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Before: Judge Marc Perrin de Brichambaut, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Péter Kovács

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public Document

**Submissions on the Evidence Admitted in the Proceedings for the Determination
of Mr Thomas Lubanga Dyilo's Liability for Reparations**

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:

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I. PROCEDURAL HISTORY

1. By an Order of 13 July 2017,¹ the Chamber instructed the parties to file submissions on the evidence admitted for the determination of Mr Lubanga's liability for reparations.

2. The Legal Representatives filed 37 pages of submissions on 6 September 2017, in accordance with regulation 38(1)(f) of the Regulations of the Court.² On the same day, the Chamber issued an urgent decision, at the request of the OPCV, limiting the authorized number of pages to 30.³

3. In view of the time limit for filing submissions and to avoid the risk of inadmissibility, the Legal Representatives hereby file the present submissions, cut to 30 pages (excluding the cover and notification pages), to replace those filed on 6 September.

II. SUBMISSIONS

A. Nature and extent of harm caused

(1) *Direct victims (former child soldiers)*

4. There is no question that for children under the age of 15 years to be enlisted into an armed group such as the one led by the convicted person – and to spend a relatively long (for the duration seemingly endless) time in that group and to take part in hostilities – must have been an extremely traumatizing experience. After all, it would have entailed being torn away from their families, having to survive in a violent and lawless environment, enduring living conditions that violated internationally recognized children's rights, being in constant fear of violence to life and limb, and frequently witnessing horrific scenes, not to mention random acts of cruel discipline in the camps (beatings and

¹ ICC-01/04-01/06-3339-tENG.

² ICC-01/04-01/06-3357.

³ ICC-01/04-01/06-3356-tENG.

degrading punishment); with no protection from inhumane and degrading treatment, abuse and sexual enslavement, they were deprived of hygiene, sleep, food and appropriate healthcare, were plied with drugs and, last but not least, were encouraged to commit crimes against the civilian population.⁴

5. While many war veterans suffer for years on end from the psychological trauma they have experienced, young children – whose personality is still being formed⁵ – are more deeply affected as their normal schooling is interrupted and replaced by “drills” designed to break their spirit and deprive them of their free will, forcing them to loot, kill, wound and mutilate.

6. It is therefore not surprising that the Trust Fund psychologists have detected in many victims symptoms of post-traumatic stress disorder (PTSD) and other significant types of psychological trauma, the consequences of which vary from one individual to another.

7. Some of the victims suffered specific types of harm in addition to that of a general nature:

- physical injuries sometimes leading to permanent disability;
- psychological trauma leading to long-term conditions;
- harm of an aesthetic (scars), sexual (problems with sexual relations), reproductive (sterility, STDs) or social (difficulty in functioning within a group or in one-to-one dealings) nature;
- loss of one or more years of schooling, or even being unable to complete school at all and, as a direct consequence, loss of job opportunities and future income;

⁴ Report by Dr Schauer, ICC-01/04-01/06-1729-Anx1, p. 17 *et seq.*

⁵ *Ibid.*, p. 17: “During childhood and adolescence mind and brain are particularly plastic and hence, stress has the greatest potential to affect cognitive and affective development. Exposure to significant stressors during sensitive developmental periods causes the brain to develop along a stress-responsive pathway.”

- lasting erosion of the moral and values system, drug addiction, aggressive behaviour, delinquency, inappropriate behaviour (especially towards people of the opposite sex); and
- inability to integrate as a young person into adult society because of the negative image of former child soldiers, risk of reprisals, difficulties in finding a life partner and other social disadvantages.

(2) *Indirect victims*

8. The abduction of children by an armed group or their “voluntary” enlistment without their parents’ authorization, and the resultant anxiety about the children’s survival and/or their physical integrity, causes great suffering to family members even if the children disappear for a short time.

9. The suffering does not end when the children regain their natural environment. In fact, young people who are traumatized by their experience in the militia are often a source of problems and a burden to their families, which have to deal with aggressive behaviour, depression and drug addiction, among other things. As they have had no schooling and lack motivation to find work, many former child soldiers remain in the care of their families for longer than normal. Frequently stigmatized by their neighbours and village communities – with girls seen as “dishonoured” while boys are labelled “thugs” – they taint not only their close family members but a far wider circle of people. In *Katanga*, the Chamber took into account the emotional harm caused not only to close relatives (spouses, parents, siblings) but also to more distant relatives.⁶

10. Some former child soldiers have had children since demobilization. Their children’s upbringing is influenced by what their parents experienced when they were children; the psychological disorders afflicting the parents may

⁶ “Order for Reparations pursuant to Article 75 of the Statute”, 24 March 2017, ICC-01/04-01/07-3728-tENG, paras. 227-232.

in turn affect their offspring. In *Katanga*, the Chamber acknowledged the notion of “transgenerational harm” and recommended that such children be monitored and paid special attention.⁷

11. The same criteria should apply in the instant case for determining Mr Lubanga’s liability, even if none of the more distant relatives of direct victims does indeed apply. Where death has occurred, close relatives suffer the loss of a loved one and parents suffer the material loss of a descendant who would have helped to look after them in their old age.

12. Logically, the parents of children who died while serving in the militia should acquire the rights of their children – of whom they are the heirs. They have suffered personal harm but the harm their child suffered before he or she died should also be taken into account.

(3) *For the community*

13. The mass enlistment of children into a militia caused significant collective harm to varying degrees. Even local communities that (in part) consented to the recruitment of children suffered the consequences, including the difficulty of integrating such children back into social and economic life once they left the militia. Some *localités* ended up with an abnormally high percentage of unqualified and even illiterate young people, resulting in dependency and anti-social behaviour such as vagrancy, bad manners and criminal activity.

