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Date: **9 May 2018**

THE APPEALS CHAMBER

Before: **Judge Piotr Hofmański, Presiding Judge**
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO

Confidential

Corrigendum to the Consolidated Response of the Legal Representatives of the V02 Group of Victims to the Briefs of the Defence for Mr Thomas Lubanga Dyilo and the Legal Representatives of the V01 Group of Victims against the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable" Handed Down on 15 December 2017 by Trial Chamber II – ICC-01/04-01/06-3404-Conf

Source: **V02 Team of Legal Representatives of Victims**

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Corrigendum to the Consolidated Response of the Legal Representatives of the V02 Group of Victims to the Briefs of the Defence for Mr Thomas Lubanga Dyilo and the Legal Representatives of the V01 Group of Victims against the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable" Handed Down on 15 December 2017 by Trial Chamber II – ICC/01/04-01/06-3404-Conf-tENG

I. PROCEDURAL HISTORY

1. On 15 December 2017, Trial Chamber II ("Chamber") handed down the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable" ("Decision"),[1] notified to all parties and participants, with two public annexes[2] and one confidential redacted annex.[3]

2. On 20 December 2017, the Chamber issued a corrected decision further to the request of the Defence for Thomas Lubanga Dyilo of 19 December 2017 to rectify the material error consisting in that the Decision handed down stated, incorrectly, that Mr Lubanga had been sentenced to 15 instead of 14 years' imprisonment.[4]

3. On 16 January 2018, the Defence for Thomas Lubanga Dyilo ("Defence") filed its notice of appeal against said Decision, in that it:

   - found that 425 of the 473 potentially eligible victims in the sample have shown on a balance of probabilities that they are direct or indirect victims of the crimes of which Mr Lubanga was convicted;
   - decided, accordingly, to award the 425 victims collective reparations approved by the Chamber in the case;

[1] ICC-01/04-01/06-3379-Conf-tENG; ICC-01/04-01/06-3379-Red.
[2] ICC-01/04-01/06-3379-AnxI and ICC-01/04-01/06-3379-AnxIII.
[3] ICC-01/04-01/06-3379-Conf-AnxII-Red.
[4] ICC-01/04-01/06-3382.

- found that those 425 victims are only a sample of the potentially eligible victims and that hundreds and possibly thousands more victims suffered harm as a consequence of the crimes of which Mr Lubanga was convicted;
- set the size of the reparations award for which Mr Lubanga is liable at a total of USD 10,000,000, which consists of his liability in respect of the 425 victims in the sample, amounting to USD 3,400,000, and his liability in respect of other victims who may be identified, amounting to USD 6,600,000; and
- directed the Trust Fund to file, by 15 January 2018, submissions on the possibility of continuing to seek and identify victims with the assistance of the OPCV and the Legal Representatives of the V01 and V02 Victims.

4. On 15 March 2018, the Legal Representatives of the V02 Group of Victims ("V02 LRVs") received notification of the Defence's document in support of appeal, entitled "Appeal Brief of the Defence for Mr Thomas Lubanga Dyilo against the '*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*' handed down by Trial Chamber II on 15 December 2017 and Amended by the Decisions of 20 and 21 December 2017".[5]

5. On 16 March 2018, the Chamber issued an order for the Trust Fund for Victims to file the documents that the Chamber had requested of it on the process for selecting further victims, the status of discussions with the relevant stakeholders about seeking and identifying further victims, the possibility of earmarking additional funds for reparations, and the status of the implementation of the reparations.[6]

6. On 19 March 2018, the Legal Representatives of the V02 Group of Victims also received notification of the document in support of the appeal of the Legal Representatives of V01 Victims ("V01 LRVs"), entitled "*Mémoire dans l'appel contre*

[5] ICC-01/04-01/06-3394-Conf-tENG.
[6] ICC-01/04-01/06-3395-tENG.

la 'Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu' du 15 décembre 2017 de la Chambre de première Instance II".[7]

7. Pursuant to regulation 59 of the Regulations of the Court, the V02 LRVs make the following submissions in response to the briefs of the Defence and the V01 LRVs.

II. ADMISSIBILITY OF THE RESPONSE TO THE BRIEFS

8. The V02 LRVs' response to the briefs is filed pursuant to the provisions of regulation 59 of the Regulations of the Court.

9. The response shall therefore be declared admissible.

III. RESPONSE TO THE DEFENCE BRIEF

A. FIRST GROUND OF APPEAL: violation of the provisions of article 75 of the Statute and rule 95 of the Rules of Procedure and Evidence

10. The Defence faults the Chamber for allowing itself to determine "on its own motion" the harm supposedly suffered by unidentified persons who had not put any application before it.[8]

11. In particular, the Defence goes on to say that, after requiring the individual identification of the victims who qualify for reparations, the Chamber, in its assessment of "the scope and extent of any damage, loss and injury to victims", gave consideration not only to the victims who had applied to the Court for reparations but also to "[TRANSLATION] hundreds and possibly thousands more victims" who were unidentified and had not made any application to the Chamber.[9]

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[7] ICC-01/04-01/06-3396-Conf.
[8] "Appeal Brief of the Defence for Mr Thomas Lubanga Dyilo against the '*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*' handed down by Trial Chamber II on 15 December 2017 and Amended by the Decisions of 20 and 21 December 2017", 15 March 2018, ICC-01/04-01/06-3394-Conf-tENG, para. 26.
[9] Defence Brief, para. 25.

