



Original: **French**

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

Date: **7 April 2013**

THE APPEALS CHAMBER

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public Document

Response to the Defence Brief on the appeal against the *Decision establishing the principles and procedures to be applied to reparations* of 7 August 2012

Source: Legal representatives of the V01 group of victims

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

Office of the Prosecutor

Counsel for the Defence

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Legal Representatives of Victims

Legal Representatives of Applicants

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Mr Joseph Keta

Mr Paul Kabongo Tshibangu

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

Trust Fund for Victims

Ms Paolina Massidda

Mr Pieter De Baan

Ms Sarah Pellet

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Counsel Support Section

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. PROCEDURAL BACKGROUND

1. On 7 August 2012, Trial Chamber I issued its *Decision establishing the principles and procedures to be applied to reparations*¹ (“Decision”).
2. On 13 August 2012, the Defence submitted an application for leave to appeal the Decision pursuant to article 82(1)(d) of the Statute and rule 155 of the Rules of Procedure and Evidence.²
3. On 24 August 2012, Principal Counsel of the OPCV and the Legal Representatives of the V02 team lodged an appeal against the Decision³ pursuant to article 82(4) of the Statute and rule 150 of the Rules of Procedure and Evidence.
4. On 29 August 2012, the Chamber issued its *Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations*,⁴ by which it granted the Defence leave to appeal.
5. On 3 September 2012, the Legal Representatives of the V01 team lodged an appeal against the Decision of 7 August 2012 pursuant to article 82(4) of the Statute and rule 150 of the Rules of Procedure and Evidence.⁵
6. On 6 September 2012, the Defence also lodged an appeal pursuant to article 82(4) of the Statute and rule 150 of the Rules of Procedure and Evidence.⁶

¹ ICC-01/04-01/06-2904, *Decision establishing the principles and procedures to be applied to reparations*, Trial Chamber I, 7 August 2012, “Decision”.

² ICC-01/04-01/06-2905-tENG, 13 August 2012.

³ ICC-01/04-01/06-2909-tENG, 24 August 2012.

⁴ ICC-01/04-01/06-2911, 29 August 2012, “Decision Granting Leave to Appeal”.

⁵ ICC-01/04-01/06-2914-tENG, 3 September 2012.

⁶ ICC-01/04-01/06-2917-tENG A3, 6 September 2012.

7. On 3 September 2012, the Legal Representatives of the V01 team lodged an appeal against that decision pursuant to article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.⁷
8. 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*,⁸ by which it found the Defence appeal pursuant to article 82(1)(d) to be inadmissible and the direct appeals lodged by the Defence and the Legal Representatives of Victims to be admissible.
9. The Appeals Chamber invited the Legal Representatives and the Defence to file a document in support of their appeal against the impugned decision by 5 February 2013.⁹ All the parties filed their respective documents on 5 February 2013.
10. The Legal Representatives hereby submit their observations on the brief filed by the Defence.

⁷ ICC-01/04-01/06-2904.

⁸ ICC-01/04-01/06-2953 A A2 A3 OA21, 14 December 2012.

⁹ *Ibidem*, p. 4. ICC-01/04-01/06-3007 08-04-2013 4/28 CB A3.

II. OBSERVATIONS

FIRST GROUND: 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 THE REPARATIONS PROCEEDINGS

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.

11. This ground is partly admissible, in particular where it pertains to the individual applications for reparations submitted by certain victims. On this point, the Legal Representatives refer to their submissions on the first ground of their own appeal brief.¹⁰
12. Indeed, it is inadmissible for the Trial Chamber to rule that applications for reparations would not be handled by the Court, leaving it to the TFV to decide whether to include the applicants in the collective reparations programmes to be developed.
13. Nevertheless, even when determining the scope and extent of the harm suffered by individual applicants, it is consistent with the Court's founding documents to seek the opinion of experts, provided that the mandate of such experts is to advise, not to decide.

¹⁰ ICC-01/04-01/06-2973.