14. Another consequence of recruiting a large number of children under the age of 15 years is that some of them have committed crimes against the civilian population, above all those “in the opposite camp”. Children tend to be more submissive than adults and can be easily made to maltreat others.

⁷ *Ibid.*, paras. 132-133.

15. In *Al Mahdi*,⁸ the Court found that the destruction of certain cultural assets caused harm not only to all the inhabitants of Timbuktu but also to the nation of Mali and humanity as a whole.⁹ Any decision to intervene should take into account the extent of the social harm caused by the crimes at issue and not be restricted to the harm caused to the direct victims.

B. Evidence for the determination of the amount of the reparation

(1) Standard of proof for the determination of victim status and the harm caused

16. Where a crime has affected a large number of victims, the establishment of the accused's guilt does not automatically pinpoint who the victims are or what harm has been caused; a case-by-case approach is required. In the instant case, it is all the more difficult to determine either of these in view of: the fact that the events are not recent (they took place some 15 years ago); the vulnerable situation in which the victims find themselves; the attitude of the convicted person and his sympathizers towards the victims and the reparations procedure; the unstable social and political setting in which the procedure is taking place; and the likelihood that the cost of the procedure will be disproportionate to the resources made available for reparations.¹⁰

⁸ ICC-01/12-01/15-236, para. 53. See also, para. 76: "[...] the harm [...] is primarily collective in character [...] It is much larger and of a different nature than the harm suffered by the 139 applicants grouped together. Aggregating their losses and prioritising their compensation would risk dramatically understating and misrepresenting the economic loss actually suffered".

⁹ *Al Mahdi*, para. 129.

¹⁰ In *Katanga*, the Chamber ruled: "That being so, and having regard to the practice of the Inter-American Court and certain transitional justice mechanisms, the Chamber sees fit to proceed on presumptions and to act on circumstantial evidence to satisfy itself of certain facts in the case." ("Order for Reparations pursuant to Article 75 of the Statute", 24 March 2017, ICC-01/04-01/07-3728-tENG, para. 61.) The Appeals Chamber noted in this respect that "[g]iven the fundamentally different nature of reparations proceedings, a standard less exacting than that for trial, where the prosecution must establish the relevant facts to the standard of 'beyond a reasonable doubt', should apply", and added that "[i]n determining the appropriate standard of proof in reparation proceedings, various factors specific to the case should be considered, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence." (Order for Reparations (amended), para. [22].)

17. Should the standard of “balance of probability” brought to bear by the Appeals Chamber be applied,¹¹ the claims of young people stating that they were recruited into the militia are highly probable provided those same young people originated in the region and were between 10 and 15 years of age at the time of the events – all the more so if they belong to the same ethnic group as the convicted person. Other factors specific to the case will make fraud even less probable: (a) if there is no financial compensation; (b) if participation in the type of programmes envisaged by the Trust Fund (including psychological monitoring, vocational training and income-generating activities) will require some effort on the part of the beneficiaries too; and (c) if it is likely that participation might be perceived negatively by the community to which the beneficiaries belong. With regard to the last factor, participation could be perceived as an act of hostility towards a community leader and identify participants as former child soldiers with the stigma that that might engender. It is not surprising, therefore, that Trust Fund officials and experts should have confirmed that the vast majority of the potentially eligible victims examined (and all of those in V01) had been enlisted as child soldiers.

18. In its various observations,¹² the Defence contests the standard of proof brought to bear by the Court (the “balance of probability” standard). In effect it argues for the same standard of proof to be applied in the reparations proceedings as the Trial Chamber applied during trial (i.e. beyond reasonable doubt) – or possibly an even stricter standard – when it claims that:

¹¹ The term “balance of probabilities” is defined as “superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.” (Order for Reparations, footnote 37.)

¹² “*Defence Response to the ‘Réplique aux Observations déposées par la Défense de M. Lubanga à la huitième transmission des formulaires des potentiels bénéficiaires en réparation’*”, 18 August 2017, ICC-01/04-01/06-3351-tENG; “*Observations of the Defence for Mr Lubanga on the First Transmission of Redacted Applications for Reparations of 8 March 2017*”, 10 April 2017, ICC-01/04-01/06-3291-tENG.

- enlistment in a militia cannot be considered as “probable” on the basis of a few hours of questioning by a Trust Fund official, unless the claims are corroborated by documents or testimony;
- it is improbable that there is a causal link between the recruitment of girls aged 14 years and younger into a militia and the sexual abuse they suffered while in the militia;
- the fact that a person was under the age of 15 years at the time of the events cannot be deduced from a voter’s card or any other document issued by the Congolese authorities – such as an “IMP” card or a driver’s licence – but only from a birth certificate (in a region, moreover, where register office services have been substandard for years);
- it cannot be considered probable that there is a causal link between the post-traumatic stress syndrome detected by Trust Fund experts in a large number of potentially eligible victims, on the one hand, and their enlistment in a militia and their participation in hostilities, on the other, even if those experts declare that there is; and
- owing to minor discrepancies in claims or details of identities (such as the precise date of birth), victim status cannot be recognized.¹³

19. Albeit admitting after all that children under the age of 15 were recruited into the militia led by the convicted person¹⁴ – the Defence steadfastly refuses to collaborate in drawing up the evidence. The Defence has failed to disclose the identity of any victim known to it or to signal any witness who might help with the identification process. It has not even checked whether potentially eligible victims who have disclosed their identities are known to it, by dint of having

¹³ Footnote 18.