12. The Defence concludes that in so ruling, without any justification of "exceptional circumstances" or the notice required by rule 95 of the Rules of Procedure and Evidence, the Chamber made an error of law by exceeding the parameters of the matter *sub judice*, and therefore the reasons advanced by the Chamber in support of its Decision are without merit.[10]

13. In the view of the V02 LRVs, the Chamber did not determine on its own motion, that is to say, *proprio motu*, the harm suffered by the "other potentially eligible victims" – whom the Defence wrongly describes as "unidentified persons who had not put any application before it".[11]

14. As regards the other potentially eligible victims, the Chamber recalled in its Decision under appeal that the OPCV and the Legal Representatives of V02 Victims had stated, in their respective submissions, that they were in contact with tens and possibly hundreds of such victims.[12]

15. Accordingly, the Chamber recalled that it had made clear in its Decision of 13 July 2017 that persons who had not been in a position to submit a dossier by 31 March 2017 would, at the implementation stage of reparations, be screened by the Trust Fund for eligibility for reparations. In that connection, the Chamber noted the initial information on the Trust Fund's planned victim screening process and the Trust Fund's request for proposals on the screening process from organizations and associations applying for implementing partner status.[13]

16. Lastly, the Chamber recalled its finding that, in addition to the 425 persons who had established that they are victims for the purposes of reparations, hundreds, and possibly thousands, more victims had been affected by the crimes of which Mr Lubanga was convicted.[14]

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[10] Defence Brief, paras. 27 and 28.
[11] Defence Brief, para. 26.
[12] "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", 15 December 2017, ICC-01/04-01/06-3379-Conf-tENG, para. 295.
[13] Decision, para. 293.
[14] Decision, para. 292.

17. The foregoing leaves no shadow of a doubt that the Chamber reached that finding further to the respective requests, that is to say, submissions, of the OPCV[15] and the Legal Representatives of V02 Victims.[16]

18. The Chamber's reasoning in this passage suffices to make that plain:

> In any event, the aforementioned submissions and the explanations in the related documents indicate that the number of victims who suffered harm as a consequence of the crimes of which Mr Lubanga was convicted far exceeds the 425 persons who have established that they are victims for the purposes of reparations and that there are hundreds and possibly thousands more victims.[17]

19. It is also for that reason that the Chamber, in its Decision – considering the Trust Fund's lateness in selecting implementing partners for the service-based collective reparations, and so as to build on the efforts of the OPCV and Legal Representatives of V02 Victims, especially the contact they have made with potentially eligible victims – invited the Trust Fund to study the possibility of continuing to seek and identify potentially eligible victims with their assistance, before the implementing partners are selected and the Chamber approves the second phase of the implementation of the service-based collective reparations. The Trust Fund was directed to keep the Chamber informed of any arrangements it makes in that regard.[18]

20. In finding, on the basis of the submissions of the OPCV and the V02 LRVs, that there were hundreds and possibly thousands more victims, the Chamber did not exceed the parameters of the matter *sub judice* and so did not make an error of law.

21. Therefore, the reasons advanced by the Chamber in support of its Decision remain well-founded – contrary to the Defence's position, which is addressed below.

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[15] OPCV Submissions of 8 September 2017, ICC-01/04-01/06-3360-tENG, para. 42.
[16] Submissions of Legal Representatives of V02 Victims of 30 March 2017, ICC-01/04-01/06-3284-Conf-tENG, paras. 18-19.
[17] Decision, para. 212.
[18] Decision, para. 296.

22. **First**, the Defence takes issue with the Chamber for maintaining that, although continued individual identification of victims was "desirable", the time it required would violate "[TRANSLATION] Mr Lubanga's right to notice within a reasonable time of his obligations arising from the reparations".[19]

23. The Defence submits that the reason advanced by the Chamber is erroneous because the clear unreasonableness of any additional extension of time for the identification of other potential victims is no justification for compounding Mr Lubanga's situation as to his reparations obligations by making him liable for "hundreds and possibly thousands more victims" who are unidentified. This, in the Defence's view, is because the Chamber should have determined that, over the course of 11 years of proceedings, the potential victims had had adequate time and facilities to make themselves known, which should have prompted it to consider that, in the circumstances, it should stop at the victims duly identified in the proceedings.[20]

24. In accordance with rule 101 of the Rules of Procedure and Evidence, Chambers may set time limits for the conduct of proceedings. In so doing, they must have regard to "the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims".

25. That provision also applies to reparations proceedings in that the rule is found in Section IV, "Miscellaneous provisions", of Chapter 4, "Provisions relating to various stages of the proceedings", which includes the reparations stage.

26. In setting a new time limit for the identification of other potential victims, the Chamber did have regard to "the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims".

27. To that end, the Chamber stated:

[19] Defence Brief, para. 29.
[20] Defence Brief, paras. 30-32.

> [A]lthough the individual identification of a greater number of victims to set the size of the reparations award would have been desirable, the necessary consultations would have unduly prolonged the proceedings, prejudicing not only Mr Lubanga's right to notice within a reasonable time of his obligations arising from the reparations, but also the right of the victims to receive prompt reparations. In that connection, the Chamber recalls that it must strike a fair balance between the rights and interests of the victims and those of the convicted person.[21]

28. It would not therefore have been right for the Chamber to have determined – as the Defence claims it should have – that over the course of 11 years of proceedings the potential victims had adequate time and facilities to make themselves known, and that therefore, in the circumstances, the Chamber should have considered that it should stop at the victims duly identified in the proceedings.

29. While it is true that a time frame of 11 years appears to be long enough for victims to make themselves known at the trial and/or appeals phase, the same cannot be said of victims applying at the reparations phase.

30. Regulation 86(3) of the Regulations of the Court provides that "[v]ictims applying for participation in the trial and/or appeal proceedings shall, to the extent possible, make their application to the Registrar before the start of the stage of the proceedings in which they want to participate". However, no like provision exists for victims applying for reparations, who cannot make themselves known until after the decision on the principles and procedure applicable to reparations.

31. Nor, in the circumstances, would it have been right for the Chamber to stop – as the Defence also contends that it should have – at the victims duly identified in the proceedings, when there are hundreds and possibly thousands more victims, including those whose applications the V02 LRVs intend to submit, in accordance with the impugned Decision.

