relating to reparations fall within the responsibilities and functions of the Judiciary.²³
18. Yet in the matter at bar, while the impugned decision provides for possible intervention by a judicial body – a differently composed chamber – such a body is not empowered to carry out the function of deciding applications for reparations. Rather, the impugned decision merely confines its role to one of “monitoring and oversight”.²⁴
19. Nonetheless, neither the differently composed chamber’s functions of approval²⁵ nor those of implementation oversight²⁶ imply any judicial decision power. In fact, said chamber carries out those functions at a stage after the decision-making has already occurred without its intervention. Furthermore, oversight of implementation will only take place where contested issues arise out of the work and decisions of the TFV.²⁷ Therefore, the chamber’s intervention is not only marginal, but also hypothetical with respect to some aspects. Furthermore, the mere requirement that the Chamber “should be

²¹ Articles 75(4) and 93.

²² Article 75 and rules 97 and 218.

²³ ICC-01/04-01/06-2904, para. 260.

²⁴ ICC-01/04-01/06-2904, para. 286.

²⁵ ICC-01/04-01/06-2904, para. 282.

²⁶ ICC-01/04-01/06-2904, para. 262.

²⁷ ICC-01/04-01/06-2904, para. 286.

updated [...] on a regular basis”²⁸ and subsequently consulted at the end of a decision-making process in which it had no part²⁹ is by no means sufficient to compensate for the marginalisation of its decision-making functions.

20. In light of the foregoing, the Trial Chamber erred in considering that rule 97(2) empowers it to delegate its exclusive powers over reparations to a non-judicial body, whose decision-making process lacks transparency, impartiality or independence.³⁰

1.2.2 The Chamber erred in ordering the formation of a differently composed chamber

21. The impugned decision provides that reparations in the present case will be dealt with principally by the TFV, overseen by a differently composed Chamber.³¹
22. That conclusion is inconsistent with the provisions of the Statute.
23. Firstly, the functions and powers of “the Court” in respect of reparations are to be carried out by Trial Chamber I, it being the only judicial body that is seised of the case at the trial stage.
24. The Statute ordains: “The judicial functions of the Court shall be carried out in each division by Chambers”.³²
25. The impugned decision rightly recalls that “[r]eparations proceedings are an integral part of the overall trial process.”³³ In August 2011, the Chamber took the view that, within the meaning of Statute, the trial “ends with the sentence

²⁸ ICC-01/04-01/06-2904, para. 282.

²⁹ ICC-01/04-01/06-2904, para. 282.

³⁰ ICC-01/04-01/06-2904, para. 265.

³¹ ICC-01/04-01/06-2904, para. 261.

³² Article 39(2)(a).

³³ ICC-01/04-01/06-2904, para. 260.

that is imposed if the accused is convicted (Article 76 of the Statute) and any award of reparations (Article 75 of the Statute)".³⁴

26. The combined provisions of articles 39(2)(b)(ii) and 74(1) prescribe that the Trial Chamber's functions are to be carried out by three judges at each stage of the trial and throughout their deliberations.
27. The only exception to this requirement is to be found in rule 38, which provides that, under specific conditions, a trial chamber judge may be replaced by another judge for reasons such as resignation, accepted excuse, disqualification, removal from office or death. The relevant statutory and regulatory provisions do not in any way envision transferral of a trial chamber's powers to three judges acting as replacements.
28. Under article 36(10), a judge assigned to a trial chamber which has begun hearing a case shall continue in office until its completion. The combined provisions of article 36(10) and rule 38(1) preclude any possibility of replacing a judge at the end of his or her term of office.
29. Since the trial phase of the present case ends after the reparations proceedings, once all reparations orders have been issued, only the triumvirate trial bench which conducted the trial may conduct the article 75 reparations proceedings.
30. Secondly, it cannot reasonably be disputed that only the bench which heard the entire body of evidence introduced at trial is in a position to conduct a thorough review of all applications from alleged victims in respect of the facts of the case against the Accused at the conclusion of a trial during which 67 witnesses were heard over the course of 204 days of hearings with 1,373 items having been admitted into evidence.³⁵

³⁴ ICC-01/04-01/06-2800, para. 47.

³⁵ Judgment, para. 11.

31. It follows that the statutory provisions do not allow the Trial Chamber to delegate to a differently composed chamber matters falling within its exclusive powers.

1.2.3 The Chamber's conclusion that it did not need to examine the applications for reparations filed by the victims is contrary to the statutory provisions

32. The Chamber considered that it “would be inappropriate to limit reparations to the relatively small group of victims that participated in the trial and those who applied for reparations.”³⁶ It added that the forms received by the Registry by then were to be transmitted to the TFV, which could, if it deemed it appropriate, include the applicants in any reparations programme that it implements.³⁷
33. The Chamber's analysis is inconsistent with the procedure set out in the Statute and the Rules, specifically requiring victims seeking reparations under article 75 to file a written request to that effect with the Registry (rule 94).
34. Firstly, only an examination of the reparations forms filed by applicants in accordance with rule 94 would enable the Trial Chamber to satisfy itself that the victims seeking reparations are able to show proof of harm directly linked to a crime on which Mr Lubanga was convicted. This highlights the need for each applicant to submit to the Court a reparations form containing, at a minimum, the information set forth under rule 94 along with any relevant supporting documentation. This information will also enable the Defence and the relevant Court bodies (e.g. VPRS) to undertake their own verification of the identity of the applicants and the extent of the harm alleged.
35. The Defence wishes to point out that the information referred to in rule 94(1) is the only information on victims which ought to be disclosed to the Defence as a matter of principle. It is thus critically important to follow this procedure,

³⁶ ICC-01/04-01/06-2904, para. 187.

³⁷ ICC-01/04-01/06-2904, para. 284.

so as to enable the Defence to make submissions and to effectively exercise its rights.

36. In this regard, it is important to note the form referred to in rule 89 (participation) differs from the one referred to in rule 94 (reparations). Unlike the participation form, the reparations form includes a section on reparations (Part F) where the applicant is asked to indicate the type of reparations he or she is seeking and the nature of the harm, loss or injury he or she suffered.
37. It follows that a request for reparations must be submitted in accordance with rule 94,³⁸ by means of the designated reparations form. Likewise, the “*ayants droit*” referred to in article 75(1) must fill a reparations form and must indicate under items 9 and 10, Part B, the name of the victim, their relationship with that victim and the harm occasioned by the commission of a crime on which Mr Lubanga was convicted.
38. Since a victim’s participation in the proceedings is contingent on the submission of an application in accordance with rule 89, all applications for reparations under article 75 must be made using the form described in rule 94 and regulation 88 of the Regulations of the Court.³⁹
39. The Trial Chamber’s conclusion that a written request for reparations need not be filed with the Registry renders the provisions of rule 94 otiose. For that reason, it should not be accepted by the Appeals Chamber.
40. Secondly, by not following the procedure set out in rule 94 and regulation 88 of the Regulations of the Court, the Trial Chamber denied the Defence the opportunity to make submissions. Indeed, since rule 89(1) entitles the Defence to make submissions on applications for participation, it ought, *a fortiori*, to be afforded the opportunity to reply on applications for reparations.

³⁸ ICC-01/04-101-tEN, para. 67, footnote 62.

³⁹ See also rule 143: only those victims who filed a form under rule 94 may seek postponement of the reparations hearing.

41. It follows that only those individuals who satisfy the rule 85 criteria and who have filed a request for reparations within the meaning of rule 94 are eligible for reparations within the meaning of article 75.

1.2.4 The principles laid down by the Chamber preclude the effective exercise of the rights of the Defence

42. The Trial Chamber has stated that “[n]othing in these principles shall prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial.”⁴⁰ However, the Chamber’s decision makes no provision for the Defence to exercise its rights, in that the impugned decision does not stipulate that the Defence is to receive the reparations forms filed by the victims or may participate in the assessment of the harm suffered by the victims⁴¹ for the purposes of determining the type of appropriate reparations to be awarded⁴² or identifying the beneficiaries of such awards.⁴³ Nor is provision made for the Defence to receive notice of TFV reparations orders and decisions.
43. Instead, the Chamber has excluded the Defence by ruling that the five-step plan proposed by the TFV shall be implemented by the latter in conjunction with the Registry, the OPCV and the experts.⁴⁴ It has assigned the TFV, the Registry, the OPCV and the experts the task of establishing the localities to be involved in the reparations process in the present case.⁴⁵ Furthermore, a team of experts will assess the harm suffered.⁴⁶ Finally, the TFV will assess the harm, and identify the victims and beneficiaries.