¹⁴ In its recent response, the Defence reiterated that “it is not seeking to deny that children under the age of 15 were enlisted in the UPC/FPLC during the time frame of the charges”. “Defence Reponse to the ‘Réplique aux Observations déposées par la Défense de M. Lubanga à la huitième transmission des formulaires des potentiels bénéficiaires en réparation’ of 16 August 2017”, 18 August 2017, ICC-01/04-01/06-3351-tENG.

been in the militia. This makes the Defence even less well placed to call into question the method used by the Trust Fund to assess the victims' dossiers.

(2) Application forms for reparations used by the Trust Fund

20. Most of the victims in the V01 group met Trust Fund officials in April 2016, in accordance with the Order of 9 February 2016.¹⁵ In fact the Trust Fund had expressed a desire to first contact the victims who had already participated in the proceedings, to form a representative sample of victims of the crimes of which Mr Thomas Lubanga Dyilo was convicted. A second group met [Trust Fund officials] in March 2017.

21. During these meetings – at which the Legal Representatives were present – Trust Fund officials interviewed the victims and filled out ad hoc forms referred to as “Reparations Forms”.¹⁶ The victims were invited by the Trust Fund to communicate their requests for participation in the procedure, and provide any identity documents in their possession, and to state whether they would be interested in participating in a collective reparations programme without specifying further.

22. The victims were first invited to sign forms prepared by Trust Fund officials and then to undergo a series of examinations, by a physician, a psychologist and a social worker. On the basis of these interviews and examinations, the participation forms and any other documents they submitted, the Trust Fund carried out a case-by-case assessment of the situation of these victims – sometimes first requesting additional documents – to determine who would

¹⁵ “Order instructing the Trust Fund for Victims to supplement the draft implementation plan”, ICC-01/04-01/06-3198-tENG.

¹⁶ For the second group, the same form was used but the title was changed to “Application Forms for Reparations.”

qualify as a victim. Regarding victims belonging to group V01, this applies to everyone for whom a dossier was compiled by the Trust Fund.

23. The interview and examination forms used by the Trust Fund were considered by the Chamber to be veritable “requests for reparations”.¹⁷ This surprised those victims who had done no more than respond to a request from the Trust Fund. It was the victims in the V01 group who appealed the decision of Trial Chamber I on the ground that the Chamber had dismissed some of the requests for reparations submitted pursuant to rule 94.¹⁸ The victims knew that the appeal had been rejected and that the Appeals Chamber had opted for collective reparations, on the basis of an array of services offered by the Trust Fund and not individual requests made by victims.¹⁹ The victims had, as a consequence, decided not to submit applications for reparations to the Registry.

24. To avoid any confusion, the victims wish to point out that, since the Judgment on the appeals of 3 March 2015, they have made no request with regard to the convicted person or even the Trust Fund. The Trust Fund’s application forms for reparations were prepared by the Trust Fund – at the request of the Chamber – for the purpose of establishing a representative sample of victims’ dossiers in order, in turn, to determine the amount of the convicted person’s liability. These forms – filled out by Trust Fund officials – are no more and no less than interview records.

¹⁷ “Decision on the Applications of the Office of Public Counsel for Victims and the Legal Representatives of the V02 group of victims for Leave to Reply to the Observations of the Defence team of Thomas Lubanga Dyilo of 22, 30 and 31 May 2017”, 16 June 2017, ICC-01/04-01/06-3331-tENG, para. [26].

¹⁸ “Decision establishing the principles and procedures to be applied to reparations”, 7 August 2012, ICC-01/04-01/06-2904.

¹⁹ “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012”, 3 March 2015, ICC-01/04-01/06-3129, paras. 149-152: “when only *collective* reparations are awarded pursuant to rule 98(3) of the Rules of Procedure and Evidence, a Trial Chamber is not required to rule on the merits of the individual requests for reparations. Rather the determination that it is *more* appropriate to award collective reparations operates as **a decision denying, as a category, individual reparation awards.**”

25. The Trust Fund has yet to implement any reparation projects and has therefore not yet been in a position to propose specific projects to the victims or even, for that matter, make tailored, personalized proposals for providing care. Since the victims still do not know the content of the projects that might be proposed to them (type of project, where and when, conditions for participation, etc.), they have not been able to state whether they want, in principle, to benefit from collective reparations.

26. Taking part in the Trust Fund's establishment of a representative sample and in its assessment of the harm suffered should not become an obligation for potentially eligible victims. Moreover, the Decision of 13 July 2017 relating to the OPCV's request²⁰ confirmed that the eligibility of potentially eligible victims for reparations would be examined by the Trust Fund at the reparations implementation stage.²¹

(3) Assessment reports by medical, psychological and social experts produced at the Trust Fund's request

27. The main objective of the experts' reports was to inform the Chamber of the kind of harm suffered by a representative sample of victims, but they also helped to boost the credibility of those victims who were assessed. The examinations revealed symptoms in most of the victims of the V01 group which they could not have simulated without special training. The expert reports helped the Trust Fund to decide on the admissibility of victims into the reparations programme.²²

(4) Documents produced by victims as proof of identity

²⁰ "Décision relative à la demande de réexamen du Bureau du conseil public pour les victimes de la Décision du 6 avril 2017", ICC-01/04-01/06-3338.

²¹ *Ibid.*, para. 11.

²² Report on assessment of psychological harm in Annex ICC-01/04-01/06-3208-Conf-Exp-Anx12, 31 May 2016.

28. Practically all the members of the V01 group provided Trust Fund officials with proof of their identity – mainly voter's cards or IMP cards but, in some cases, other documents.

29. In the specific case of former child soldiers, proof of their identity should also determine their age at the time of the events. This is not, however, so straightforward. The Legal Representatives – like the OPCV whenever it has been in contact with other potentially eligible victims – have observed that the dates of birth on some documents may be at variance with each other or do not match the date given by the victims themselves – or by their relatives – when they submitted their requests to participate.