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

14. In actual fact, the Chamber did not “order” the constitution of a chamber. It merely considered it “unnecessary for the present judges of Trial Chamber I to remain seized throughout the reparations proceedings”.¹¹
15. Although the Statute does indeed provide that it is the Trial Chamber which rules on reparations, neither article 39 nor article 74 exclude the possibility of the reparations phase being handled by a trial chamber different in composition from the chamber which ruled on the accused’s guilt and the sentence. While rule 38 allows for the replacement of one or more judges even during the same stage of proceedings, this is not necessarily impossible during an entirely new stage.
16. The constitution of a chamber specialised in matters of harm and reparations to victims could be an opportunity to include judges with particular expertise in this area which is relatively specialised, compared to international criminal law in general.
17. The drafters of the Statute intended that judges with expertise in certain areas should sit at the Court. For example, article 36(8)(b) provides: “States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.”
18. The reference to expertise in violence against women or children would appear to suggest that the drafters of the Statute wanted to have certain judges who are specialised in victims’ issues. Clearly, it would be difficult to have such specialised judges in every chamber. Consequently, assigning the matter of

¹¹ Decision, para. 261.

reparations to a specialised chamber does not appear to be in any way contrary to the spirit of the Statute.

19. The argument that only judges who have personally heard the entirety of the evidence are able to assess victims' applications is irrelevant. Neither the fact that a person was a victim of enlistment into the UPC or participated in hostilities when under the age of 15 years, nor the harm suffered by that person and his or her family members, nor the most appropriate means of making reparation for the harm can necessarily be established on the basis of evidence presented at trial. On the contrary, that would be exceptional, since the evidence presented at trial pertained to the criminal responsibility of the accused and not the harm suffered by victims.
20. Where a victim has relied on evidence presented at trial, such evidence, as well as Defence evidence in rebuttal, is available in its entirety in the trial transcripts or the documents tendered, and can therefore be presented to any judge.
21. Lastly, even if the Appeals Chamber were to find that the Trial Chamber's position is erroneous, it could not compel the Trial Chamber to continue the reparations procedure, since article 83 of the Statute provides only for:
 - an amendment of the decision by the Appeals Chamber;
 - a new trial before a new trial chamber;
 - the remanding of a factual issue to the original trial chamber for it to determine the issue and report back.

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.

22. This part of the first ground is well founded. The Legal Representatives also raised it in their own appeal.

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

23. The Defence alleges a violation of the rights of the convicted person because he would be excluded from the collective reparations procedures implemented by the TFV. This ground of the Defence might be admissible if collective reparations procedures were implemented at the expense of the convicted person. It should be recalled that the Legal Representatives raised a second ground in their own appeal as to the error in law of absolving the convicted person from any obligation as regards reparations.
24. If the Appeals Chamber were to find this ground to be well founded, for both individual and collective reparations, the Defence would in fact have to exercise its rights under rule 97. In fact, the arrangements set out in the Rules of Procedure for the convicted person's participation directly result from the principle enshrined in article 75(2) of the Statute and rule 98 that all reparations shall be awarded against the convicted person, even if they are initially implemented by the TFV.
25. However, should the Appeals Chamber uphold – even for collective reparations only – the logic of the Decision of 7 August, which absolves the convicted person of any financial involvement in these reparations, it is self-evident that the rights of the Defence will not be breached by the fact that it cannot intervene in a process which no longer concerns the convicted person, even if it was his crimes which prompted the need to award such reparations.

26. Even if the TFV paid reparations to individuals who did not suffer any harm resulting from the crimes committed by the convicted person, that would not cause him any prejudice, or even moral harm.
27. Apart from the detrimental effect which the Defence's involvement in the reparations process would inevitably have on the victims, it would be disproportionate to submit every detail of such a programme to *inter partes* judicial proceedings, not between the victims and the TFV, but between the victims and the convicted person – especially if the programme is funded exclusively by the TFV which cannot make claims against the person who caused the harm.

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

28. The Defence did not raise this point before the Trial Chamber. In its observations, it did not oppose participation at the reparations stage of victims whose identity had not yet been disclosed to the Defence.¹² Strangely, it was only after the Trial Chamber had absolved the convicted person of any obligations for reparations – while admitting the Defence as a party in a collective reparations procedure funded by the TFV – that the Defence argued that its rights had allegedly been violated because the Chamber had not specified that the identity of all beneficiaries of the programme to be implemented by the TFV must be disclosed to the Defence.
29. Apart from the fact that failure to rule on this issue cannot constitute an error in law, the Defence appears to confuse the fact that certain anonymous victims participate in the judicial proceedings at the reparations stage, with the TFV's disclosure of the information it possesses on the potential beneficiaries of the programme it is to implement.