⁴⁰ ICC-01/04-01/06-2904, para. 255.

⁴¹ ICC-01/04-01/06-2904, para. 285.

⁴² ICC-01/04-01/06-2904, para. 282.

⁴³ ICC-01/04-01/06-2904, paras. 283-284.

⁴⁴ ICC-01/04-01/06-2904, para. 281.

⁴⁵ ICC-01/04-01/06-2904, para. 282.

⁴⁶ ICC-01/04-01/06-2904, para. 282.

44. Those conclusions are incontestably contrary to the provisions of rule 97(2), which provides that experts may assist the Chamber in determining the scope and extent of any damage, loss and injury, and may suggest various options to the Chamber concerning the modalities and types of reparations. The Defence is therefore entitled to make submissions on any opinions presented by those experts.
45. It must be recognised that the impugned decision creates a discernable imbalance between the rights of the Defence and rights of the victims. Whereas the rights of the Defence are so restricted that they cannot possibly be exercised effectively, the Chamber has averred that during the reparations phase “the Court is mainly concerned at this juncture with the victims”.⁴⁷
46. Moreover, it must be highlighted that the involvement of the OPCV in the implementation of the reparations plan⁴⁸ seems inappropriate, given that the latter is still providing legal representation to Victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06, a number of unrepresented applicants, as well as unidentified individuals who have not applied for reparations but whose interests may be affected by collective reparations.⁴⁹
47. It follows that since the principles set out in the impugned decision are imprecise as to the modalities of the Defence’s participation, their implementation is bound to entail violation of the convicted person’s rights, including the right to a fair trial.

1.2.5 The participation of anonymous victims in the reparations proceedings prejudices the fairness of the trial

48. Giving effect to victim participation throughout the trial, including the reparations proceedings, must not in any way prejudice the fairness of

⁴⁷ ICC-01/04-01/06-2904, para. 267.

⁴⁸ ICC-01/04-01/06-2904, para. 282.

⁴⁹ ICC-01/04-01/06-2928, para. 9 and ICC-01/04-01/06-2858.

proceedings.⁵⁰

49. Based thereupon, the Defence argued in its 18 April 2012 submissions⁵¹ that, in its view, the fairness of the trial requires that it be allowed to examine the applications for reparations submitted by the alleged victims, and be afforded adequate time and facilities to verify the truthfulness of the allegations made by individuals identifying themselves as victims, in particular, as regards their civil status. Furthermore, the Defence must be afforded the opportunity to, where necessary, report to the Trial Chamber regarding the results of its analyses and verifications by tendering evidence and/or seeking leave to call witnesses.
50. This can only be achieved if the Defence is given full access to the information furnished by the victims, *inter alia*, concerning their identity or civil status, as well as to any other information concerning the circumstances invoked in support of their applications.
51. However, the Defence's submissions are not addressed anywhere in the impugned decision.
52. Yet, a participating victim's allegation regarding personal harm arising from a crime held against the convicted person amounts to a fresh and specific accusation which the convicted person must be afforded the opportunity to meet, in accordance with the rights guaranteed to him under article 67.
53. Since the Defence is "entitled" to respond to victims' applications for participation,⁵² it also ought, *a fortiori*, to be entitled to respond to victims' applications for reparations submitted under rule 94.

⁵⁰ Articles 67 and 68 and rule 97(3): 1. Victim participation at the reparations stage must be effected in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

⁵¹ ICC-01/04-01/06-2866-tENG, paras. 8 *et seq.*

⁵² Rule 89.

54. Such verifications by the Defence are critically important given that in the case at bar, they were the basis upon which the Chamber withdrew the participation rights of nine victims⁵³ and rejected the testimony of nine Prosecution witnesses who had presented themselves as former FPLC child soldiers.⁵⁴
55. However, the extensive redactions that were made to the applications for reparations disclosed to the Defence have had the effect of concealing the identity of the vast majority of victims or persons acting on their behalf, thereby making it impossible for the Defence to know with any degree of certainty the identity of the alleged victims and the factual circumstances invoked in support of their applications. In fact, the Defence knows the identity of only one of the 85 victims (a/0105/06) who submitted a form for reparations.⁵⁵
56. Those redactions therefore render the Defence's right to respond totally ineffectual.
57. In its 18 January 2008 decision, Trial Chamber I reaffirmed that the participation of an anonymous victim could affect the fairness of the proceedings, stating:

Furthermore, the Chamber will take into account the fact that a victim is anonymous in determining the extent of his or her participation, thus safeguarding the fairness of the proceedings. In particular, the extent of participation by a victim on any issue that has a bearing on the Chamber's determination of the charges is likely to be significantly limited if a victim is anonymous. Against that background, the hypothetical possibility of participation, in exceptional circumstances, by anonymous

⁵³ Victim a/0002/06 and his father, Victims a/00225/06, a/0229/06, a/0270/07, a/0047/06, a/0048/06, a/0050/06 and a/0052/06. See ICC-01/04/01/06-2842, paras. 484 and 502.

⁵⁴ Witnesses P-0007, P-0008, P-0010, P-0011, P-0298, P-0157, P-0297, P-0213 and P-0294, as well as P-0299, father of P-0298. See ICC-01/04/01/06-2842, paras. 247, 268, 288, 441, 473, 429, 406 and 415.

⁵⁵ Save for Victims a/0047/06, a/0048/06, a/0050/06, a/0052/06 and a/0002/06, who are no longer authorised to participate in the proceedings. It will be noted as regards Victim a/0105/06 that only the victim's names were disclosed to the Defence. No other details regarding the civil status or the circumstances of this victim's alleged recruitment were disclosed to the Defence.

victims is not an issue that could significantly affect either the fairness or the expeditiousness of the proceedings or the outcome of the trial.⁵⁶

58. By denying to grant the Defence leave to raise this matter on appeal, the Trial Chamber again recognised that the participation of an anonymous victim could affect the fairness of the proceedings:

It is likely that only a few, indeed if any, victims will be allowed to participate on this basis. Furthermore, the Chamber will take into account the fact that a victim is anonymous in determining the extent of his or her participation, thus safeguarding the fairness of the proceedings. In particular, the extent of participation by a victim on any issue that has a bearing on the Chamber's determination of the charges is likely to be significantly limited if a victim is anonymous. Against that background, the hypothetical possibility of participation, in exceptional circumstances, by anonymous victims is not an issue that could significantly affect either the fairness or the expeditiousness of the proceedings or the outcome of the trial [...].⁵⁷

59. Moreover, this approach is consistent with the jurisprudence of the Extraordinary Chambers in the Courts of Cambodia (ECCC), where the identity of the civil parties is revealed to the accused person.⁵⁸
60. In its 18 January 2008 decision, Trial Chamber I clearly stated that "[t]he greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself".⁵⁹ In accordance with the decision, the Chamber stated on 11 March 2010 that it was likely that if a victim wished to question a Defence witness, that victim would be asked to reveal his or her identity to the Defence.⁶⁰ Thus, at the reparations stage, after victims' participation had ended, maintaining the anonymity and concealing part of the information on the circumstances alleged in support of their applications would render the trial manifestly unfair.

⁵⁶ ICC-01/04-01/06-1119, para. 131.

⁵⁷ ICC-01/04-01/06-1191, para. 37 (emphasis added).

⁵⁸ See for example ECCC Trial Chamber, *Decision on Protective Measures for Civil Parties*, Case No. 001/18-07-2007/ECCC/TC, 2 June 2009.

⁵⁹ ICC-01/04-01/06-1119, para. 131; see also ICC-01/04-01/06-2764-Conf, para. 22.

⁶⁰ ICC-01/04-01/06-2340, para. 36.

a) Information to be disclosed to the Defence

61. For the Defence to be in a position to make meaningful submissions on each application for reparations, it is paramount for it to receive disclosure of information they contain and, where necessary, that contained in any related applications for participation.
62. Therefore, the Chamber erred by omitting to clearly enunciate that the information outlined below must be disclosed to the Defence so as to ensure the exercise of its rights.

- Complete information about the applicants' civil status

63. It is beyond dispute that false declarations concerning civil status or, for that matter, identity theft, represent a real risk in the case at bar.⁶¹ For that reason, it is imperative that full details about the identity of the applicants (surname, given name and date of birth) be disclosed to the Defence for the necessary verification. Such verification cannot be successfully conducted unless the identity of the applicant victim's parents and, if mentioned, that of his or her siblings is also disclosed to the Defence.
64. Furthermore, disclosure of the applicants' full date of birth (day, month and year) is particularly important, considering that age is among the elements of the crime set out in article 8(2)(e)(vii) of the Statute and by the same token also a component of the definition of "victims".
65. Full disclosure of the victims' identity also requires lifting the redactions made to the photographs they provide.
66. In the matter at bar, the Defence only has access to the almost entirely redacted versions of the applications for participation and reparations.⁶²

⁶¹ ICC-01/04-01/06-2842, para. 502.