30. The explanation they gave is that, owing to the deplorable state of the civil status registries in the region, official documents of this kind were created on the basis of statements made by those concerned. In addition, some young people born in remote villages did not know their exact date of birth when the documents were created, while others had given a date earlier than their true date of birth in order to be issued a voter's card, the only proof of identity available at that time. To have an identity document offers significant advantages in everyday life – for instance, the holder can avoid problems during police checks. Moreover it was some of the youngest victims who did that. These explanations are therefore plausible.

31. However, notwithstanding the discrepancies in dates of birth observed in the documents, the dates invariably show that those concerned were under 15 years of age – and often even under 13 – when they were enlisted into the UPC/FPLC army.

(4) Documents or testimony corroborating individual accounts (or their absence)

32. The Appeals Chamber applied a less exacting standard of proof.²³

33. It is worth noting that the potentially eligible victims were interviewed more than 15 years after the events occurred. Some of the victims received a “demobilization certificate” when they left the militia, but it is difficult to understand why they would have kept it for so many years. Even so, the Defence criticized the Trust Fund for having disclosed the dossiers of potentially eligible victims which did not contain documents or testimony proving that they had been in the FPLC militia.

34. When the Chamber instructed the Trust Fund to “prepare files”, it did not specify how those “file[s]” were to be put together, leaving it to the Trust Fund’s discretion. The Trust Fund put together files that comprised an interview form, expert reports, a copy of the request for participation (if available) with its annexes, the identity documents of the victims contacted, and a final assessment by the Trust Fund team. The Trust Fund rightly considered that it did not need to interview witnesses about the facts referred to by the victims, or request the potentially eligible victims to corroborate the facts with “statements” whose value, by definition, is all relative.

35. The information contained in the forms is a summary drafted by a Trust Fund official who had conducted an interview several hours long, to test the sincerity of those interviewed. It is normal that the answers given during these interviews did not go further than the questions asked by the examiners and the

²³ The Appeals Chamber points out that: “[g]iven the fundamentally different nature of reparations proceedings, a standard less exacting than that for trial, where the prosecution must establish the relevant facts to the standard of “beyond a reasonable doubt”, should apply. In determining the appropriate standard of proof in reparation proceedings, various factors specific to the case should be considered, **including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence.**” ICC-01/04-01/06-3129-AnxA, para. 22.

examiners, in turn, did not necessarily deem it of any use to record certain details if they felt the information collected was sufficient.

36. The Legal Representatives of Victims underscore that the Chamber had not thus far required participating victims to submit proof other than that which had enabled their victim status to be recognized with a view to their participating in the proceedings. They note that in *Al Mahdi* the Chamber made the following decision **with regard to individual reparations requests**:

39. In its 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims', the Chamber ruled on the criteria to be met for individuals or organisations to be considered as victims. The Chamber sees no reason to deviate from its own jurisprudence at the reparations phase, noting however the different standard of proof to be met by applicants for reparations.

37. The Legal Representatives of Victims also note that in several applications parents recognized as indirect victims by the Chamber corroborated the statements of their children with the account they gave in their own applications for reparation.²⁴

(5) Interviews and assessment of potentially eligible victims by the Trust Fund

38. In the case of the V01 team, the Trust Fund assessed each individual dossier and forwarded only those that it considered as complete and concerning persons whom it qualified as victims of the crimes committed by the convicted person. Before reaching a decision on whether the people concerned were victims, it first analysed the applications for participation, most of which had been filled out more than 10 years earlier, sometimes by the parents or guardians of the direct victims; it then examined the documents they presented at the time of the

²⁴ The Legal Representatives note that the statements made by indirect victims a/ corroborate those made by their children, whom they had represented while they were still minors.

interviews or at some time in the past; they were next interviewed by a qualified official; and, lastly, they underwent technical tests (medical, psychiatric and social and economic).

39. A personal interview conducted by a qualified official – once the interviewee’s confidence has been gained – is a precious tool for assessing the person’s credibility on the basis of the precision of certain details, or the explanations given about any gaps or contradictions in the chronology, or concerning anything that might have been omitted in the interview record – such as the interviewee’s attitude during the interview, his or her emotion (or lack of) when recalling anything traumatic or his or her body language. Any of these might help to detect an impostor. Conducting a personal interview is often recommended for the assessment of vulnerable people whose accounts are not corroborated by written evidence or testimony, e.g. in asylum proceedings.²⁵

(6) Other documents

40. By its order of 20 July 2017,²⁶ the Chamber instructed the Registry to file in the case record a series of documents containing analyses of the conflict in Ituri and information of interest on the recruitment of child soldiers by the UPC-FPLC militia. The Legal Representatives believe that the standard of proof chosen by

²⁵ UN High Commission for Refugees, *Handbook and Guidelines on Procedures and Criteria for determining Refugee Status*:

<http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>

“200. An examination in depth of the different methods of fact-finding is outside the scope of the present Handbook. It may be mentioned, however, that basic information is frequently given, in the first instance, by completing a standard questionnaire. Such basic information will normally not be sufficient to enable the examiner to reach a decision, and one or more personal interviews will be required. It will be necessary for the examiner to gain the confidence of the applicant in order to assist the latter in putting forward his case and in fully explaining his opinions and feelings. In creating such a climate of confidence it is, of course, of the utmost importance that the applicant’s statements will be treated as confidential and that he be so informed.”