¹² ICC-01/04-01/06-2885-tENG 04-10-2012.

30. However, the Trial Chamber made a distinction between the beneficiaries of reparations, the victims who submitted an application for reparations and the victims participating in the proceedings, and 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”.¹³
31. The Chamber favours a collective approach which ensures that reparations reach those victims who are currently unidentified¹⁴ (and, by definition, have not submitted an application for reparations), without stating that such victims must submit applications, but only that the TFV must secure their consent: “208. Reparations are entirely voluntary and the informed consent of the recipient is necessary prior to any award of reparation, including participation in any reparations program.”
32. Furthermore, the Chamber provides for the participation of victims who submitted applications for reparations (but whose applications have not been processed), and of the Defence, as parties, but does not rule on the arrangements for the parties’ participation in the proceedings or on the obligations of the TFV (in particular its disclosure obligation) towards them.
33. Had the Chamber decided to award reparations against the convicted person, it could have ordered those victims who wish to receive such reparations to disclose their identity and the documents on which they wish to rely as evidence of the harm they suffered. However, the Trial Chamber did not take this approach. Furthermore, even such an approach would not preclude certain information pertaining to certain victims from being disclosed to the Defence or being disclosed restrictively (for example, to Counsel but not to the convicted person himself).

¹³ Decision, para. 189.

¹⁴ Decision, para. 219.

34. Obviously, the collective reparations procedure to be implemented by the TFV pursuant to a reparations order which it will sponsor with its own funds is a different matter altogether.
35. The Chamber implicitly lifted the anonymity of the participating victims vis-à-vis the party which is supposed to compensate them, namely the Trust Fund for Victims. The Chamber ordered the Registry to disclose previously submitted applications to the TFV, without requesting that they be redacted.¹⁵ Therefore, if the Trial Chamber's decision is upheld, there will be no anonymous victims within the programme to be implemented by the TFV.
36. However, there is no need to disclose the identity of all beneficiaries to the public, the other participating victims, the Office of the Prosecutor or the Defence.
37. The Decision indeed confirmed that the Defence will remain a "party" in the collective reparations proceedings, as will the victims (understood to be those who have been or will be authorised to participate in the proceedings). Being a party to the reparations proceedings does not automatically imply a right to receive disclosure of all available information about all persons involved in the proceedings as beneficiaries.
38. A mandatory disclosure obligation binding on the TFV could prevent a significant number of victims from collaborating with it and could make effective reparation impossible to implement without a protection programme for the victims who are beneficiaries. Such a programme could consume a disproportionate amount of resources compared to the funds currently available for reparation.

¹⁵ Decision, 7 August 2012, para. 284.

39. Furthermore, it would be equally disproportionate to rule that the Defence may conduct verifications (paid for by legal aid) of the identity of all potential beneficiaries of the TFV's reparations programme, and even of their parents and siblings,¹⁶ when there could be a large number of potential beneficiaries.
40. In any event, the impugned Decision does not rule on disclosure obligations in the reparations proceedings and hence cannot be reversed on this ground.
41. The Defence errs when it states that a victim wishing to be included in a collective reparations programme (for example, by receiving training or medical treatment) is implicitly making a "fresh and specific accusation" against the convicted person,¹⁷ who shall be entitled to mount a defence in accordance with article 67.
42. In actual fact, that article applies to the rights of an accused person in the context of criminal proceedings, not to those of a convicted person who must mount a defence against an application for reparations. It is even less applicable to a convicted person who has been absolved of any reparation obligations, who no longer has the status of defendant but rather of an observer, at most, in reparations proceedings to be funded by a third party.
43. For the record, the Legal Representatives note that it is inaccurate to state that Victims a/0002/06 were introduced to the Office of the Prosecutor by Intermediary P-0321 as the Defence claims,¹⁸ and still more inaccurate to state that their victim status was withdrawn on those grounds.¹⁹ The Chamber did not withdraw their victim status; it only withdrew their right to participate in

¹⁶ Defence brief, para. 63.