32. In striking a fair balance between the rights and interests of the victims and those of the convicted person, while having regard to the expeditiousness of the proceedings, with the aim of identifying a greater number of victims so as to set

[21] Decision, para. 234.

the size of the award for reparations, the Chamber did not violate Mr Lubanga's right to canvass the size of the award against him, since he will have the opportunity to do so in due course when the Chamber invites him to make submissions on the dossiers of other potentially eligible victims, which the Trust Fund is to submit to the Chamber during the implementation of the reparations, pursuant to the Decision under appeal.[22]

33. In view of all of the foregoing, the reason advanced by the Chamber is not erroneous.

34. **Second**, the Defence notes that the Chamber is of the view that the time necessary to continue the individual identification of victims would prejudice "the right of the victims to receive prompt reparations".[23]

35. Here, the Defence deplores what it calls the undue length of the reparations proceedings and its adverse effects on the victims, and consequently invites the Chamber to implement reparations measures for the identified victims promptly and not to indefinitely increase the number of persons within the purview of the measures on the basis of dubious conjecture.[24]

36. Of note is that publicists have consistently taken the view that an award of individual reparations will not aid the recovery of the communities affected by the crimes committed. Collective reparations are considered to have the advantage of serving the whole community and constituting acknowledgement of the harm suffered by the entire community. Collective reparations measures are therefore regarded as beneficial to a very large number of people and as having the advantage of avoiding any adverse distinction on the grounds set forth in

[22] Decision, para. 296.
[23] Defence Brief, para. 34.
[24] Defence Brief, para. 35.

article 21 of the Rome Statute.[25] They are also seen as a way of avoiding further stigmatization of victims within their communities.[26]

37. In the case before it, moreover, the Chamber approved the collective reparations inasmuch as when collective reparations are awarded they should address the harm the victims suffered on an individual and collective basis.[27]

38. The identification of other victims who may qualify for reparations, so as to determine appropriate collective reparations measures, cannot, therefore, aggravate a purported delay, let alone impede the implementation of the collective reparations.

39. Furthermore, to avoid that and to implement reparations measures for the victims promptly, the Chamber invited the Trust Fund to study the possibility of continuing to seek and identify potentially eligible victims with their assistance before the selection of its implementing partners is made and the Chamber approves the second phase of the implementation of the service-based collective reparations.[28]

40. **Third**, the Defence considers to be invalid the reason given by the Chamber – "[TRANSLATION] the number of victims who might have come forward through a screening process would have remained well below the actual number of victims affected by the crimes of which Mr Lubanga was convicted" – which was prompted by several factors which, in the Chamber's view, may explain why some victims did not claim reparations.[29]

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[25] Rome Statute, article 21(3): "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."

[26] Edith-Farah Elassal, "*Le régime de réparation de la Cour pénale internationale : analyse du mécanisme en faveur des victimes*", Quebec Journal of International Law, 2011, pp. 288 and 289.

[27] Decision, paras. 192-194.

[28] Decision, para. 296.

[29] Defence Brief, para. 36.

41. Relying on article 75 of the Statute, the Defence contends that the numerous factors identified by the Chamber do not in any way constitute "exceptional circumstances" authorizing the Chamber to make a determination "on its own motion" on harm not put before the Chamber for its consideration by the victims of that harm.[30]

42. For the reasons set out above,[31] the V02 LRVs recall that the Chamber did not make a determination "on its own motion" on harm not put before the Chamber for its consideration by the victims of that harm. Quite the opposite: the Chamber had before it submissions from the OPCV, and the Legal Representatives of V02 Victims stating that they were in contact with tens, and possibly hundreds, of other potentially eligible victims.[32]

43. That, moreover, is why the numerous factors identified were not presented by the Chamber as "exceptional circumstances".[33]

44. Furthermore, the Defence allegation that some child soldiers might have deliberately chosen not to seek reparations from Mr Lubanga is incorrect, as the hundreds and possibly thousands of potentially eligible victims identified by the V02 LRVs also include child soldiers – some of whom even participated at trial – who unfortunately were not in a position to submit their applications for reparations.

45. The discussion of article 75 of the Statute and rule 95 of the Rules of Procedure and Evidence is, therefore, inconsequential.

46. **Fourth**, under this limb of the ground of appeal, the Defence regards the Chamber's statement that "[TRANSLATION] certain international courts [or] tribunals have, in the course of their work, also had recourse to approximations or minimum estimates in appraising victim numbers" and that "[TRANSLATION]

[30] Defence Brief, paras. 39 and 40.
[31] V02 LRV Response, paras. 13-20.
[32] "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", 15 December 2017, ICC-01/04-01/06-3379-Conf-tENG, para. 295.
[33] Decision, para. 236.

other Chambers of this Court have described the number of victims in indeterminate or approximate terms: 'many', 'numerous', 'hundreds'" as irrelevant insofar as the decisions referred to do not concern civil reparations proceedings, but convictions or sentences pronounced in criminal proceedings, which do not require the exact identification of victims.[34]

47. Article 21(2) of the Rome Statute provides that the Court may apply principles and rules of law as interpreted in its previous decisions.

48. In the matter before it, the Chamber did apply previous decisions: convictions and sentences.

49. Therefore, the Chamber was right to make that assertion, which is relevant.

50. The Defence's assertion, however, that "convictions or sentences pronounced in criminal proceedings […] do not require the exact identification of victims" is not relevant, since the Chamber's analysis refers to "victim numbers"[35] and not victim identification.

51. **Fifth**, in pursuing that ground of error of law, the Defence states that, by ruling "on its own motion" on the harm to unidentified victims without applying the procedure set forth in rule 95, the Chamber, far from protecting the rights of the parties in a balanced manner, deprived Mr Lubanga of the rights provided for under that rule, and specifically of the right to file submissions proving the lack of any "exceptional circumstances" that could justify the Court's ruling "on its own motion" on harm not put before it for consideration, whereas the Chamber justified its position by "recall[ing] […] that [it] must strike a fair balance between the rights and interests of the victims on the one hand and those of the convicted person on the other".[36]

[34] Defence Brief, para. 43.
[35] Decision, para. 237.
[36] Defence Brief, paras. 44-46.