²⁶ [reference missing].

the Appeals Chamber allows these documents to be used as evidence to assess the extent of the enlistment of children into the militia led by the convicted person. This is also applicable to the reports drafted by the Trust Fund on the basis in particular of its work in the region under its assistance mandate.

B. Monetary value of each type of harm

(1) Difficulty in quantifying certain types of harm

41. For certain kinds of material harm – such as the loss of income for a certain period or damage to a house or a vehicle – harm may be calculated with relative precision. By corollary, it is possible to put into figures a partial loss of income over a certain period, calculate the exact cost of repairing or replacing an object or its temporary unavailability, and determine the amount of compensatory interest to take into account the time between the harm's occurrence and the payment of compensation.

42. For many other types of harm – in particular emotional, aesthetic, sexual and reproductive harm (*pretium doloris*) – no objective assessment is possible because they are irreparable by nature. The approach to reparation for such types of harm depends on the legal system that applies and may vary from one court to another, sometimes even within the same country.

43. Some countries of Muslim tradition still apply the traditional principle of talion (“an eye for an eye”), according to which victims of harm have the right to seek reparation through retaliation in kind (*qiṣāṣ*) against the perpetrator, though the latter may “buy back” the right by means of an amount of compensation (*diya*

or blood money) agreed with the victim or the victim's family.²⁷ This is the case in some States Parties to the Rome Statute, e.g. Afghanistan and Nigeria.²⁸

44. In the Romano-Germanic tradition, the only known reparation for harm – in principle – is financial compensation, and as a rule that financial compensation is determined without taking into account the financial position of the perpetrator or the victim, or the cause of the harm (accidental or criminal). In some countries (e.g. France and Belgium), courts usually determine the “rates” for each type of non-material damage on the basis of case-law analysis.²⁹ There is currently a tentative trend towards taking into account the situation of the parties in *procédures de médiation pénale* [trials under special French legislation in which criminal proceedings are avoided by means of mediation] or in cases involving young people.

45. In some countries of the common law tradition – such as the United States, Australia and New Zealand – courts take into account the perpetrator's attitude and financial position, as well as the seriousness of the offences, when imposing punitive damages,³⁰ which may be substantial for harm that is itself relatively modest. According to prevailing opinion, however, this principle is contrary to the principle of proportionality, which is a rule in international law on reparations.³¹

²⁷ J. Sarkin, “Reparations for gross human rights violations as an outcome of criminal versus civil court proceedings”, *Out of The Ashes*, Intersentia (2005), p. 488.

²⁸ “Introduction to the Criminal Law of Afghanistan,” Stanford University, p. 100 *et seq.* <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/12/Intro-to-Crim-Law-of-Afg-2d-Ed.pdf>

²⁹ *Référentiel indicatif de l'indemnisation du préjudice corporel* [Guide for the Compensation of Bodily Harm], French Appeals Court (*hors Paris*), 2011, www.avocatparis.org/system/files/worksandcommissions/att5e6i9.pdf and *Tableau Indicatif belge* [Belgian Reference Table] 2012 (*Die Keure – La Charte* 2012 (6th edition), p. 12.

³⁰ Wikipedia, “Punitive damages”, https://en.wikipedia.org/wiki/Punitive_damages

³¹ O. Amezcua-Noriega, “Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections”, University of Essex (2011), para. 3: “By virtue of the principle of proportionality, reparation should be proportional to the injury caused by the wrongful act”. “An important consequence of the principle of proportionality is that reparations are not punitive in nature. This is so regardless of the gravity

46. In the *[A]l Mahdi* Order, the Chamber recalled that: “There is an inherent difficulty in addressing and measuring monetary values [...] ‘a price cannot be put on dignity, as it cannot be put on faith, and so both are that much more difficult to restore’.”³² This must also apply to reparations with respect to violations of human rights, in particular children’s rights as in the instant case.

47. In the DRC, the amounts of reparation awarded by military courts vary between USD 7,000 and 100,000 per victim for the killing of a close family member, between USD 2,000 and 5,000 for inhumane and degrading treatment, and between USD 5,000 and 30,000 for rape.³³ In the DRC, the amounts of reparation awarded by military courts vary between USD 7,000 and 100,000 per victim for the killing of murder of a close family member, between USD 2,000 and 5,000 for inhumane and degrading treatment, and between USD 5,000 and 30,000 for rape.³⁴ Although compensation for the loss of a child in Belgium can amount to EUR 5,000, in France EUR 30,000 and in the United States USD 1,000,000, these amounts do not represent the “value” of a child in those countries but are considered to be the right amount to relieve any suffering. The range of awards for comparable types of harm merely confirms that the monetary value of any harm is none other than the estimated value of the reparations.

48. At the international level, the award of reparations with respect to harm caused by mass crimes has given rise to specific administrative or (quasi-)judicial practices tailored to this form of crime. In parallel with international criminal

of the breach. Reparations should exclusively be aimed at remedying the damage committed through the wrongful act, and not conceived as an exemplary measure.”

³² *Al Mahdi*, para. 129.

³³ *La réparation des crimes internationaux en droit congolais*, report by Avocats sans frontières, December 2014, p. 82:

http://www.asf.be/wp-content/uploads/2015/09/ASF_RDC_R-parationCrimesInternat_201509.pdf pp. 82-83.