¹⁷ Defence brief, para. 52.

¹⁸ *Ibidem*, para. 73.

¹⁹ This decision was made on the basis of "the Chamber's present conclusions as to the reliability and accuracy of these witnesses", in particular Witness P-298, who the Chamber stated was possibly manipulated by Intermediary P-321. (ICC-01/04-01/06-2842, para. 484).

the proceedings.²⁰ Furthermore, these victims were authorised to participate in the proceedings long before they were approached by the Office of the Prosecutor, which learned of their identity via the Registry's disclosure of their application for participation.

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

44. The proof in question does not mean "proof" which serves as a basis for a suit against the convicted person, but rather "proof" that will enable the Trust Fund for Victims to distribute the available resources amongst the beneficiaries. The Legal Representatives fail to see how the standard of proof to be applied in organising this reparations programme could affect the rights of the convicted person. On the contrary, the degree of formality applied could impact on the victims' rights: overly strict criteria could deprive certain victims of their right to reparation, whereas overly flexible criteria risks overspending the available funds and making reparation purely symbolic.
45. The Defence itself concedes that the Chamber failed to articulate in detail the standard of proof which the TFV must apply.²¹
46. 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, whether such obligation is to be implemented.
47. The Legal Representatives concur with this position. However, the Trial Chamber did not link the issue of the standard of proof to the accused's

²⁰ ICC-01/04-01/06-2842, para. 484.

²¹ Defence brief, para. 80.

financial capacity, as the Defence wrongly claims, but instead to his civil liability.

48. In fact, the Chamber wrongly inferred from the convicted person's temporary insolvency that he has no obligation to provide reparation. This is the error in law on which the Legal Representatives based their second ground of appeal.
49. Before ruling on the TFV's involvement, the Chamber should have ruled on Mr Lubanga's extant obligation to provide reparation.
50. However, the Chamber legitimately decided to adopt a more flexible approach for collective reparations paid for by the TFV rather than individual reparations ordered against the accused. In so doing, it certainly did not violate the rights of the Defence; it did quite the contrary. The Chamber also explicitly stated that it did not order the seizure of the convicted person's assets for the payment of any reparations awards:

....the Decision states simply that States Parties should provide the Court with timely and effective assistance pursuant to Article 93(1)(k) and notes that "the ICC requires the cooperation of States Parties and non-states parties" before recommending that the Registry and TFV establish standard operating procedures, confidentiality protocols and financial reporting obligations. Therefore, the issue identified by the defence is based on an erroneous reading of the Decision.²²

51. Lastly, the Chamber in no way deviated from the principle that applicants for reparations have the burden of proving the harm they suffered. This principle does not imply that there are any universal rules governing evidence. The manner in which a judge or expert assesses harm is certainly not identical for "all civil claims across the world". In many jurisdictions, the rules of evidence differ depending on whether they serve to determine individual criminal responsibility or reparations for criminal conduct. In the common-law tradition, the "beyond reasonable doubt" standard in criminal matters is often replaced with a balance of probabilities in civil matters. However, certain

²² ICC-01/04-01/06-2911 29-08-2012, para. 39.

jurisdictions in the Romano-Germanic tradition, such as the Netherlands, also make such distinctions.²³

52. Assessment of harm is frequently left to the discretion of the trial judge, who may decide to award a fixed sum as reparation (*ex aequo et bono*) when the harm cannot be measured precisely, especially in the case of reparations for harm resulting from a person's death or physical injury.
53. In collective reparation programmes after mass crimes, the burden of proof does not always lie with the applicant. Often, the burden of proof is significantly relaxed or shared by means of a balance of probabilities.²⁴ For example, article 22(2)(e) of the Governing Rules of the Swiss Claims Resolution Tribunal for Dormant Accounts (of Holocaust victims) includes amongst the criteria for making awards the specific requirement that "the Claimant has provided other compelling reasons for making an Award, as determined by the CRT".²⁵

SECOND GROUND: 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

54. First of all, it must be noted that the Trial Chamber by no means decided that victims of crimes other than those for which Mr Lubanga was found guilty could receive reparation. The arguments concerning this ground in fact pertain to the causal link between those crimes and the harm for which reparation is due.