⁶² Although Victims a/0057/06, a/0226/06, a/0237/06, a/0239/06 and a/2911/11 have not sought any protective measure vis-à-vis the Defence, the Registry has redacted their identity and details regarding

- *Information contained in the description of the alleged crimes*

67. Applicants may be awarded reparations only if the harm they suffered is demonstrated to have been as a result of the crimes on which Mr Thomas Lubanga was convicted, and that such crimes were committed within a given timeframe and a clearly defined geographical area.
68. It is therefore crucial for the Defence to be in a position to verify the allegations contained in the applications for reparations concerning any alleged places and dates, in order, *inter alia*, to assess them in the light of findings of fact.
69. Similarly, the Defence cannot effectively make submissions unless it receives full disclosure of the information relating to the crimes, such as the names of the commanders mentioned by the victims and, where applicable, the hospitals where the latter may have received treatment, the names of any witnesses and victims mentioned in the applications for reparations, as well as information on the harm suffered.

- *Identity of persons acting on behalf of the victim and of those who assisted him or her to complete the forms and identity of the intermediaries who were in contact with the victims*

70. Throughout this case, the Defence has demonstrated that a number of intermediaries incited some individuals to make false statements and to submit false applications for participation and/or reparations.
71. In this regard, the Defence is deeply concerned about the applications for reparations submitted by victims who have not been called to testify and who, therefore, have not been fully vetted.
72. For instance, it would appear that some applicant victims have links with Intermediary/Victim a/0270/07, who lost his right to participate in the

the circumstances surrounding the case against Mr Lubanga. The Defence takes the view that these redactions in particular ought to be lifted.

proceedings on account of his implication in identity theft by Victims a/0225/06 and a/0229/06.⁶³ Another example is Victim a/0270/07, who is the legal guardian of a/0224/06, a/0226/06 and a/0230/06. This relationship casts serious doubts on the truthfulness of these victims' statements and the authenticity of the items attached to their applications, given that two of the five individuals under the legal guardianship of a/0270/07 have already been shown to have been participating in the proceedings fraudulently.

73. Similarly, it has been established that P-0321 introduced several witnesses to the Office of the Prosecutor, inciting them to make false statements;⁶⁴ such witnesses include a/0002/06, who lost victim status on this account.⁶⁵ It may therefore very well be that other applicant victims, whose identity remains unknown to the Defence, were introduced to the VPRS by this intermediary, *inter alia*, through the association for which he worked. This would inevitably raise legitimate concerns regarding the applicants' credibility.
74. Other examples include Victims a/0049/06 and a/0051/06, whose application for participation was submitted by Intermediary P-0143, in respect of whom the Chamber determined: "it is likely that as the common point of contact he persuaded, encouraged or assisted some or all of them to give false testimony."⁶⁶
75. Lastly, it is a matter of concern that some applications for reparations contain similar descriptions of the crimes committed and the harm suffered; moreover many of the descriptions are lacking in substance and are sketchy. Of

⁶³ ICC-01/04-01/06-2842, para. 502.

⁶⁴ ICC-01/04-01/06-2842, para. 450.

⁶⁵ ICC-01/04-01/06-2842, para. 484.

⁶⁶ The Defence is of the view that it has also shown proof that Victims a/0049/06 and a/0051/06, who were introduced by Intermediary P-00143, gave false statements to the Office of the Prosecutor. See, *inter alia*, Exhibits EVD-D01-00763 and EVD-D01-00765.

particular concern to the Defence is the fact that the applicants concerned have all indicated that they have the same legal representative.⁶⁷

76. In light of the above, it is crucial for the Defence to receive notification of not only the information mentioned *supra*, but also the identity of any persons who acted on behalf of the victims, those who helped them complete the forms or whose name or signature appears on the application for reparations and/or participation, as well as that of any intermediaries who were in contact with the victim, so as to enable the Defence to conduct any investigations, as necessary.
77. The Trial Chamber therefore erred in omitting to order the lifting of all of the redactions to Part A (save for items 14 and 15), B (save for question 6), D, E, F, I and J of the forms, as well as the related information in the additional statements, the follow-up sheets, the requests for further information and the supporting documentation attached to the applications for reparations and, where applicable, to the applications for participation.

b) The anonymity is unwarranted

78. As the Defence is mindful of the need to protect witnesses and victims, it will, needless to say, take all the necessary precautions in the conduct of its investigations and verifications with a view to preserving the confidentiality of any information revealed to it, in accordance with the Chamber's 3 June 2008 decision concerning disclosure of non-public information to members of the public.⁶⁸

⁶⁷ a/0026/10, a/0027/10, a/0028/10, a/0029/10, a/0030/10, a/0031/10, a/0032/10, a/0033/10, a/0034/10, a/0035/10 and a/0037/10.

⁶⁸ ICC-01/04-01/06-1372.

1.2.6 The standard of proof adopted by the Trial Chamber at the reparations stage does not guarantee respect for the rights of the convicted person

79. The Trial Chamber considers that the appropriate standard of proof at the reparations stage is the balance of probabilities, and that a “wholly flexible” approach is more appropriate when reparations are awarded from the resources of the TFV.⁶⁹ The reasoning for its Decision was “the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence.”⁷⁰
80. However, the Chamber omitted to articulate the standard of proof the TFV must discharge in determining the factual matters contained in the victims’ applications for reparations.
81. While the texts governing the Court’s proceedings do not prescribe a standard of proof applicable to the determination of factual matters during reparations proceedings, they nonetheless clearly state that the Court must respect “the rights of the victims and the convicted person” (rule 97(3)).⁷¹
82. Being an integral part of the trial,⁷² reparations proceedings are subject to the same standards as other aspects of the trial, in particular with regard to the fundamental rights of the accused and the rights and duties of the other participants.
83. The Defence submits that protection of the fundamental rights of the convicted person and respect for the rights of the victims require a more exacting standard of proof at the reparations stage than the (*prima facie*) standard applied by the Chamber in ruling on victims’ applications for participation.⁷³ The victims must provide proof of the harm they suffered and

⁶⁹ ICC-01/04-01/06-2904, paras. 253-254.

⁷⁰ ICC-01/04-01/06-2904, para. 252.

⁷¹ See also articles 68(3) and 67.

⁷² ICC-01/04-01/06-2904, para.260.

⁷³ ICC-01/04-01/06-1119, para. 99.

the causal link between such harm and the crimes charged against Mr Lubanga based on a standard of proof at least equivalent to that of the preponderance of probabilities.

84. On this point, the Appeals Chamber will find that:

- There is no well-founded argument in support of applying a more “flexible” standard of proof at the reparations stage;
 - The Chamber cannot deviate from the internationally recognised principle according to which the applicant bears the burden of proof with regard to civil claims;
 - The fact that victims may face difficulties in obtaining evidence in support of their applications is no justification for violation of the convicted person’s rights;
 - The flexible standard of proof adopted by the Trial Chamber offends the principle of legal certainty.
- *The fact that the convicted person lacks sufficient resources to personally pay the reparations in whole or part is no justification for holding victims to a less exacting standard of proof*

85. The Trial Chamber recognises that the “most probable hypothesis” or the “balance of probabilities” is “sufficient and proportionate to establish the facts that are relevant to an order for reparations when it is directed against the convicted person”.⁷⁴ However, it considers that “[w]hen reparations are awarded from the resources of the Trust Fund for Victims or from any other source, a wholly flexible approach to determining factual matters is

⁷⁴ ICC-01/04-01/06-2904, para. 253.

appropriate, taking into account the extensive and systematic nature of the crimes and the number of victims involved.”⁷⁵

86. That being as it may, Mr Lubanga’s indigence cannot justify holding victims to a less exacting standard of proof, given that the impugned decision specifically provides for the seizure of the convicted person’s assets in order to pay for reparations awards.⁷⁶
87. In the same vein, the Defence recalls that a distinction must be drawn between, on the one hand, the determination as to whether or not an individual must pay reparations based on his or her responsibility, and, on the other hand, whether such an obligation is to be implemented .
88. The Appeals Chamber must therefore find that the Trial Chamber erred in linking the issue of standard of proof to the Accused’s financial standing.