52. Insofar as it is necessary, it must again be recalled – as it has been above[37] – that the Chamber did not determine "on its own motion" the harm to unidentified victims when it applied the procedure set forth in rule 95.

53. On the contrary, the Chamber made a determination on the respective submissions of the OPCV and the Legal Representatives of V02 Victims – who stated that they were in contact with tens, and possibly hundreds, of other potentially eligible victims [38] – and it did so in order to reach a greater number of victims who may qualify for collective reparations.

54. Accordingly, the Chamber did not make an error of law in ruling on "the scope and extent of any damage, loss and injury to, or in respect of, victims", by factoring in not only the victims who had applied to the Court for reparations, but also "hundreds and possibly thousands more victims" – identified or contacted by the OPCV and the V02 LRVs, from whom the Chamber had received submissions to that effect – without any justification of "exceptional circumstances" and without giving the notice required by rule 95 of the Rules of Procedure and Evidence.

55. The Chamber was therefore right in ordering Mr Lubanga to pay USD 6,600,000 in reparations for the harm suffered by potentially eligible victims who may be identified during the implementation of the reparations.[39]

56. Consequently, contrary to the relief sought by the Defence, the V02 LRVs ask the Appeals Chamber to hold that the Trial Chamber did not make a determination on its own motion, and moreover to affirm its Decision as regards the payment by Mr Lubanga of USD 6,600,000 in reparations for the harm done to potentially eligible victims.

[37] V02 LRV Response, paras. 13-20.
[38] *Ibid.*, footnote 30.
[39] See the operative part of the impugned Decision.

B. SECOND GROUND OF APPEAL: misapplication of the standard of proof

57. The Defence takes issue with the Chamber's application of the standard of proof – a balance of probabilities – because the methods relied on by the Chamber to determine the number of victims who qualify for reparations – be they those who submitted applications for reparations to the Chamber or the unidentified victims "[TRANSLATION] who may be identified during the implementation of reparations" – fall short of the requirements of that standard.[40]

1. Potential victims identified in the proceedings

a. Uncorroborated statements

58. The Defence contends that, in considering that the "uncorroborated statements" of the applicants for reparations as victims sufficed to satisfy the applicable standard of proof, provided that they were "coherent and credible", the Chamber made an error of law.[41]

59. It is, in principle, generally accepted that the burden of establishing that an injury is a consequence of the convicted person's act or conduct rests with the victim seeking reparation. Applications for reparations must contain a description of the injury, loss or harm, and, to the extent possible, must state the identity of the person or persons the victim believes to be responsible.[42]

60. Rule 94(1)(g) of the Regulations of the Court further states that the victim must also furnish – "**to the extent possible**" – any relevant supporting documentation, including names and addresses of witnesses.

61. The nature of the mass crimes under the Court's jurisdiction is such that full effect should be given to the expression "to the extent possible" by easing the burden on victims who are not in a position to provide supporting documentation to bolster their applications.

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[40] Defence Brief, para. 52.
[41] Defence Brief, para. 70.
[42] Rules of the Court, rule 94(1)(a) and (c).

62. In the Chamber's view, that rule makes allowance for the fact that the potentially eligible victims are not always in a position to furnish documentary evidence in support of all the harm alleged, in view of the circumstances in the DRC and the many years that have elapsed since the material events.[43]

63. At any rate, most of the 425 victims who are to receive reparations did present – in other words, corroborate – their statements with some supporting documentation, to which, however, the Chamber attached limited probative value.[44]

64. This was the case, in particular, of Victims a/30130/17, a/30208/17, a/30209/17, a/30216/17, a/30244/17, a/30248/17, a/30249/17 and a/30260/17, with whom the Defence finds fault for not having proved, in any way whatsoever, the facts that they alleged, whereas it acknowledges in the same breath that they submitted only a voter card or an IPM [*impôt personnel minimum* (minimum personal tax)] card.[45]

65. The Chamber has stated that the crimes of which Mr Lubanga was convicted entail that child-soldier status is the *sine qua non* which the victim, direct or indirect, has to prove to qualify for reparations.[46]

66. As proof of child-soldier status in the case *sub judice*, all of the potentially eligible victims used the same types of documents to establish their identities – namely personal tax cards (IPM cards), voter cards, and student or pupil identity cards – which the Chamber rightly considered, relying on a line of authority, to be sufficient for natural persons seeking victim standing at the trial or reparations phase.[47]

[43] Decision, para. 61.
[44] Decision, para. 62.
[45] Defence Brief, para. 64.
[46] Decision, para. 66.
[47] Decision, paras. 74 and 75.

67. Article 21(1)(b) states that the Court shall apply, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.

68. Yet, the Defence says that in international law the standard of proof based on the "coherent and credible" nature of statements is applied only to the assessment of eligibility for refugee status under the 28 July 1951 Geneva Convention relating to the status of refugees, and hence a particularly low standard of proof is required, whereas the assessment of the size of the reparations award for which Mr Lubanga is liable in the proceedings at hand demands a significantly more stringent standard of proof: a balance of probabilities.[48]

69. In view of the above-cited provisions of the Rome Statute and the Regulations of the Court, the Defence's argument − that the Chamber was barred from relying on the standard of proof foreseen by the aforementioned Geneva Convention on account of the different aims pursued by the two bodies, the ICC and the United Nations High Commission for Refugees – must be dismissed.

70. Therefore, in considering, on the basis of the provisions referred to above, that the statements of some applicants for reparations as victims, albeit uncorroborated by supporting documentation, were "coherent and credible", and that they satisfied the requisite standard of proof – a balance of probabilities – the Chamber did not make an error of law.