²³ Van den Wyngaert, C., *Strafrecht, strafprocesrecht & internationaal strafrecht*, 2003, p. 258.

²⁴ See Niegergall, H., *Overcoming Evidentiary Weakness in Reparation Claims Programmes* in "Reparations for victims of genocide, war crimes and crimes against humanity. Systems in place and systems in the making" Martinus Nijhoff Publishers, 2009, pp. 145 *et seq.*

²⁵ http://www.crt-ii.org/_pdf/governing_rules_en.pdf, article 22.

55. Since the Statute, the Rules of Procedure and Evidence and even the Regulations of the Court contain no provisions as to how the causal link must be established, this is necessarily an issue which must be addressed through the precedents to be set by the chambers, as is also the case at the national level. Even if the Appeals Chamber were to adopt a different approach from that underpinning the Trial Chamber's decision, it would not necessarily follow that the impugned Decision is "materially affected by error of fact or law" such that it must be amended or that the matter be remanded to a different trial chamber.

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 consistent with the principle that the convicted person is only responsible for reparations for harm arising from crimes on which he was convicted.

56. Once again, the Defence is interpreting provisions which do not, in fact, feature in the Decision. The Chamber did not rule that all victims of all sexual and gender-based violence committed by the convicted person's troops should receive reparation. Rather, it ruled that "[t]he Court should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence",²⁶ which suggests, at the very most, that the victims include individuals who suffered such violence.

57. Clearly, the Chamber's concern must be understood in the context of the Decision, which explicitly requires a causal link between the crimes committed by the convicted person and the harm for which reparations are due: "The 'damage, loss and injury', which form the basis of a reparations claim, must

²⁶ Decision, para. 207.

have resulted from the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities."²⁷

58. Such victims include the many young girls who suffered sexual violence as a result of their recruitment into the militia. Admittedly, the crimes of conscripting and enlisting child soldiers do not necessarily imply that those children will be killed or injured or subjected to inhuman and degrading treatment or violence of any kind, including sexual violence. However, such a nexus need not be established in order for victims to receive reparation. The Chamber requires there to be a causal link between such violence and recruitment into the militia, which does not constitute an error of law.
59. Establishing a link between the crimes for which the accused was convicted and particular harm does not imply a fresh accusation. These alleged acts of sexual violence were not committed by the accused himself and his command responsibility was not at issue in the context of the charges. This led the majority of the Chamber to decide – wrongly, in the victims' view – when ruling on the sentence that:

On the basis of the totality of the evidence introduced during the trial on this issue, the Majority is unable to conclude that sexual violence against the children who were recruited 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.²⁸

[...]

the link between Mr Lubanga and sexual violence, in the context of the charges, has not been established beyond reasonable doubt. Therefore, this factor cannot properly form part of the assessment of his culpability for the purposes of sentence.

76. In a separate Decision, the Chamber will assess whether this factor is relevant to the issue of reparations.

60. This position is not contradictory. Just because a perpetrator did not intend or plan the consequence of a crime (and hence no *mens rea*) does not mean that no

²⁷ Decision, para. 247.

²⁸ Decision on Sentence, para. 74.

compensation may be provided for that consequence. Reparation is not a charge, and must not be restricted to the harm which necessarily results from a crime.

61. Furthermore, harm is not necessarily one of the elements of a crime as the Defence suggests, although it may be. Unlike certain national legislations, the ICC Statute contains no provision whereby a consequence of a crime transforms it into another crime or increases the possible sentence. The crimes of conscripting and enlisting children under the age of 15 years and causing them to participate in hostilities are still punishable by 30 years or life imprisonment. On the contrary, by way of example, under article 136 *quinquies* of the Belgian Criminal Code these same crimes carry a penalty of 10 to 20 years of imprisonment, rising to 20 to 30 years

[TRANSLATION] if the consequences thereof are either an apparently incurable illness, a personal permanent occupational disability, the total loss of the use of an organ, or serious mutilation. They are punishable by life imprisonment if they result in the death of one or more persons.