 - *Under article 21(1)(c), it is impermissible for the Chamber to deviate from the internationally recognised principle according which the burden of proof with regard to civil claims lies with the applicant*
89. It is the Defence’s submission that it is impermissible for the Chamber to deviate from the internationally recognised principle according to which the burden of proof relating to civil claims lies with the applicant.
90. In both civil law and common law, the onus is on the applicant to prove the facts in support of his or her application, according to the balance of probabilities.⁷⁷

⁷⁵ ICC-01/04-01/06-2904, para. 254.

⁷⁶ ICC-01/04-01/06-2904, paras. 276-280. See also, *inter alia*, regulation 117 of the Regulations of the Court.

⁷⁷ Article 1315 of the French Civil Code; articles 2803 and 2804 of the Québec Civil Code; Supreme Court of Canada, *F.H. v. McDougall*, [2008] 3 S.C.R. 41, 2008 SCC 53, para. 49; United Kingdom: *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35, para. 13.

91. Indeed, this approach is reaffirmed in the rules in force before the only other international criminal court which awards reparations to victims of war crimes and crimes against humanity, namely the Extraordinary Chambers in the Courts of Cambodia (ECCC).⁷⁸ The ECCC Trial Chamber applied this standard of proof in *Duch* (“‘more likely than not to be true’ or ‘preponderance of evidence’”).
92. The ECCC Supreme Court Chamber upheld that decision, affirming that “this standard is common to civil claims across the world.”⁷⁹
93. The ECCC Supreme Court Chamber affirmed that civil parties’ statements which were not corroborated by any other evidence did not suffice.⁸⁰ It further affirmed that while there was no doubt that the three victims suffered physical and psychological harm, the evidence did not meet the Chamber’s standard of proof according to which the harm must be the result of the criminal conduct of the accused.⁸¹
94. For example, the applications of Victims E2/23 and E2/33 were dismissed due to lack of objective evidence, such as registers, photographs or confessions to corroborate the allegations of their detention at S-21.⁸² Also, the application of Victim E2/32 was rejected owing to the inconsistencies and contradictions

⁷⁸ Article 23 *bis*, para. 1 (emphasis added): the Internal Rules provide: “When considering the admissibility of the Civil Party application, the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true.”

⁷⁹ ECCC Supreme Court Chamber, Case No. 001/18-07-2007-ECCC/SC, *Appeal Judgement*, Doc No. F28, para. 531 [emphasis added].

⁸⁰ ECCC Supreme Court Chamber, Case No. 001/18-07-2007-ECCC/SC, *Appeal Judgement*, Doc No. F28, para. 528, upholding the Trial Chamber’s findings, Doc No. E188, para. 647.

⁸¹ ECCC Supreme Court Chamber, Case File No. 001/18-07-2007-ECCC/SC, *Appeal Judgement*, Doc No. F28, paras. 576, 593 and 598. The Supreme Court Chamber upheld the Trial Chamber’s ruling as concerns three victims (E2/23, E2/32 and E2/33 as direct victim). See ECCC, Case File No 001/18-07-2007-ECCC/SC, *Judgement*, Doc No. E188, para. 647.

⁸² Supreme Court Chamber of the ECCC, Case File No. 001/18-07-2007-ECCC/SC, *Appeal Judgement*, Doc No. F28, paras. 593 and 597 upholding ECCC, Case File No. 001/18-07-2007-ECCC/SC, *Judgement*, Doc No. E188, para. 647.

between the information contained in that victim's application and in-court testimony.⁸³

95. As to indirect victims, the ECCC Trial Chamber has rejected several applicants owing to their failure to demonstrate an immediate victim or special bonds to an immediate victim.⁸⁴
96. Finally, the experience of the case at hand shows that the standard of proof adopted by the Trial Chamber is insufficient. In all the instances where the Defence, based on its investigations, was in possession of complete information about the identity and alleged circumstances of the enlistment of victims, the Chamber found that all the victims concerned had given false testimony.⁸⁵ The Chamber withdrew the participation rights of nine victims based on evidence gathered by the Defence.⁸⁶
97. Therefore the argument that applicants' statements alone are sufficient to establish their identity and their status as victims of the crimes held against Mr Lubanga is unsustainable.
 - *The fact that victims may face difficulties in obtaining evidence in support of their applications is no justification for violating the rights of the convicted person*
98. The Trial Chamber lacked grounds for its finding that "the difficulty victims may face in obtaining evidence in support of their claim due to the destruction

⁸³ ECCC, Case File No 001/18-07-2007-ECCC/SC, *Judgement*, Doc No. E188, para. 647. It must be noted that the appellate chamber found that Victim E2/32 was an indirect victim on account of her father's time in S-21, but upheld the Trial Chamber's ruling that she had not shown that she herself had been in S-21. Supreme Court Chamber of the ECCC, Case File No. 001/18-07-2007-ECCC/SC, *Appeal Judgement*, Doc No. F28, paras. 575-576.

⁸⁴ This decision was upheld by the Supreme Court Chamber of the ECCC. See for example Case File No. 001/18-07-2007-ECCC/SC, *Appeal Judgement*, Doc No. F28, para. 547 (Victim E2/69) and 551 (E2/73). ECCC, Case File No. 001/18-07-2007-ECCC/SC, *Judgement*, Doc No. E188, para. 648.

⁸⁵ The Defence considers that it has also provided proof that Victims a/0049/06 and a/0051/06, who were presented by Intermediary W-00143, gave false statements to the Office of the Prosecutor. See, in particular, exhibits EVD-D01-00763 and EVD-D01-00765.

⁸⁶ See ICC-01/04-01/06-2842, paras. 222-288; 430-441; 485-502.

or unavailability of evidence”⁸⁷ is justification for holding victims to a less exacting burden of proof to the detriment of the convicted person, as the onus is shifted onto him.

99. In the case at bar, the Defence’s investigations have revealed that even with the situation as it was in Ituri at the material time, it was quite possible for it to obtain evidence in support of the alleged facts. For that reason, holding victims to a less exacting burden of proof, as proposed by the Chamber, is a violation of the convicted person’s rights.
100. While some victims may face difficulties in obtaining evidence in support of their applications for reparations, such as documentary proof of their age and identity, the fact that the victims live in a post-conflict region is no justification for holding them to a less exacting burden of proof in regard to the validity of their applications. The potential for abuse arising from applying a less exacting burden of proof has been amply demonstrated in the case at hand.
101. In his opening statements, the Prosecutor spoke in the following terms regarding documentary proof of age for witnesses who were presented as former child soldiers: “As a result of the conflict, most of them [*kadogos*] never had a birth certificate or lost any identity document. They were displaced, their homes burned, their families lost. State and school records in the Ituri region were largely ‘destroyed’.”⁸⁸
102. However, this statement turned out to be untrue. Even with its meagre investigation resources, the Defence still managed to obtain identity documents and school records of persons who were presented as former child soldiers. Based on those elements of proof, all of the evidence pertaining to these purported children was dismissed, and all those who had the dual status of victim and witness lost their participation rights.

⁸⁷ ICC-01/04-01/06-2904, para. 252.

⁸⁸ T-107-ENG-ET, p. 16.

103. Moreover, even though some victims were unable to furnish official document in support of their applications owing to exceptional circumstances, nothing prevented them from using other means of proof, provided that such proof was reliable.⁸⁹
104. The ECCC Supreme Court Chamber highlighted in this regard that in practice several reparations programmes for victims of armed conflict eased the burden on the claimants having regard to the paucity of official and formal documents in support of their claims, not by lowering the standard of proof, but rather by accepting a wider variety of evidence.⁹⁰
- *The “wholly flexible” standard of proof adopted by the Trial Chamber is inconsistent with the principle of legal certainty*
105. By omitting to articulate in its decision the standard of proof to be discharged by the TFV in determining the factual matters in the victims’ applications for reparations, the Trial Chamber ran counter to the principle of legal certainty.⁹¹
106. Failure to articulate the standard of proof leaves the TFV full discretion to determine the admissibility of applications for reparations without having to issue reasoned decisions based on objective criteria.
107. Moreover, the Chamber’s flexible approach with regard to the standard of proof applicable to the reparations phase does not allow the convicted person to know with any degree of certainty the standard of proof he himself must meet in demonstrating that a given person is not a victim of the crimes held against him within the meaning of rule 85.

⁸⁹ The Trial Chamber chose this option with respect to documents submitted in support of applications for participation. ICC-01/04-01/06-1119, para. 87.

⁹⁰ Case No. 001/18-07-2007-ECCC/SC, Judgment, Doc No. F28, para. 525, quoting: Niebergall, “Overcoming Evidentiary Weaknesses in Reparation Claims Programmes”, pp. 156-158 (referring to the standard of plausibility that was prescribed in the CRT I and II Rules).