³⁴ *La réparation des crimes internationaux en droit congolais*, report by Avocats sans frontières, December 2014, p. 82:

http://www.asf.be/wp-content/uploads/2015/09/ASF_RDC_R-parationCrimesInternat_201509.pdf pp. 82-83.

law, which applies specific principles when determining an individual's criminal liability (Nuremberg principles), reparative justice is being developed specifically for mass human rights violations,³⁵ considering among other things the award collective reparations in particular. The Inter-American Court has played a major role in this process.³⁶ Most international rulings on reparations for mass human rights violations have taken the form of decisions against States and not individuals,³⁷ but the Rome Statute and [the regulations] of the Trust Fund for Victims, the Trust Fund's filings³⁸ and the earliest decisions taken at the International Criminal Court drew most of their inspiration from these developments.³⁹

49. Since reparation programmes first began after World War II, a number of international courts, arbitration institutions and ad hoc commissions have awarded reparations with respect to mass claims.⁴⁰ As a rule, these institutions did not carry out a case-by-case analysis of the harm suffered, but standardized the different types of harm and awarded flat rate payments.⁴¹

(2) *Per capita or overall assessment?*

³⁵ The principles governing international reparations law were codified in the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," adopted by the United Nations General Assembly, resolution 60/147, 16 December 2005.

³⁶ See Theo van Boven's preface to *Out of the Ashes – Reparation for Victims of Gross and Systematic Human [R]ights Violations*, Intersentia (2005), p. vii.

³⁷ O. Amezcua-Noriega, *op. cit.*, para. 2: "The core principles on reparations under international law are mainly customary norms that apply exclusively to relations between States. However, some of those principles could apply in relation to breaches of international law obligations owed not only by States but also by individuals. Furthermore, as a special branch of international law, international human rights law has also reinterpreted some of those principles and has even created its own ones to respond to the nature of the violations it deals with."

³⁸ ICC-01/04-01/06-3177-Conf., paras. 230-235.

³⁹ The International Criminal Court cites the United Nations Compensation Commission after the Gulf War and the case law of the Inter-American Court, in *Katanga*, paras. 227-232, and *Al Mahdi*, footnote 134.

⁴⁰ E. Kristjansdottir, "International Mass Claims Processes and the ICC Trust Fund", *Reparations for victims of genocide, war crimes and crimes against humanity*, Martinus Nijhoff Publishers (2009), pp. 175-178.

⁴¹ E. Kristjansdottir, *op. cit.*, pp. 167-168.

50. With a view to awarding individual reparations – or a combination of individual and collective reparations – the harm caused to each victim may be assessed either on a fixed-sum *ex aequo et bono* basis according to the type of harm suffered, or on the basis of an in-depth examination of the situation faced by each victim, usually carried out by experts. In mass claims the former option tends to be chosen because the latter is difficult and costly, without necessarily being “fairer”. Moreover, in mass claims the outcome of the compensation can never really be that all the harm is entirely remedied (*restitutio in integrum*). Primarily, it will serve as acknowledgement of the harm caused to the victims and provide them with some kind of compensation for their suffering.

51. In *[A]l Mahdi*, the Chamber recalled that:

The Appeals Chamber in *Lubanga* expressly took no position on ‘whether a Trial Chamber would be required to rule on each individual reparations request received if it decides to award reparations on an individual basis [...] or to award reparations on both an individual and collective basis’. **The Chamber considers that it is not required** to make such an assessment when awarding individual reparations, making administrative screening through the TFV an approach that is compatible with the statutory framework.⁴²

52. For the purposes of collective reparations, there is no point in assessing the individual harm caused to each victim, given that, to calculate the total value of the harm, it is enough to estimate the value for an average victim (in a given category) and multiply that figure by the estimated number of victims. An individual assessment also deludes victims with the false impression that they will receive individual pecuniary reparation only to dash their hopes and possibly cause divisions among them.

53. In the instant case, the Appeals Chamber, the Trust Fund and this Chamber have already ruled out paying victims individual compensation and given preference to collective reparations. In the absence of individual reparations, the monetary value of the harm suffered by the victim[s] is not the sum of a series of

⁴² *Al Mahdi*, para. 142.

individual payments of compensation, but the cost of a collective reparations programme that is supposed to take into account the losses and suffering of the victims and offer them a benefit which may be perceived as fair and reasonable compensation for the harm suffered.

54. Although individual victims will benefit from programmes to be implemented by the Trust Fund, their benefit will be related not with the extent of the harm they suffered after their enlistment, but with their current needs and the ability of the programmes devised to that end to meet them. That said, following recent discussions with their clients, the Legal Representatives are proposing that the collective approach to reparations be tempered with regard to a small group of indirect victims, i.e. the close relatives of children who died as a result of their enlistment. The loss of a child, brother or sister has caused significant suffering – albeit of a different kind – and they will not qualify for the programmes devised specifically for former child soldiers. Neither their emotional suffering nor the loss of potential food aid can be offset by any of the vocational training, psychological assistance or employment counselling programmes aimed at former child soldiers. Yet these victims are also entitled to have the harm they suffered both recognized and compensated for.

55. The arguments against awarding monetary compensation to former child soldiers (possible negative reactions from other victims, misunderstanding in society of this specific form of victimhood, likely misuse of funds linked to their young age or their psychological state as a result of trauma) do not apply in cases of compensating parents or other close relatives for the loss of a child.

56. Lastly, excluding this specific category of victims from any individual reparation would be perceived as discrimination against parents who lost a child as a result of the crimes committed by Mr Katanga. The Legal Representatives therefore suggest that a lump sum be earmarked for financial assistance to help the parents of children who were killed or disappeared.

A measure of this kind should not affect the collective nature of the reparations programme.

57. In response to the Chamber's question about the most appropriate method for calculating the amount required for reparations, the Legal Representatives are therefore of the opinion that an overall estimate of the harm should be made.