The fact that the Rome Statute leaves consideration of the consequences of the crime to the judges' discretion during sentencing clearly does not preclude the payment of reparations for a consequence of the crime.

62. In the present case, just because such sexual violence was not "sufficiently widespread" to be considered an aggravating factor warranting a stricter sentence does not mean that it cannot be eligible for reparation.²⁹
63. The real issue here is the manner in which the Court must adjudicate on the link between the crime committed and the harm to be compensated at the

²⁹ Defence Brief, para. 134.

reparations stage. This issue is handled differently in the various national and legal traditions.

64. Neither the Statute nor the Rules of Procedure and Evidence determine the principles on which the Court must rely in awarding reparations. Article 75 of the Statute explicitly leaves it to the discretion of the Chamber, whose sole obligation is to state the principles on which it bases its decision.

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.

65. The Defence is of the opinion that the Chamber erred in law by holding that reparations may benefit the communities affected. In the Defence's view, the Chamber should have stated that, even with respect to collective reparations, "each and everyone of the victims who are recognised as beneficiaries in the case against Mr Thomas Lubanga must be identified" by the Court.³⁰
66. This argument is clearly at odds with rules 97 and 98. Reparations to individually identified victims who have been acknowledged as such in the context of the trial are by definition individual, not collective. However, the Rules of Procedure and Evidence explicitly provide for the possibility of awarding collective reparations. Rule 98(4) even provides for the possibility of entrusting the reparation funds to an intergovernmental, international or national organisation which will execute the collective reparation. By definition, such organisations are not victims within the meaning of rule 85(a) or 85(b). Furthermore, it is not stated that such organisations must submit an "application form for reparations" as the Defence suggests,³¹ only that they must be approved by the Trust Fund for Victims. Moreover, such an

³⁰ *Idem*, paras. 138, 144 and 145.

³¹ Defence Brief, para. 147.

application is not considered to be a “precondition” for the award of collective reparations, but applies solely to the procedure for individual reparations (rules 94 and 95(5)(a)).

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.

67. In determining the rules to be applied by the TFV for collective reparations, it was impossible for the Chamber to violate the rights of the convicted person, who has been absolved of any financial, moral or even symbolic involvement in the reparation offered to the victims.
68. Furthermore, the Chamber did not take such a decision. The Defence actually relies on the Chamber’s lack of precision in the determination of the principles which it intends to apply to reparation, to request the Appeals Chamber to supplement the decision with a series of restrictions which the Defence would like to see applied.
69. Even if the Defence’s criticism were justified, it would not amount to an error in law which materially affects the decision to the extent of legitimately warranting an appeal.
70. The principles by which harm may be established and reparations provided are many and varied. Certain legal traditions favour restitution to restore victims to their previous state by means of reparation for the harm in its entirety and nothing more. Others depart from this principle by taking account of the financial status of the parties and the degree of liability of the person responsible, which may lead to reparations which greatly exceed the harm suffered (punitive damages). Reparations awarded to a large number of victims (class actions or reparation schemes after mass crimes) often employ flat-rate payments.

71. It would seem difficult to calculate objectively the harm suffered by a large number of children under the age of fifteen years who were enlisted into a militia and forced to participate in hostilities. While expert forensic reports may describe with a certain degree of precision the physical effects of victims' injuries and psychological trauma in terms of temporary occupational incapacity, permanent disability, disfigurement, loss of schooling and others, it is more difficult to calculate the cost of "full reparation" for such material harm. It is even more difficult to assess the cost of full reparation for the mental suffering endured by enlisted children and their family members, especially the parents of children who lost their lives.
72. The Defence suggests that in order to determine the harm to victims, the Chamber should have relied on the interpretations of the French courts and the Extraordinary Chambers in the Courts of Cambodia, insofar as the ECCC's procedures are based on the French judicial system.³²
73. The Statute has left all options open and is not influenced by the manner in which the Romano-Germanic legal systems conceive compensation of civil parties. Had it been influenced by such systems, victims' participation would certainly have been organised differently. The concept of reparations which the Defence is now attempting to impose is at odds with the position it defended throughout the trial, regarding the role of victims before the ICC.
74. Furthermore, should the Court decide to rely on a single national tradition for inspiration, the Legal Representatives fail to see why it should grant special status to French case law. If such were the case, it would be more logical to favour the case law of the DRC (or Belgium, since Congolese criminal law is based on Belgian criminal law).