⁹¹ Court of Justice of the European Union, Order of the Court (Eighth Chamber) of 16 February 2012, (reference for a preliminary ruling: Tribunale di Milano - Italy) – criminal proceedings against Vincenzo Veneruso, No. C-612/11; ECHR: *Jecius v. Lithuania*, Judgment, 31 July 2000, No 34578/97, para. 56; *Baranowski v. Poland*, 28 March 2000, Application No. 28358/95, para. 52.

108. The lack of foreseeability as to the standard of proof to be discharged makes it impossible for the convicted person effectively to exercise his right to respond.
109. The Defence submits in conclusion that it is for those individuals claiming to be victims of the crimes held against Mr Lubanga to provide proof, based on the preponderance of probabilities, as to their identity, date of birth, enlistment into the FPLC or participation in the hostilities as FPLC soldiers from September 2002 to 13 August 2003, as well the harm they may claim to have suffered as a direct result of these facts.

1.2.7 Failure to set a time frame

110. In its decision, the Chamber sets no time frame for the Trust Fund's implementation of the five-step plan. The principles formulated by the Chamber will therefore have the effect of delaying the issuance of any orders indefinitely.
111. Now, the Chamber's failure to set a time frame is fraught with consequences for Mr Lubanga, in that he will be in the dark as to the extent of the claims against him until the end of the reparations stage. This is bound to infringe his rights, including that of being tried without undue delay, as enshrined in article 67(1)(c) of the Statute.
112. Given that the case before the Court entails both a criminal phase and civil claims phase – a situation similar to that in national courts – it would be unfair to consider that the right to be tried without undue delay only applies to the criminal phase of the trial. Rather, it applies throughout the trial of the accused, including the phase relating to civil claims, namely the reparations phase.
113. Moreover, that view is consistent with the case law of the European Court of Human Rights, which has explicitly held that the right to be tried within a reasonable time applies at "all stages of legal proceedings for the

‘determination of ... civil rights and obligations’ [...], not excluding stages subsequent to judgment on the merits”.⁹² This shows that the reparations stage is also subject to the expeditiousness requirement, in the interests of both the victims and the convicted person; the responsibility of the convicted person cannot be invoked indefinitely

114. Yet in the case at bar, it is noteworthy that the impugned decision leaves Mr Lubanga entirely in the dark as to how long the reparations phase is expected to last, given that it does not set a time frame. That is a manifest violation of the rights of the Defence as guaranteed under the Statute.

1.3 The violations invalidate the decision

115. All of the foregoing observations show that Trial Chamber’s delegation of its powers to a non-judicial organ under the oversight of a differently composed trial chamber is contrary to the Court’s founding documents. Furthermore, the procedure laid down by the Chamber in its decision does nothing to ensure the Defence’s effective exercise of its rights, as guaranteed under the Statute.
116. As a consequence, the Appeals Chamber will find that implementing the impugned decision is certain to impair the fairness of the proceedings.

2 – BY NOT RESTRICTING REPARATIONS TO THE VICTIMS OF THE CRIMES HELD AGAINST THE CONVICTED PERSON, THE CHAMBER EXCEEDED ITS JURISDICTION AND VIOLATED THE PROVISIONS OF THE STATUTE AND THE RULES

2.1 Applicable law

117. Rule 85(a) defines “victims” as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”.⁹³

⁹² European Court of Human Rights, *Robins v. United Kingdom*, 23 September 1997, Application No. 118/1996/737/936, para. 28. See also *Mocie v. France*, 8 April 2003, Application No. 46096/99, para. 21.

⁹³ Victims may include organisations or institutions as defined in rule 85(b).

118. The harm suffered by such victims must be personal harm,⁹⁴ either direct or indirect,⁹⁵ and must be linked to the charges confirmed against the accused.⁹⁶
119. An order for reparations must be aimed at repairing the harm suffered as a direct result of a crime or crimes on which the accused person was convicted.⁹⁷ The crime or crimes must have been proven beyond reasonable doubt,⁹⁸ after the Defence has been permitted to introduce evidence and advance submissions.⁹⁹
120. The Appeals Chamber has affirmed that the competence of the Trial Chamber should be limited to the charges confirmed by the Pre-Trial Chamber, and that any determination of the Chamber “in relation to a victim’s status and/or participatory rights which is unrelated to the specific charges against the accused would fall outside this framework”.¹⁰⁰
121. Hence in the present case, only those persons who have demonstrated personal harm arising directly from the enlistment, conscription into the FPLC of children under the age of 15 years or their participation in hostilities in the period between 1 September and 13 August 2003 may be granted victim status and may claim reparation for the harm suffered.

2.2 Errors of law

122. The Appeals Chamber will note that the Trial Chamber has expanded the notion of “victims” in order to make up for the fact that the limited scope of

⁹⁴ ICC-01/04-01/06-1432, paras. 1 and 32 *et seq.*

⁹⁵ The Appeals Chamber held that to be authorised to participate as a victim, it is essential to show the existence of personal harm, whether direct or indirect. ICC-01/04-01/06-1432, para. 32. Harm is indirect when suffered by an individual with a close relationship to a direct victim, such as, for example, a filial relationship.

⁹⁶ ICC-01/04-01/06-1432, paras. 2 and 63-66.

⁹⁷ See ICC-01/04-01/06-1432, paras. 63-66. The Trial Chamber states that reparations fulfil two main purposes: they oblige those responsible for serious crimes to repair the harm they caused to victims and make it possible to ensure that offenders account for their acts. ICC-01/04-01/06-2904, para. 179 (emphasis added).

⁹⁸ Article 66(3).

⁹⁹ Article 67(1).

¹⁰⁰ ICC-01/04-01/06-1432, para. 63.

the charges has had the effect that fewer categories of victims can claim reparations in the present case.¹⁰¹ The Chamber has thus acted contrary to the principle that the convicted person may only be held responsible for reparations for harm resulting from the crimes on which he or she was found guilty.

123. The Chamber expanded the notion of victims by:

- Including alleged victims of sexual or gender violence;
- Asserting that the communities and families of the alleged victims may be eligible for reparations in the present case;
- Considering that persons claiming to be victims of crimes committed by Mr Lubanga need not demonstrate that they have suffered any harm, which is personal, actually came into being and has not been the subject of a previous reparations award; and
- Considering that the Court should apply the “proximate cause” test in determining the causal link between the crime committed and the harm suffered;
- Failing to limit reparations to the localities mentioned in the charges and in relation to which it recorded findings in its judgment.

124. On those points, the Defence submits as follows:

2.2.1 The holding that the “victims of sexual and gender-based violence” may, as such, be eligible for reparations in the proceedings against Mr Thomas Lubanga is inconsistent with the principle that the convicted person is only responsible for reparations for harm arising from crimes on which he was convicted

¹⁰¹ See for example ICC-01/04-01/06-2904, footnote 383.

125. Whereas sexual violence is not among the charges in the case against Mr Lubanga or, for that matter, among the crimes on which he was convicted,¹⁰² the Chamber gives alleged victims of sexual violence priority.¹⁰³
126. The impugned decision states that “[t]he Court should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence”.¹⁰⁴
127. The Appeals Chamber will find the Trial Chamber’s conclusion devoid of any proper foundation.
128. In fact, the Appeals Chamber has affirmed that the Trial Chamber’s jurisdiction should be limited to the charges confirmed by the Pre-Trial Chamber and that any determination of the Chamber “in relation to a victim’s status and/or participatory rights which is unrelated to the specific charges against the accused would fall outside this framework”.¹⁰⁵
129. In the case at bar, Mr Lubanga was neither charged with nor convicted of crimes of sexual violence.¹⁰⁶ For that reason, the Defence led no evidence in his defence, and did not cross-examine the Prosecution witnesses whose testimony the Chamber analysed at paragraphs 890 to 896 of the judgment in relation to this issue; the Defence simply put a single question to P-0016 solely for the purpose of pointing to a glaring contradiction between his statement and his in-court testimony.¹⁰⁷

¹⁰² ICC-01/04-01/06-2901, paras. 60 and 67-75.

¹⁰³ See for example: ICC-01-04/01/06-2904, paras. 207-209, 233 and footnote 371.

¹⁰⁴ ICC-01-04/01/06-2904, para. 207.

¹⁰⁵ ICC-01/04-01/06-1432, para. 63.

¹⁰⁶ ICC-01/04-01/06-2901, paras. 60 and 67-75.

¹⁰⁷ This seriously undermines the credibility of this witness as regards the statements he made concerning sexual violence: Witness P-0016 stated in 2005 that he was not aware of any instances of rape of a soldier by another soldier within the FPLC. Statement of 2005, para. 232; cited at T-191-CONF-FRA CT, p. 10, lines 5-6.