[48] Defence Brief, para. 54.

b. Deficiencies and lack of coherence

71. The Defence submits that the Chamber made a further error of law – or, at the very least, clearly misappreciated the facts against the applicable standard of proof – by considering that the deficiencies and lack of coherence did not mar the credibility of the applications before it and failing, as a result, to draw the necessary conclusions from the factual incoherence and evidentiary deficiencies it identified or should have identified.[49]

72. With regard to proof of the age that the direct victims were between 1 September 2002 and 13 August 2003, the Defence submits that the Chamber did not draw the necessary conclusions when it considered that

> [TRANSLATION] these discrepancies have no bearing on the determination of the age of a victim who may be eligible, insofar as the various dates of birth provided would, in any case, mean that the victim was under the age of 15 years at the material time.

Yet, in the Defence's view, since the age of the victim is a decisive factor for eligibility, the credibility of a statement is inevitably affected when the applicant gives different dates of birth on the application form for participation and on the application form for reparations, or submits identification stating different dates of birth.[50]

73. Although, in the case at bar, being under the age of 15 years is a decisive factor to a victim's eligibility for reparations, the fact of giving different dates of birth on the application form for participation and the application form for reparations, or submitting identification stating different dates of birth, cannot in any way affect the credibility of the application if all of the differences in dates, that is, all of the discrepancies, point to an age under 15 years at the material time.

74. In this connection, the Chamber has recalled that article 8(2)(e)(vii) of the Statute prescribes that the person must be under the age of 15 years at the time of enlistment. The Chamber has also recalled that the time frame of the charges spans 1 September 2002 to 13 August 2003. Therefore, for a direct victim to have

[49] Defence Brief, para. 71.
[50] Defence Brief, paras. 73 and 74.

been under the age of 15 years during the time frame of the charges, he or she must not have been born before 1 September 1987 in order to have been recruited by 1 September 2002. Accordingly, if the age of a direct victim is not established, or if the recruitment took place when the victim was 15 years of age or older, the dossier cannot be considered in relation to the award of reparations in the case. The Chamber further recalled that it suffices that it is established that the victim is within a certain age range, namely under the age of 15 years.[51]

75. Lastly, citing *Katanga*, the Chamber recalled that the mere fact that an application for reparations contains slight discrepancies does not, on the face of it, cast doubt on its credibility.[52]

76. In considering that the lack of coherence or deficiencies did not mar the credibility of the applications before it, the Chamber did therefore draw the necessary conclusions and did not therefore make any error of law, let alone clearly misappreciate the facts against the applicable standard of proof, a balance of probabilities.

77. With regard to the date of enlistment or conscription, the Defence submits that the Chamber failed to draw the necessary conclusions from a comparison of the applicants' statements and the evidence on record when it concluded "[TRANSLATION] that the fact that the military wing of the UPC was established by September 2002 does not preclude earlier recruitment in the prospect of establishing the FPLC and that it is therefore possible that children under the age of 15 years had been recruited before September 2002", whereas the UPC did not have a military wing until September 2002, when pre-existing armed groups active in Ituri joined the UPC, a political party, whose President was Mr Lubanga.[53]

[51] Decision, paras. 84 and 85.
[52] Decision, para. 86.
[53] Defence Brief, paras. 76-79.

78. Whereas, as the Defence states, the UPC did not have a military wing until it was joined in September 2002 by pre-existing armed groups active in Ituri, the statements of eligible victims attributing the recruitment or training of child soldiers under the age of 15 years to the UPC/FPLC are necessarily credible since it has been established beyond reasonable doubt that those children participated actively in hostilities on the side of the UPC/FPLC, even though that recruitment and training cannot be attributed to that political party or might have been the doing of pre-existing armed groups which were active in Ituri but which gave their allegiance to the UPC, whose President was Mr Lubanga.

79. In that connection, the Chamber therefore rightly noted that some of the potential victims had stated that they were enlisted by the UPC/FPLC before the time frame of the charges, i.e. before 1 September 2002. It considered, however, that such statements did not affect their credibility if they established in a coherent and credible manner that, when in the FPLC, they participated actively in hostilities during the time frame of the charges and that they were under the age of 15 years then.[54]

80. Accordingly, the Chamber did not clearly misappreciate the facts.

81. With regard to the certificates of demobilization, the Defence finds fault with the fact that the Chamber rejected its arguments concerning their probative value, when it commented that

> [TRANSLATION] the Judgment Handing Down Conviction addresses only the probative value of the logbooks, which record the names of demobilized children, and speaks of certificates of separation only to recapitulate the Defence stance, but does not make a determination on the probative value of such certificates.[55]

82. In the Defence's view, since the demobilization logbooks and the certificates of demobilization were issued at the same time, the unreliability of the former, as found in the Judgment Handing Down Conviction, entails the unreliability of the latter, and the certificates of demobilization could not, therefore, prove enlistment

[54] Decision, para. 76.
[55] Defence Brief, para. 82.

in the FPLC since they do not state the armed group to which a demobilized person belonged.[56]

83. Since the Judgment Handing Down Conviction did not make a determination on the probative value of the certificates of mobilization, it should not be automatically inferred, without any proof, that these certificates are equally as unreliable as the mobilization logbooks called into question by Trial Chamber I. On the contrary, although the demobilization certificates do not state the armed group to which the demobilized person belonged, they may however constitute proof of enlistment where the person's statements are found to be coherent and credible, in particular by showing, as some eligible victims have done in the case at bar, that he or she served as a result of recruitment, conscription or participation in hostilities.