³² Defence Brief, para. 156.

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.

75. In the Defence’s view, the Trial Chamber committed an error of law which vitiates the decision, by applying the “proximate cause” and “but-for” tests, since they are “based on a purely subjective appraisal of the person applying it”.
76. The aforementioned tests are used frequently in common law. The concept of “proximate cause” is even more favourable to the party against which reparations are ordered than the principle of equivalent causes or “*causa sine qua non*” generally applied in the Romano-Germanic systems. For example, the Belgian Court of Cassation has consistently held that there is a causal link between fault and harm, since without the fault, the harm would not have occurred as it did *in concreto*.³³ For a long time, the French Court of Cassation rejected the concept of equivalent causes, preferring the “adequate cause” theory, which seeks the dominant fault in the chain of faults which led to the harm. In a landmark judgment of 4 December 2001,³⁴ the French court reversed its practice and thenceforth it too applied the theory of equivalent causes for liabilities.³⁵

³³ Van Ommeslaghe, P., *Lien de causalité et dommage réparable: dérives et corrections*, in *Liber Amicorum Jean-Luc Fagnart*. Ed. Bruylant 2008, p. 687.

³⁴ <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007045447&dateTexte=>.

³⁵ “[TRANSLATION] The *Franck* judgment of the Court of Cassation (Fr) 1st civ. of 6 January 1943 was, for a long time, the leading precedent: it rejects the theory of equivalent conditions. In that case, a person’s car was stolen and the thief caused an accident, originating from a fault on the part of the owner. Under the equivalent conditions principle, the owner’s fault is a cause of the harm; however, the court did not accept that there was a causal link between the proven fault of the owner and the accidental death of the cyclist. Since 2001, there has therefore been a reversal in the case law.” ([http://fr.jurispedia.org/index.php/Lien_de_causalit%C3%A9\(fr\)](http://fr.jurispedia.org/index.php/Lien_de_causalit%C3%A9(fr))).

77. The Defence is mistaken in perceiving “a definite trend in international courts and international bodies towards adopting a restrictive approach in the assessment of causation” which would exclude any indirect harm.
78. To buttress its position, the Defence misquotes international decisions or quotes them out of context.
79. For example, the Defence claims that the European Court has developed settled jurisprudence with regard to material harm by requiring a “clear causal connection” to establish a right to reparation. This is wholly incorrect.
80. The ECHR does not rule on reparations for harm caused by crimes, but on the award of “just satisfaction” by a State which has violated a guaranteed right or freedom. While the ECHR is relatively cautious in awarding “just satisfaction” for violations of procedural rights or other “non-material” rights, such as the right to family life, nowhere does it require the link between established harm and a violation of the Convention to be “clear”, only that such a link exists. In *Gillow v. United Kingdom*,³⁶ the ECHR held that there was sufficient causal link between the unwarranted denial of a residence permit and the costs of selling a property. In *Lozidou v. Turkey*,³⁷ the court awarded reparation for a breach of the right to family life resulting from Turkey’s occupation of part of Cyprus.
81. In the judgments referenced by the Defence which pertain to detentions found to be unlawful, the ECHR did indeed hold that there was a causal link between the violation of the Convention and harm suffered by the applicants, who were awarded reparations. However, the applicants were unable to prove the existence of certain hypothetical losses (loss of income which an applicant considered he would have earned if he had been released). Accordingly, these

³⁶ Judgment of 14 September 1987, Publ. Court, Series A, Vol. 109.