(3) Assessment of the specific harm of child recruitment

58. Examples of case law – national or international – on the compensation of harm resulting from the recruitment of child soldiers are few and far between. One important precedent is the decision issued by the Colombian Supreme Court on 16 December 2011.⁴³ In that case, children who had been recruited by a paramilitary militia were awarded collective reparations (training programmes, etc.) and individual compensation: the equivalent of the minimum salary for the period of enlistment as well as reparation for the emotional harm suffered, amounting to USD 6,750 per victim on average.

59. Other situations that concern something similar to this type of harm are those involving forced labour or slavery and deprivation of liberty in concentration camps, covered by a number of German programmes (notably the Holocaust Victim Compensation Fund and the German Forced Labour Co[m]pensation Program[me]) and, specifically with regard to the treatment of minors in violation of children's rights, the Common Experience Payment programme resulting from the Indian Residential Schools Settlement Agreement in Canada.⁴⁴ As part of this programme – totalling 1.9 billion Canadian dollars – individual compensation averaging 111,758 dollars per victim was paid to persons belonging to ethnic minorities who, in their childhood, had been forced to live in

⁴³ Supreme Tribunal of Bogotá, *Case of Fredy Rendón Herrera*, No. 2007 82701, 16 December 2011. Cited in *International Review of the Red Cross*, Vol. 95, No. 885 (2012), Biannual update on national legislation and case law July–December 2011, p. 430. See also International Center for Transitional Justice, *Colombia's Landmark Ruling Orders Reparation for Former Child Soldiers*.

<https://www.ictj.org/news/colombia-first-ruling-requiring-reparations-recruitment-minors>

⁴⁴ <https://www.aadnc-aandc.gc.ca/eng/1100100015594/1100100015595>

boarding houses with the aim of integrating them into the dominant culture. They could also request a “personal loan” of 3,000 dollars to enrol in an educational programme.

60. The recruitment of child soldiers caused those concerned material harm consisting in the loss of schooling. Those who succeeded in resuming formal education after being demobilized faced delays in obtaining their certificates and lost the equivalent of one or more years’ income. Some of those who could not resume formal education – or who had to drop out of school as a result of the trauma they suffered – lost the chance of completing their education or obtaining a certificate. Others were hampered in their search for employment by the effects of physical or psychological wounds or the stigma attached to their past in the militia.

61. It would be difficult to carry out a case-by-case evaluation of these losses of income for three reasons: to some extent it is hypothetical, in the absence of individual reparations it is unnecessary and, thirdly, it is likely to split the victims. The financial incidence of this type of losses is limited. Taking into account the average income in the region and the social category to which most of the victims belong, the material harm resulting from the loss of one school year may be estimated at a fixed amount of EUR 500 per direct victim. As for the initiatives which are supposed to partially remedy this harm (scholarships, vocational training, support to start a business, etc.), only the Trust Fund could estimate the cost of that part of their programme. The Legal Representatives therefore suggest that this type of harm be included under the emotional head of harm.

62. Emotional harm is also difficult to individuate, as that would require distinguishing between victims according to the time they spent in the militia, any ill-treatment or sexual abuse they suffered in the camps, any battle wounds inflicted on them and any psychological sequelae they may present. The medical

and psychological support programmes of the Trust Fund could lessen that harm but not remedy the suffering endured. Consequently, if the amount for which Mr Lubanga will be liable is to truly reflect the harm he caused, the assessment should be based on (a) the cost of those Trust Fund programmes which will limit the future impact of what Mr Lubanga did and (b) what could constitute reasonable compensation for the suffering already endured by the direct and indirect victims alike.

63. In *Katanga*, the Chamber estimated at EUR 2,000 the emotional harm resulting from being present in Bogoro during the attack on the village with no consequence other than having feared for one's life and physical safety, and having witnessed a horrific scene. All things considered, the victims in the instant case witnessed this kind of event on several occasions, and must have feared for their life and physical integrity practically each day, while suffering the specific harm caused by separation from their family, deprivation and ill-treatment in the camps, not to mention sexual and other forms of abuse. It would therefore be reasonable and proportionate to estimate this harm (material and emotional combined) at a minimum of EUR 10,000 per direct victim.

64. With regard to the indirect victims, the Legal Representatives suggest that individual financial assistance be awarded to the ascendants of deceased children, either as a lump sum or as a form of annuity or pension, as was the case in other programmes (e.g. the Canadian programme). The precise form of this assistance could be decided by the Trust Fund. Concerning the amount for this specific reparation, the Chamber could rely on what it considered reasonable compensation for this type of harm in *Katanga*, i.e. EUR 8,000 per parent of a deceased direct victim.

65. The Legal Representatives are not proposing that individual financial assistance of this kind be awarded to the other indirect victims. This does not mean that, if the reparations are to be individuated, the harm they suffered

should not be estimated at amounts comparable to those awarded in *Katanga*, i.e. EUR 8,000 for siblings and EUR 4,000 for the loss of a deceased distant relative. EUR 1,000 could be fixed as remedy for harm suffered by close relatives of a direct victim who managed to return to the family home and EUR 500 for distant relatives.

(4) Assessment of harm suffered by communities

66. By its Order of 21 October 2016, the Chamber approved a symbolic reparations programme. Its purpose is not to remedy the harm suffered by individual victims – who were opposed to the programme and sought leave to appeal against the Order – but to remedy collective harm caused by the crimes, especially in certain local communities.

67. Since collective harm does exist, the cost of its reparation must be taken into account in determining the amount for which the convicted person is liable. However, this should be distinguished from the amount that will be awarded to remedy the harm suffered by the victims.

C. TOTAL NUMBER OF VICTIMS

68. Neither the Legal Representatives nor their clients know the total number of children under the age of 15 years who were recruited into the UPC militia. In view of their age at the time and the time that has elapsed, the victims could not even give a reliable estimate of the number of children of that age group in the camps they frequented.