130. In fact, the Prosecutor deliberately¹⁰⁸ limited the scope of his case to Thomas Lubanga and to the crimes of enlisting, conscripting and using children under the age of 15 years to participate in the hostilities, and thereby allowed those most responsible for the crimes committed during the conflict in Ituri to escape prosecution.
131. The Prosecutor contended that he selected the charges he brought against Mr Lubanga in the interests of a fair and expeditious trial.¹⁰⁹ Moreover, it would be unfair at the reparations stage to hold charges against the convicted person on which he has not been indicted and against which he has not been afforded the opportunity to raise a defence. No evidence has been led as to whether those crimes were actually committed and neither has Mr Lubanga's responsibility for any such crimes been established beyond reasonable doubt.
132. In fact, in its judgment, the Chamber did not record any findings with respect to those charges for the purpose of establishing Mr Lubanga's responsibility.¹¹⁰
133. In its sentencing decision, after the Chamber had strongly deprecated the attitude of the former Prosecutor in relation to this issue,¹¹¹ the Trial Chamber, by majority, stated that "nothing suggests that Mr Lubanga ordered or encouraged sexual violence, that he was aware of it or that it could otherwise be attributed to him in a way that reflects his culpability".¹¹²
134. The Chamber also rejected the argument that enlistment, conscription or use of children under the age of 15 years would necessarily lead to the commission of sexual violence on the children, affirming that in light of the body of evidence tendered at trial, it was "unable to conclude that sexual

¹⁰⁸ *Inter alia*, ICC-01/04-01/06-2867, para. 2(a). See also: Interview with the Deputy Prosecutor, Ms Fatou Bensouda, in which she stated "I think we went for the charges for which we had the evidence." See: <http://www.lubangatrial.org/2009/07/31/interview-with-fatou-bensouda-icc-deputy-prosecutor/>.

¹⁰⁹ *Idem*.

¹¹⁰ Judgment, para. 896.

¹¹¹ ICC-01/04-01/06-2901, para. 60.

¹¹² ICC-01/04-01/06-2901, para. 74.

violence [...] was sufficiently widespread that it could be characterised as occurring in the ordinary course of the implementation of the common plan for which Mr Lubanga is responsible".¹¹³ Accordingly, no reparations should be awarded on that basis.¹¹⁴

135. Furthermore, that stance is consistent with the following considerations:

- Article 8(2)(e)(vii) and the Elements of Crimes which amplify it make no reference to the commission of sexual violence; likewise, article 8(2)(e)(vi) does not link the commission of sexual violence and the status of child soldier. *De jure*, these two categories of offence are totally unrelated and have nothing in common, apart from the context of an armed conflict.
- The international criminal courts adjudicating the crimes of enlistment, conscription or use of children under the age of 15 years have not considered subjection to sexual violence as establishing the status of "child soldier".¹¹⁵ Even when directed against young recruits by soldiers within an armed group, such violence clearly has no bearing on hostilities, is not in any way akin to any military functions unlawfully imposed on children, and is not part of the operational requirements of the armed group in question.
- No international convention or principle or rule of international law expressly or impliedly includes sexual violence among the legal elements of the crime of enlistment, conscription or use of children under the age of 15 years. The same observation applies to domestic law.

¹¹³ ICC-01/04-01/06-2901, para. 74.

¹¹⁴ The Defence refers to its submissions to the Trial Chamber on this point: ICC-01/04-01/06-2885, para. 44.

¹¹⁵ On this point, see all the SCSL decisions. It is noteworthy that none of the SCSL decisions includes sexual slavery among the defining elements of the status of child soldier.

136. Accordingly, contrary to the Chamber's decision, as acts of sexual violence were not charged, established or held against Mr Lubanga, they cannot constitute a basis for awarding reparations against him for the alleged resulting harm.

137. The Defence submits that the same reasoning applies, *mutatis mutandis*, to the alleged harm arising from acts considered to amount to cruel treatment to which the Chamber refers in the impugned decision.¹¹⁶

2.2.2 By holding that communities could be compensated within the meaning of article 75, the Chamber clearly failed to distinguish between collective reparations and community reparations

138. The Trial Chamber affirmed that "[r]eparations fulfil two main purposes that are enshrined in the Statute: they oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Chamber to ensure that offenders account for their acts".¹¹⁷ However, the Chamber held that reparations could contribute "more broadly, to the communities that were affected".¹¹⁸

139. That view is plainly inconsistent with the regime governing victim participation and reparations under the Statute, and with previous Appeals Chamber decisions on the issue.

140. According to rule 97(1), the Court may award reparations on a collective, or an individualised basis or both.

141. It is the view of the Defence that a "collective award", aimed at the collective reparation of harm individually suffered by several victims recognised by the Court must be differentiated from an award aimed at a "community" claiming to be victim of a crime in the Ituri region, where not each and every one of its members is identified.

¹¹⁶ ICC-01/04-01/06-2904, para. 240.

¹¹⁷ ICC-01/04-01/06-2904, para. 179.

¹¹⁸ ICC-01/04-01/06-2904, para. 179. See also para. 231.

142. Moreover, the Appeals Chamber has affirmed that the jurisdiction of the Trial Chamber must be confined to the charges confirmed by the Pre-Trial Chamber and that any determination of the Chamber “in relation to a victim’s status and/or participatory rights which is unrelated to the specific charges against the accused would fall outside this framework.”¹¹⁹
143. Therefore, in dealing with any issue concerning victim status and reparations to be awarded to victims, the Trial Chamber must consider only the charges which were held against the Accused and were upheld in its judgment pursuant to article 74.
144. This means that even with respect to collective reparations, each and every one of the victims who are recognised as beneficiaries in the case against Mr Thomas Lubanga must be identified.
145. The form of reparations – whether individual or collective – is determined only once the victims of the crimes on which the accused was convicted have been clearly identified and recognised as such. Identification of victims is subject to a strict procedure and specific criteria, as laid down in the Rules. Therefore, victim status may only be granted to natural persons satisfying the rule 85(a) criteria or to legal persons satisfying the rule 85(b) criteria. In accordance with rule 97(1), the Chamber then proceeds to determine the most appropriate form of reparations. As a consequence, collective reparations may only be awarded to a group of persons who have been properly identified and have been granted victim status.
146. It follows that in contending that the concept of collective reparations implies reparations of harm suffered by the “community” concerned,¹²⁰ it must be ascertained that the “community” qualifies as a victim within the meaning of rule 85(a) or 85(b). Clearly, the “community” is not a natural person within the

¹¹⁹ ICC-01/04-01/06-1432, para. 63.

¹²⁰ ICC-01/04-01/06-2904, para. 179.

meaning of rule 85(a). Moreover, it cannot be treated as an “organisation or institution” within the meaning of rule 85(b) – according to which, reparations are to be awarded only to legal persons for direct harm to property sustained as a result of the crimes on which the convicted person was convicted.

147. On this point, the Defence observes that, to date, no “community” has submitted an application for reparations, a pre-condition for awarding reparations.
148. Be that as it may, the Defence wishes to indicate that it has no objection to the TFV implementing projects and support programmes, or, for that matter, making payments to a wider group of people rather than just to the victims who were identified in accordance with the procedure laid down in the Rules, provided – as has been the practice thus far – that such projects are devised and implemented outside the legal framework of this case, that they are not in any way portrayed as having any bearing on the case, and that they are not based on an order made against Mr Lubanga.¹²¹
149. As to the victims’ ethnic origin, the Chamber notes: “The limited scope of the charges brought by the prosecution against Mr Lubanga limited the categories of victims who have participated in this case. They come largely from the same ethnic group and they do not necessarily represent all those who suffered from crimes committed during the relevant conflict in Ituri. This situation could give rise to a risk of resentment on the part of other victims and the re-stigmatisation of former child soldiers within their communities.”¹²²
150. The Chamber’s conclusions seem without foundation. Even though the ethnic group and place of residence of the 85 applicants were redacted, the Defence

¹²¹ See for example the many projects funded by the TFV to help victims rebuild their communities, which projects have so far benefitted more than 81,500 victims in the DRC and Uganda: TFV/DRC/2007/R2/027, TFV/DRC/2007/R1/004, etc. <http://www.trustfundforvictims.org/projects>. See “Earmarked Support at the Trust Fund for Victims”, p. 6, at: <http://www.trustfundforvictims.org>.

¹²² ICC-01/04-01/06-2904, footnote 383.

is able to discern that many victims are from the Mahagi Territory, which is home to a predominantly Alur population.