84. On that matter, the Chamber considers that while the presentation of a certificate of separation is insufficient to establish that the potentially eligible victim served as a child soldier in the UPC/FPLC where the armed group is unspecified, such a certificate can nonetheless be taken into account to determine whether the potentially eligible victim belonged to the UPC/FPLC, provided that the victim's account is coherent and credible.[57]

85. The Chamber therefore did not misappreciate the facts in that respect either.

86. With regard to the date of 2 June 2004, by which the UPC no longer had an armed wing, the Defence lambastes the Chamber for determining that

> [TRANSLATION] even where the victims who may be eligible mistook the date in alleging that they had belonged to the UPC/FLPC after 2 June 2004, they qualify for reparations, provided that they establish, to the requisite standard of proof, that they were conscripted or enlisted or that the UPC/FLPC used them to participate actively in hostilities during the time frame of the charges, and that they were under the age of 15 years at the material time.[58]

[56] *Idem*, paras. 85-87.
[57] Decision, para. 97.
[58] Defence Brief, para. 89.

87. The Defence contends that, given that the UPC no longer had an armed wing as of 2 June 2004, the statements of some potential victims that they continued to fight on the side of the UPC/FPLC cast serious doubt on the credibility of their accounts.[59]

88. If some potential victims did make such statements, the question arises as to how these victims could have "continued to fight" on the side of the UPC/FLPC if they had not first been recruited or enlisted in an armed wing which existed before 2 June 2004. Such statements, which have no bearing on the standing of the potential victims who belonged to the UPC/FPLC, cannot cast serious doubt on the credibility of their accounts. Thus, it was not necessary for the Chamber, as the Defence wrongly recommends, to examine individually the dossiers concerned to ascertain who among them had stated only that they "belonged" (and not "continued to fight") on the side of the UPC/FPLC after 2 June 2004.[60]

89. Hence, by so ruling, the Chamber did not clearly misappreciate the facts.

90. With regard to the training camps enumerated, the Defence submits that the Chamber clearly misappreciated the facts by regarding "[TRANSLATION] the UPC/FLPC headquarters in Bunia and the military camps at Rwampara, Mandro and Mongbwalu as the sole training centres where child[ren] were trained", even though the potential victims had alleged that they were trained elsewhere than at training centres.[61]

91. However, the Chamber took into consideration only the allegations of potentially eligible direct victims that they were trained elsewhere than at training centres or that they were deployed in other camps, because their accounts were found to be coherent and credible as to the facts alleged.[62]

92. The Chamber therefore did not misappreciate the facts in that respect either.

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[59] Defence Brief, para. 91.
[60] Defence Brief, para. 90.
[61] Defence Brief, paras. 93-94.
[62] Decision, paras. 141-142.

93. With regard to the commanders enumerated, the Defence argues that the Chamber again misappreciated the facts in that, even though it noted "[TRANSLATION] that [n]or do certain names of commanders mentioned by victims who may be eligible and raised in the Defence submissions appear in the statements of the witnesses who testified at the trial", it was however of the view "[TRANSLATION] that it may nonetheless consider the names of these commanders where an account by a direct victim who may be eligible is coherent and credible as to the facts alleged."[63]

94. By taking the view that it may nonetheless consider the names of these commanders where an account by a potentially eligible direct victim is coherent and credible as to the facts alleged, even though their names are not mentioned in the statements of the witnesses who testified at the trial,[64] the Chamber drew the correct conclusions since this testimony cannot, at this stage of the proceedings, affect the *locus standi* of victims eligible for reparations.

95. The Chamber did not clearly misappreciate the facts in this respect either.

96. With regard to the presence of Chief Kahwa in the UPC/FPLC, the Defence considers that the Chamber saw that "[TRANSLATION] a UPC decree dated 2 December 2002, formally removing Chief Kahwa from his position as UPC defence minister, and leading to his departure from the UPC, was found by Trial Chamber I to be authentic". That notwithstanding, it nonetheless decided to overlook the illogicality in the statements of the applicants alleging that they had been Chief Kahwa's subordinates after 2 December 2002, on the ground that the potential victims "[TRANSLATION] might have mistaken the dates, not least given the time elapsed since the events relevant to the charges".[65]

97. In so deciding, whereas the statements of the potentially eligible victims allowed the Chamber to find to the requisite standard of proof that they were conscripted

[63] Defence Brief, paras. 95-96.
[64] Decision, para. 108.
[65] Defence Brief, paras. 97-98.

or enlisted or that the UPC/FPLC had used them to participate actively in hostilities, during the time frame of the charges and that they were under the age of 15 years at the material time, the Chamber did not, in any way, clearly misappreciate the facts, in particular because it took account of the fact that some potentially eligible victims might have mistaken the dates, not least given the time elapsed since the events relevant to the charges.[66]

98. It is also the view of the Defence that the Chamber again clearly misappreciated the facts in considering that, while "[TRANSLATION] a [potential v]ictim cannot attribute the same enlistment or conscription to both Mr Lubanga and Mr Katanga, who were in fact members of different militias", "[i]t cannot be ruled out, however, that a victim was enlisted or conscripted into, or belonged to both militias at different times," whereas there was nothing in the dossier of the potential victim to have prompted such conclusions.[67]

99. Whereas there was nothing in the dossier of the potential victim to have prompted such conclusions, the statements of that victim, found to be coherent and credible, sufficed to satisfy the Chamber that the victim belonged to two militias at different times.

100. Hence, in so ruling, the Chamber did not, in any event, clearly misappreciate the facts.

101. Lastly, the Defence argues that the Chamber made an error of law by mischaracterizing the facts on record, as found at trial, in that Prosecution Witness P-0055, who was found to be credible by Trial Chamber I, testified that Commander Kakwavu had defected from the UPC/FPLC several days before 6 March 2003 to create his own movement, as had Commander Kasangaki.[68]

102. The Chamber did not, as the Defence would have it believed, mischaracterize the facts on record in that it underlined that, in the Judgment Handing Down

[66] Decision, para. 115.
[67] Defence Brief, para. 100.
[68] Defence Brief, para. 102.