³⁷ Judgment of 28 July 1998, Reports, 1998, para. 39.

judgments do not pertain to the link between an event and established harm, but instead to proof of alleged harm. In other cases concerning detentions resulting from violations of the Convention, the Court did indeed award material reparations.³⁸

82. The Defence also contends that the inter-American human rights system applies a “restrictive approach to causation when dealing with reparations”,³⁹ referring to an excerpt from paragraph 49 of the judgment in *Aloboetoe et al. v. Suriname*. That judgment does indeed concern a crime which could be characterised as a crime against humanity (mass killing of civilians). However, a reading of the entire paragraph referenced shows that it in fact states the opposite of what the Defence suggests:

49. For a long time, the law has addressed the subject of how human actions occur in practice, what their effects are and what responsibilities they give rise to. On the international plane, the arbitral award in the case of “Alabama” already dealt with this question (Moore, History and Digest of International Arbitrations to which the United States has been a Party, Washington, D.C., 1898, vol. I, pp. 653-659).

The solution provided by law in this regard consists of demanding that the responsible party make reparation for the immediate effects of such unlawful acts, but only to the degree that has been legally recognized. As for the various forms and modalities of effecting such reparation, on the other hand, the rule of *in integrum restitutio* refers to one way in which the effect of an international unlawful act **may** be redressed, but it is not the only way in which it **must** be redressed, for in certain cases such reparation may not be possible, sufficient or appropriate (cf. Factory at Chorzów, merits, supra 43, p. 48). The Court holds that this is the interpretation that must be given to Article 63(1) of the American Convention.⁴⁰

83. In this judgment – which is of great interest to the present case – the IACHR awards reparations not only to the successors of the deceased, but also to persons who suffered morally from the death of their family members (paragraph 76), and even to others who were dependent on them financially (paragraph 77). The same decision also awarded collective reparations to the Saramaka tribe:

³⁸ For example, *Texeira de Castro v. Portugal*, 9 June 1998, Reports, 1998, para. 49.

³⁹ Defence Brief, para. 176.

⁴⁰ http://www.corteidh.or.cr/docs/casos/articulos/seriec_15_ing.pdf.

5. Also orders the State of Suriname, as an act of reparation, to reopen the school located in Gujaba and staff it with teaching and administrative personnel so that it will function on a permanent basis as of 1994, and to make the medical dispensary already in place in that locality operational during that same year.

84. In general, the IACHR's approach is anything but restrictive in matters of reparations.⁴¹
85. Still in an attempt to prove "a definite [convergent] trend in international courts", the Defence finally cites the case law of the United Nations Compensation Commission,⁴² which, it argues, requires the establishment of a direct causal link between the alleged harm and, in that case, the invasion and occupation of Kuwait by Iraq, in particular regarding commercial damage.⁴³ However, commercial damage is, by definition, indirect harm resulting from a war of aggression. Furthermore, not only did the UNCC award compensation for harm suffered by Kuwaiti businesses, which were more directly affected by the aggression, but also to businesses in 70 other countries which suffered harm as a result of the Gulf War, *inter alia* for non-payment for goods and services provided, lost profits and applications based on export guarantees.⁴⁴
86. Hence, the international case law on which the Defence relies does not, in any way, support its position.
87. Mr Thomas Lubanga was not convicted for having contributed to the recruitment of children in specific locations, but for having collaborated in an overall plan which included the conscription and enlistment of children under the age of 15 years. This overall plan was not restricted to the places cited in the

⁴¹ *Ibidem*. Disposition.

⁴² Defence Brief, para. 178.

⁴³ Defence Brief, para. 178.

⁴⁴ L. Taylor. I. "The United Nations compensation commission", in *Reparations for victims of genocide, war crimes and crimes against humanity. Systems in place and systems in the making*. Martinus Nijhoff Publishers, 2009 p. 197 *et seq.*

judgment, which were referenced only in order to establish the evidence for the crimes charged.

88. The Trial Chamber did not, therefore, exceed its powers by requesting the TFV to determine which localities ought to be involved in the reparations process.

Accordingly, the Legal Representatives respectfully request the Appeals Chamber to:

- declare point 1.2.3 of the first ground of the Defence appeal to be well founded; and
- declare the remainder of the appeal to be unfounded.

For the V01 team of victims

[signed]

Luc Walley and Franck Mulenda, absent at signature

Dated this 7 April 2013, at Brussels, Belgium, and Kinshasa, DRC.