151. Moreover, the Chamber offers no proof of its assertion that existing tensions between communities in Ituri could be exacerbated by awarding reparations to victims who are largely from the same ethnic group.
152. In any event, even if all the persons seeking reparations belonged to the same ethnic group, to invoke that alone, at this stage, as a ground for expanding the categories of persons entitled to reparations would amount to a breach of the convicted person's rights.

2.2.3 The decision violates the rights of the convicted person in that it does not specify that the harm must be personal, have actually come into being, be certain, and not have been the subject of a previous reparations award

153. Since under rule 97 the Chamber has the obligation to determine the scope and extent of the damage, this means that it must set out in advance the criteria it intends to apply in assessing harm.
154. Yet nowhere in its decision does the Trial Chamber clearly enunciate the type of harm that victims must demonstrate in order to qualify for reparations. The Chamber merely indicates that it is able to "take into account any awards or benefits received by victims from other bodies in order to guarantee that reparations are not applied unfairly or in discriminatory manner".¹²³ The Chamber's omission could open the door to abuses that may impair the rights of the convicted person.
155. Irrespective of the form of the reparations, rule 85 requires proof that the harm suffered by a clearly identified natural person or the direct harm suffered by clearly identified organisations or institutions is as a direct result of the crimes on which Mr Thomas Lubanga was convicted.

¹²³ ICC-01/04-01/06-2904, para. 201.

156. Save for a handful of established principles on this issue, it is noteworthy that both the founding documents and the jurisprudence of the Court are silent on the assessment of harm. The Defence therefore urges the Appeals Chamber in its adjudication of reparations to seek guidance in the current procedures at other competent criminal courts, such as French courts and the Extraordinary Chambers in the Courts of Cambodia, insofar as the ECCC's procedures are based on the French judicial system.
157. It is the Defence's submission that the Chamber erred by omitting to clearly enunciate that reparations shall be awarded only if the harm suffered is personal, has actually come into being and is certain, and has not been the subject of a previous reparations award.

The harm suffered must be personal harm

158. The Defence wishes to recall the Appeals Chamber decision, according to which the harm suffered must be personal harm.¹²⁴
159. The fact that harm is personal means that only the victim who has suffered it is eligible for reparations. This definition therefore applies mainly to direct victims of the crimes on which Mr Lubanga was convicted, in other words, those who, at the relevant time, were enlisted, conscripted or used in the FPLC whilst they were under the age of 15 years.
160. Lastly, it is the Defence's submission that while harm to indirect victims may, in some instances, be presumed, it still lies with the indirect victims to show proof of a direct victim, i.e., a child who was enlisted into the FPLC whilst under the age of 15 years during the period between September 2002 and 13 August 2003. Furthermore, each indirect victim must, where applicable, demonstrate a family relationship with the direct victim or that he or she attempted to prevent the commission of the crime against the direct victim.

¹²⁴ ICC-01/04-01/06-1432, para. 32.

The harm must have actually come into being and be certain

161. The ECCC Trial Chamber held that injury must have actually come into being.¹²⁵ In other words, such harm must be in existence at the time when the victim applies for reparation. Nonetheless reparations for future harm – i.e. not yet in existence – can be claimed if the latter is certain and it is a direct result of the crime in question.¹²⁶
162. The Defence submits that the Court must also apply this fundamental principle.

The harm must not have been the subject of a previous reparations award

163. Reparation for harm must be awarded in accordance with the principle of integral reparation, pursuant to which the victim of a crime shall not incur any loss or gain with regard to the amount awarded to him or her by way of compensation.¹²⁷
164. This means that where a victim has previously been the subject of an award for reparations for harm suffered as a result of the crimes on which Mr Lubanga was convicted, that victim is barred from seeking further reparation.
165. The Defence notes that the TFV reflects this stance in proposing that the Chamber take into account any benefits already received by victims through national or international processes, such as the Disarmament, Demobilisation and Reintegration programme.¹²⁸
166. In this regard, it is noteworthy that the TFV has already funded six projects which are specially designed for former child soldiers in Ituri.¹²⁹ According to

¹²⁵ ECCC, Case No. 001/18-07-2007-ECCC/SC, *op. cit.*, para. 640.

¹²⁶ In this respect see French Court of Cassation, Criminal Division: mixed division, 29 May 1970, Bull. crim. 1970, No. 176; Cass. Crim. 20 October 1971, Bull. crim. 1971, No. 279.

¹²⁷ French Court of Cassation, Criminal Division: Crim., 5 November 1997, No. 96-85366; Crim., 3 November 2011, No. 11-80077.

¹²⁸ ICC-01/04-01/06-2872, para. 54.

¹²⁹ <http://www.trustfundforvictims.org/projects>.

the figures disclosed by the TFV, a number of individuals identifying themselves as former child soldiers have benefitted from reintegration and vocational training programmes.¹³⁰

167. It is therefore highly likely that a number of the victims who filed applications for reparations have already benefited from such programmes. The implication is that some victims may receive double reparations, contrary to the principle of integral reparation.
168. Similarly, it has been recognised that several demobilisation and rehabilitation programmes have been implemented in Ituri, including the transit and orientation centres [*centres de transit et d'orientation*] (CTOs)¹³¹ established by various non-governmental organisations. The many children who have already benefited from these programmes could be some of the people who are now seeking reparation.
169. Therefore, only full and accurate identification of the beneficiaries of the projects implemented by the TFV and some NGOs can avert the risk of awarding double reparation.
170. In addition, the Defence wishes to draw the attention of the Appeals Chamber to the fact that some applications for reparations are grossly exaggerated and without merit. For example, it cannot be contended that anyone who was about ten or twelve years of age at the time of the crimes of which he or she claims to be a victim personally owned cattle.¹³² In any event, even if such claims were true, it cannot be contended that this form of harm (stolen cattle

¹³⁰ The projects are TFV/RC/2007/R2/030, TFV/RC/2007/R1/026 & TFV/DRC/2007/R2/028, TFV/DRC/2007/R1/011, TFV/RC/2007/R2/031 & TFV/DRC/2007/R2/033 & TFV/DRC/2007/R2/043 and TFV/DRC/2007/R2/029. The TFV has indicated that an estimated 1,600 children benefitted from project TFV/DRC/2007/R1/019 but did not identify which of them were former child soldiers, orphans or children who ended up in vulnerable situations on account of the war.

¹³¹ See, *inter alia*, ICC-01/04-01/06-2773, paras. 662-663.

¹³² See, for example, applications for reparations a/0055/07, a/0027/10, a/0031/10, a/0033/10, a/0037/10, a/0035/10 and a/2916/11.

or destroyed homes¹³³) directly resulted from the crimes on which Mr Thomas Lubanga was convicted.

171. In light of the foregoing, the Chamber should reasonably have found that reparations for harm suffered by a victim as a direct result of a crime on which Mr Lubanga was convicted in the judgment may be contemplated only where such harm is demonstrated to be personal, to have actually come into being, to be certain and not to have been the subject of a previous reparations award.

2.2.4 By holding in its decision that the Court should apply the “proximate cause” test to determine a causal link between the crime committed and the harm suffered, the Chamber adopted a test which is vague and imprecise and which is certain to infringe Mr Thomas Lubanga’s rights

172. The Trial Chamber considers that the Court should apply the “proximate cause” standard to determine the existence of a causal link between the crime committed and the harm suffered.¹³⁴
173. However, in adopting such a standard, the Chamber was certain to infringe the rights of the Accused, since the “but for” test¹³⁵ derives from abstract, hypothetical reasoning, based on the imagination of the person applying it. Adopting such a vague and imprecise standard would mean that determination of the scope of the right to reparations is based on a purely subjective appraisal of the person applying it.
174. Contrary to the Trial Chamber’s view,¹³⁶ there is a definite trend in international courts and international bodies towards adopting a restrictive approach in the assessment of causation.
175. For instance, the Extraordinary Chambers in the Courts of Cambodia held that “[t]he injury suffered must result directly from the criminal conduct of the Accused”¹³⁷ to establish a right to reparations.

¹³³ See, for example, a/0032/10, a/0033/10 and a/0034/10.

¹³⁴ ICC-01/04-01/06-2904, paras. 249-250.

¹³⁵ ICC-01/04-01/06-2904, para. 250.