Conviction, Trial Chamber I did not rely on evidence it heard from one witness alleging facts similar to those raised by the Defence because it was not clear whether Mr Kakwavu's forces were under the control of Thomas Lubanga at the relevant time.[69]

103. Since P-0055's evidence did not state clearly whether Mr Kakwavu's forces were under the control of Mr Lubanga at the material time, the Chamber saw fit to afford consideration to the allegations by the potentially eligible direct victims that they were subordinates of Mr Kakwavu after 6 March 2003.[70]

104. The Chamber therefore did not make an error of law.

105. In the light of the foregoing, and in the absence of any such errors of law and/or instances of clear misappreciation of the facts, the Chamber therefore duly ruled with regard to the standard of proof, that is, the balance of probabilities, by according victim status for the purpose of reparations to 425 of the 473 of the applicants registered in the proceedings and by ordering Mr Lubanga to pay USD 3,400,000 in reparations for the harm suffered by the victims identified in the proceedings.

106. Accordingly, contrary to the relief sought by the Defence, the V02 LRVs request the Appeals Chamber to affirm the Decision in that it orders Mr Lubanga to pay USD 3,400,000 in reparations for the harm suffered by the victims identified in the proceedings.

2. Unidentified potential victims

107. The Defence is of the view that the Chamber's findings as to the existence of "[TRANSLATION] hundreds and possibly thousands more victims" who are unidentified rely essentially on reports by various organizations that provide no specific assessment of the number of children under the age of 15 years in the

[69] Decision, para. 111.
[70] Decision, para. 112.

UPC/FLPC during the time frame of the charges and also rely on the demobilization lists provided by the Democratic Republic of the Congo.[71]

108. The Defence further contends that the relevance and reliability of these documents fall well short of the requisite standard of proof.[72]

a) **The reports of NGOs and international organizations**

109. In the opinion of the Defence, the Chamber made an error of law by declining to take into account and respond to the Defence arguments and by eschewing any analysis of the reliability of these reports even though it frequently relies on their figures to make its estimates[73] of the number of children under the age of 15 years in the UPC/FPLC.

110. While, as the Defence points out, it has been determined that a report is considered relevant and reliable where it provides sufficient guarantees of impartiality and includes "sufficient information on [its] sources and the methodology used to compile and analyse the evidence",[74] presumptions are accepted as a mode of proof in criminal proceedings, not civil proceedings, to establish the civil liability of the person who must acquit an obligation or who is responsible for harm caused and who, in this instance, is the convicted person.

111. In that connection, the Chamber underscored:

> The Additional Documents Entered on Record [including the NGO reports disputed by the Defence] are relevant and […] are by way of illustration. […] The documents in question supply a wealth of contextual information about the situation in Ituri and the use of child soldiers, in the DRC in general and by the UPC/FPLC in particular. […] [i]n this regard, […] the results the Chamber has presented, which are based on the entirety of the Additional Documents Entered on Record, appear fairly consistent with one another as regards the widespread use of child soldiers in Ituri. Accordingly, the[re] [is] no need to engage in a detailed analysis of the reliability of each Annex.[75]

[71] Defence Brief, paras. 106-107.
[72] Defence Brief, para. 108.
[73] Defence Brief, para. 116.
[74] Defence Brief, paras. 110-111.
[75] Decision, para. 216.

112. In making that point, the Chamber did not decline to give consideration – let alone decline to respond – to the arguments raised by the Defence, so much so that the Chamber consulted these additional documents for their illustrative value and, as such, it was less necessary to analyse them for their reliability.

113. The Chamber therefore did not make an error of law.

b) The disarmament, demobilization and rehabilitation/reinsertion/reintegration lists

114. The Defence argues that the Chamber also made an error of law – or, at the very least, clearly misappreciated the facts – by disregarding its submissions on the reliability of the demobilization lists provided by the Democratic Republic of the Congo and drawing conclusions contrary to those of Trial Chamber I, which considered that it could not rely on the content of the logbooks enumerating the children who had participated in the DDR programmes "because of the potential unreliability of the information when it was originally provided and the apparent lack of sufficient (or any) verification." [76]

115. In addition to what has been said above regarding the reliability of the additional documents, including the demobilization lists provided by the Democratic Republic of the Congo, the V02 LRVs note that the Chamber did, in fact, respond to the Defence submissions[77] and did consider Trial Chamber I's findings.[78]

116. Whereas Trial Chamber I arrived at this determination concerning the content of the logbooks enumerating the children who had participated in the DDR programmes, that same Chamber "ha[d] not reached conclusions to the criminal standard, as to the precise number, or proportion, of the recruits who were under

[76] Defence Brief, paras. 135-142.
[77] Decision, para. 216-222.
[78] Decision, para. 233.

15 years"[79] and had considered that there was "uncertainty as to the number of victims".[80]

117. That uncertainty surrounding the determination of the number of victims meant that the Chamber was therefore right to refer to the additional documents entered on record, which indicate, as do the other evidence and the submissions of the parties, that the sample alone does not represent the sum-total of the victims affected by the crimes committed by Mr Lubanga, and that there are in fact hundreds and possibly thousands more victims.[81] And it made reference to them upon judicious calculation of the mortality of the victims and the ethnic proportions within the Ituri population.[82]

118. By so proceeding in its assessment of the number of victims "who may be identified during the implementation of reparations", the Chamber did not misapply the requisite standard of proof and so no error of law of any general sort can be held against it.

119. Contrary to the relief sought by the Defence, therefore, the V02 LRVs request the Appeals Chamber to determine that the Chamber did not make any error of law and to affirm the Decision in that it orders Mr Lubanga to pay USD 6,600,000 in reparations for the harm suffered by "hundreds and possibly thousands more victims".