69. Although the Defence no longer contests the presence of children under the age of 15 years among the UPC troops, it has never given an estimate of their number. Moreover, it has contested the victim status of all of those considered as such by the Trust Fund, the Legal Representatives and the OPCV.

70. The Trust Fund for Victims has been working for many years with victims in the region under its assistance mandate, and has analysed the reports and documents referred to in the said decision. In the opinion of the Trust Fund the following figures are pertinent:

- Mr Lubanga estimated the number of people in his forces at 15,000;
- observers from international institutions and NGOs active on the ground have estimated that up to 40% of those troops were children;
- almost 500 people have been identified to date as potentially eligible direct victims; and
- in its report of 3 November 2015, the Trust Fund estimated the total number of direct and indirect victims at 3,000.⁴⁵

71. With regard to the figures cited by the Trust Fund itself – its estimate of 3,000 direct and indirect victims – it has probably underestimated the number of indirect victims, bearing in mind in particular the notion as defined in the *Katanga* Decision, which implies that indirect victims should include not only parents one of whose children died but also a host of other family members.

72. Considering that an average nuclear family in Ituri comprises two parents and seven children, and that a child will have far more uncles, aunts and cousins than the number of members of the nuclear family, each child recruitment must have created eight indirect victims within the close family and as many as 30 in the more distant family circle.

73. It can be estimated, therefore, that the enlistment of those direct victims already identified – more than 400 in number – caused emotional harm to 3,200 members of their close family and a huge number of distant relatives, even if not all of the latter did suffer any harm. This does not take into account the harm caused by the death of an unknown number – 100, possibly even hundreds – of

⁴⁵ ICC-01/04-01/06-3177-Conf, para. 253.

child soldiers in the hostilities. In total, the number of direct and indirect victims could be as high as 20,000 to 25,000.

D. OVERALL AMOUNT OF REPARATION

74. An attempt to calculate the monetary value of individual reparations for the aforementioned harm may produce the following result:

- 1,000 direct victims still living:	EUR 10,000,000
- 8,000 close relatives of child recruits:	EUR 8,000,000
- 10,000 distant relatives:	EUR 5,000,000
- 800 close relatives of deceased victims:	EUR 6,400,000
- 3,000 distant relatives of deceased victims:	EUR 12,000,000
- harm done to communities	EUR 300,000
Total:	EUR 41,700,000

75. However, it would not be reasonable to hold the convicted person liable for all the harm, when, in accordance with the decisions of the Court and the Trust Fund, this harm will not be remedied in its entirety, given that reparation will be limited to a service-based programme – from which only the former child soldiers can benefit – and to a symbolic reparations programme.

76. Consequently, and following consultations with the other representatives of the potentially eligible victims, the Legal Representatives are in agreement that the amount to be earmarked for reparation can be evaluated at EUR 6,000,000. This amount includes EUR 300,000 for symbolic reparations; the remaining EUR 5,700,000 should be for a significant collective reparations programme that comprises a set of services to be offered to direct victims (training programmes, (para-)medical and psychological assistance, coaching, help with job creation, microcredit programmes and other support for starting up self-employment, etc.) and a financial assistance programme for those ascendants of children killed in the fighting who are in need.

E. MR LUBANGA'S LIABILITY

77. The judgment issued pursuant to article 74 found that:

1271. Viewed in its entirety, the evidence demonstrates that the accused and his alleged co-perpetrators, including particularly Floribert Kisembo, Chief Kahwa and Bosco Ntaganda, worked together and each of them made an essential contribution to the common plan that resulted in the enlistment, conscription and use of children under the age of 15 to participate actively in hostilities.

78. When a crime has been committed by several people acting together, the Court may consider that they are jointly and severally liable and convict them *in solidum* for the entire harm caused (a solution usually chosen in countries of the Romano-Germanic tradition), or separate out the perpetrators and order each of them to compensate for just one fraction of the harm, in proportion to the role each of them played.

79. In international law, reparation *in solidum* (liability for all harm) seems to be the rule where there are several causes or perpetrators of the harm.⁴⁶ Neither the Rome Statute nor the Rules of Procedure and Evidence state, however, how a convicted person should be made liable for reparations in the event of a crime committed by several perpetrators.

80. Neither the Rome Statute nor the Rules of Procedure and Evidence specify how reparations should be distributed among several people who are liable, and early Court rulings are of no help in that, bearing in mind his personal involvement in what occurred, Mr Katanga was found liable for only a fraction of the harm, whereas in *Al Mahdi* the convicted person was found liable for all the harm.

81. In the present case, the Legal Representatives are of the opinion that it is more reasonable to find [the convicted person] liable for the full amount of the reparations. After all, at least one of the persons who, according to the Court,

⁴⁶ O. Amezcua-Noriega, *op. cit.*, para. 8, citing, in particular, the case of the *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*.
https://www1.essex.ac.uk/tjn/documents/paper_1_general_principles_large.pdf

made a crucial contribution to the commission of the crimes – namely Mr Bosco Ntaganda – is also at trial before the Court but is yet to be convicted. A decision to assess the relative contribution to be made by Mr Lubanga in relation to the other co-accused could therefore infringe on their rights. In addition, Mr Lubanga exercised hierarchical authority over the other persons who are liable, making his role specific and decisive. Finding him liable will not prevent the Court from finding anyone else jointly and severally liable for all or part of the harm.

FOR THESE REASONS,

MAY IT PLEASE THE TRIAL CHAMBER:

To take note of the submissions of the Legal Representatives

For the V01 group of victims

[signed]

Luc Walley and Franck Mulenda, Legal Representatives

Dated this 8 September 2017

At Brussels and Kinshasa