¹³⁶ ICC-01/04-01/06-2904, paras. 247 *et seq.*

176. Moreover, the European Court of Human Rights has issued a long line of decisions concerning pecuniary damage whereby there must be a “clear causal connection”¹³⁸ between the violation of the Convention and the damage claimed to establish a right to reparation. Here, the Defence is referring, *inter alia*, to *Kallweit v. Germany* and *Jendrowiak v. Germany*, which exemplify perfectly of this approach.¹³⁹
177. Similarly, the Inter-American Court of Human Rights has also followed in that it applies a restrictive approach to causation when dealing with reparations. In *Aloeboetoe et al v. Suriname*, it held that an entitlement to reparations only arises from “the immediate effects” of an unlawful act.¹⁴⁰
178. Finally, the Governing Council, which establishes the criteria to be applied by the United Nations Compensation Commission (“UNCC”),¹⁴¹ has required a direct causal link between the alleged harm and the illegal invasion and occupation of Kuwait by Iraq in each instance.¹⁴² In particular, in relation to business losses, the requirement that “the causal link must be direct”¹⁴³ was explicitly recognised as a *sine qua non* condition for such losses to be admissible. This restrictive approach is also clearly reflected in the rejection of

¹³⁷ *Duch*, Trial Chamber, Judgment, 26 July 2010, Case No. 001/18-07-2007/ECCCC/TC, para. 642.

¹³⁸ See ECHR, *Çakici v. Turkey*, 8 July 1998, No. 23657/94, para. 127; ECHR *Akkoç v. Turkey*, 10 October 2000, Nos. 22947/93 and 22948/93, para. 133; ECHR *Z. et al v. United Kingdom*, 10 May 2001, No. 29392/95, para. 119; ECHR, *Goodwin v. United Kingdom*, 11 July 2002, No. 28957/95, para. 118.

¹³⁹ In both cases, the ECHR refused to grant compensation which would have been awarded under the “proximate cause” doctrine: having been illegally detained on remand in violation of the Convention, the applicants argued the financial loss they had suffered in that their detention had prevented them from earning a salary (ECHR, *Kallweit v. Germany*, 13 January 2011, No. 17792/07, para. 87, and *Jendrowiak v. Germany*, 14 April 2011, No. 30060/04).

¹⁴⁰ Inter-American Court of Human Rights, *Aloeboetoe et al v. Suriname*, 10 September 1993, para. 49.

¹⁴¹ See report S/22559 of the United Nations Secretary-General of 2 May 1991 pursuant to paragraph 19 of Security Council resolution 687(1991).

¹⁴² Regarding urgent claims, see Decision 1 of the Governing Council, Criteria for Expedited Processing of Urgent Claims, S/AC.26/1991/1, 2/08/1991, para. 18; Decision 7, Criteria for Additional Categories of Claims, S/AC.26/1991/7/Rev.1, 17 March 1992, para. 6.

¹⁴³ Decision 15, Compensation for Business Losses Resulting from Iraq’s Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures Were also a Cause, S/AC.26/1992/15, 4/01/1993, para. 3 (“Decision 15”).

claims for damage or injury which were not attributable to the embargo,¹⁴⁴ and also in the requirement of detailed factual descriptions of the circumstances of the claimed loss, damage or injury.¹⁴⁵

179. Wherefore, the Trial Chamber had no reason to assert that “there is no settled view in international law on the approach to be taken to causation”,¹⁴⁶ given that all of the international courts and international bodies empowered to deal with reparations apply the direct and immediate causal link test.

2.2.5 The Chamber acted *ultra vires* in holding that reparations shall not be limited to the localities to which the judgment refers

180. The Trial Chamber considers that it is for the TFV, along with the Registry, the OPCV and the experts to “establish which localities ought to be involved in the reparations process in the present case”.¹⁴⁷ The Chamber stated that the reparations programme is not limited to the localities mentioned in the judgment.¹⁴⁸
181. That stance is inconsistent with the Court’s previous decisions, which emphasise that only the facts confirmed by the Pre-Trial Chamber constitute the relevant framework for the subsequent proceedings. The Court has stated: “Article 74(2) of the Statute makes it clear that it is those facts and circumstances that form the basis for the charges confirmed at the pre-trial stage which are determinative of ‘the factual ambit of the case for the purposes of the trial and circumscribe [the trial] by preventing the Trial Chamber from exceeding that factual ambit’”.¹⁴⁹

¹⁴⁴ Decision 15, para. 3; see Decision 9, Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation, S/AC.26/1992/9, 6 March 1992, para. 6.

¹⁴⁵ Decision 15, para. 5.

¹⁴⁶ ICC-01/04-01/06-2904, para. 248.

¹⁴⁷ ICC-01/04-01/06-2904, para. 282 (emphasis added).

¹⁴⁸ ICC-01/04-01/06-2904, para. 282.

¹⁴⁹ ICC, *The Prosecutor v. C. Mbarushimana*, Pre-Trial Chamber I, *Decision on the confirmation of charges*, 16 December 2011, paras. 81-82 (emphasis added).

182. Accordingly, at the reparations stage, only the factual framework set out by the Trial Chamber in its judgment on the basis of the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber is pertinent. Expanding this framework would amount to a manifest breach of the convicted person's rights.
183. The judgment is strictly based on the facts which were debated at trial. Taking account of new facts, such as geographical data, which were not previously submitted to the Court and in respect of which no findings have been recorded would entail holding the convicted person responsible for additional facts on which he was not afforded the opportunity to make submissions at the trial stage.
184. Therefore at this juncture, with the trial having come to an end, it would be unfair to allow non-judicial bodies, such as the Trust Fund, experts, the Registry and the OPCV, to revisit matters which have already been disposed of, given that adversarial debate is no longer possible.

2.3 Those violations invalidate the decision

185. By expanding the definition of "victims", the Trial Chamber erred in its interpretation of the Court's founding documents. The Trial Chamber's interpretation is inconsistent with the principle that the convicted person may only be held responsible for reparations for harm resulting from the crimes on which he or she was convicted.
186. As clearly reflected in the letter of the Statute¹⁵⁰ and previous Court decisions,¹⁵¹ the Trial Chamber must consider only the charges which were confirmed by the Pre-Trial Chamber. It is not for the Trial Chamber to

¹⁵⁰ Articles 74(2) and 64(8)(a) of the Statute.

¹⁵¹ ICC, *The Prosecutor v. C. Mbarushimana*, PTC I, *Decision on the confirmation of charges*, ICC-01/04-01/10-465-Red, 16 December 2011, paras. 81-82.

augment or expand the scope of the case before it.¹⁵² Adopting any other position with respect to reparations would undermine the entire reparations proceedings, and thereby render them devoid of any legal basis in the judgment.

187. In that sense, all of the procedures described above, which the Trial Chamber employs in expanding the scope of the reparations amount to a breach of its mandate, and have the effect of severing the link between the reparations awarded and the facts underpinning the legal elements of the crimes established in the present case. The Trial Chamber has therefore manifestly acted *ultra vires*.
188. For that reason, the Court will find this discernable error to be a serious breach of the rights of the convicted person, as he was not properly informed of the nature, cause and content of the charges as amended owing to the Trial Chamber's approach to reparations, and was therefore not afforded the opportunity to defend himself against all of the charges brought against him.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

ENTERTAIN the present appeal;

SET ASIDE the decision rendered on 7 August 2012 by Trial Chamber I;

and

ADJUDGE and DECLARE that the Trial Chamber committed errors of law which invalidate the impugned decision in:

- Delegating some of its judicial functions to the Trust Fund for Victims, in breach of the Statute, as well as the Rules of Procedure and Evidence;

¹⁵² ICC, *The Prosecutor v. J-P. Bemba Gombo, Decision on the confirmation of charges*, ICC-01/05-01/08-424, 15 June 2009, para. 208: "The Chamber believes that it is the duty of the Prosecutor to furnish all facts underpinning the charges. Any deficiencies cannot be compensated by the Chamber."

- Ordering the formation of a differently composed trial chamber to determine issues which fall within its exclusive powers;
- Concluding that it did not need to examine the applications for reparations which are on the record;
- Omitting to articulate any mechanism allowing the Defence effective exercise of the rights guaranteed to it under the Statute during the reparations proceedings;
- Allowing anonymous victims full participation in the reparations proceedings;
- Concluding that a “wholly flexible” standard of proof should be applied during reparations proceedings;
- Omitting to specify a set time frame in which the TFV must implement the five-step “plan”;
- Concluding that victims of “sexual or gender violence” are entitled to receive reparations in the present case;
- Concluding that communities are entitled to receive reparations;
- Omitting to articulate the applicable principles in the assessment of harm;
- Holding that it is justified in applying the “proximate cause” test in determining causation between the crime committed and the harm alleged by a victim; and
- Holding that reparations shall not be restricted to the localities referred to in its judgment.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 5 February 2013, at The Hague