C. THIRD GROUND OF APPEAL: violation of the rules of a fair trial

120. The Defence further alleges that the Chamber made an error of law or, at the very least, clearly misappreciated the facts, by determining that "[TRANSLATION] the Defence had sufficient information to impugn the evidence brought against it in a process which duly afforded it notice and the opportunity to be heard, and, hence, a fair hearing", despite the extensive redactions to the applications for

[79] Determination of Sentence, ICC-01/04-01/06-2901, para. 50.
[80] Decision on Reparations, ICC-01/04-01/06-2904, para. 219.
[81] Decision, para. 231.
[82] Decision, paras. 223-229.

reparations, *viz.* the redaction from the dossiers of potentially eligible victims of all the information relating to their place of residence and other contact information which could reveal their whereabouts, and concerning the potential victims who objected to disclosure of their identity to the Defence, the redaction of their names and any information which could identify the persons whose statements were appended to the applicants' dossiers.[83]

121. Regulation 100(2) of the Regulations of the Registry provides that, where a victim wishing to participate in the proceedings or apply for reparations fears that his or her application is putting him or her at risk, or where the assessment undertaken under regulation 99, sub-regulations 1 and 2, concludes that such a risk exists, the Registry may advise the Chamber on appropriate protective measures and/or security arrangements in order to protect the safety and the physical and psychological well-being of the victim.

122. In that instance, further to the Registry's opinion on the security risk according to its report of 30 November 2016, the Chamber ordered the redactions which did allow the Defence to make submissions on the potential victims' applications for reparations.[84]

123. With regard to the particulars that applications for participation must contain,[85] these redactions, wrongly described by the Defence as "extensive redactions", are in fact minor ones and cannot, alone, violate the right of the Defence to a fair trial.

124. Aside the redactions to the applicants' whereabouts or place of residence, to the identity of the persons whose statements were appended to their dossiers and to

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[84] Decision, para. 56.

[85] Rule 94 of the Rules of Procedure and Evidence: "A victim's request for reparations under article 75 shall be made in writing and filed with the Registrar. It shall contain the following particulars: (a) The identity and address of the claimant; (b) A description of the injury, loss or harm; (c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm; (d) Where restitution of assets, property or other tangible items is sought, a description of them; (e) Claims for compensation; (f) Claims for rehabilitation and other forms of remedy; (g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses."

the names of potential victims who refused to disclose their identities to the Defence, the utmost information in the applications for reparations was disclosed to the Defence, including the description of the injury, loss or harm; the location and the date of the incident; the identity of the person(s) whom the victims hold responsible for the injury, loss or harm; the description of assets, property or other tangible items for which restitution or reparation is sought; claims for compensation; claims for rehabilitation and other forms of remedy; documentation in support of their victim standing,[86] all of which gave the Defence sufficient information to impugn the evidence brought against it.

125. It follows from the all of the foregoing that these redactions did not seriously affect the fairness of the trial; the Chamber therefore did not make an error of law, let alone clearly misappreciate the facts.

126. Accordingly, contrary to the relief sought by the Defence, the V02 LRVs request the Appeals Chamber to affirm the Decision in that it orders Mr Lubanga to pay USD 10,000,000.

D. FOURTH GROUND OF APPEAL: violation of the provisions of rules 97 and 98 of the Rules of Procedure and Evidence

127. The Defence is further of the view that the Chamber made a clear error of law by setting the size of the award for which Mr Lubanga is liable at that of the aggregate individual harm, rather than that of the actual cost of the collective reparations, because the Chamber explained in its Decision that it "[TRANSLATION] now assesses the average harm suffered by each victim" and concluded that "[TRANSLATION] [it] reckons *ex æquo et bono* the harm suffered by each victim, direct or indirect victims, at USD 8,000."[87]

128. It should be recalled, if it were needed, that collective reparations are considered to have the advantage of serving the entire community and constituting acknowledgement of the harm suffered by the whole community. Collective

[86] Decision, para. 44.
[87] Defence Brief, paras. 215-224.

reparations measures are therefore regarded as beneficial to a very large number of people and are also seen as a way of avoiding further stigmatization of victims within their communities.[88]

129. To achieve that end, the Chamber, contrary to what the Defence claims,[89] did not scrutinize the specific harm alleged by each potentially eligible victim to set the quantum of that harm; instead, it applied a presumption of average harm to each direct and indirect victim. That average harm encompasses material, physical and psychological components, which reflect the types of harm defined by the Appeals Chamber and the fact that each victim suffered them in different combination.[90]

130. Regarding the monetary value of the average harm suffered by each victim, the 2005 Basic Principles and Guidelines on the Right to Reparation state that compensation should be provided for economically assessable damage resulting from gross violations of international human rights law, as appropriate and proportional to the gravity of the violation and the circumstances of each case.[91]

131. The Chamber was therefore right in reckoning *ex æquo et bono* the harm suffered by each victim, direct or indirect, at USD 8,000.[92]

132. Hence, the Chamber did not make any clear error of law.

133. Accordingly, the V02 LRVs request the Appeals Chamber to affirm the Trial Chamber's Decision in that it orders Mr Lubanga to pay the sum-total of USD 10,000,000.

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[88] See, above, para. 36.
[89] Defence Brief, para. 214.
[90] Decision, para. 247.
[91] "The 2005 Basic Principles and Guidelines on the Right to Reparation", at principle 20, give examples of the damage which may attract compensation: physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
[92] Decision, para. 259.

E. FIFTH GROUND OF APPEAL: violation of the principles applicable to a convicted person's liability for reparations

134. The Defence continues to maintain that the Chamber made an error of law or, at the very least, clearly misappreciated the facts, in holding Mr Lubanga liable for the full award for reparations, without taking into account the plurality of the co-perpetrators, his degree of participation in the commission of the crimes, his efforts to promote peace, and the specific circumstances of the case.[93]

135. In the case at bar, the Chamber held Mr Lubanga liable for the full award for reparations because to its (the Chamber's) knowledge, no convictions have been returned against other persons for the crimes that occasioned the harm suffered by the victims in the case *sub judice*. In any event, the Chamber's decision was confined to determining Mr Lubanga's individual liability for reparations and was taken after careful consideration of Mr Lubanga's participation in the commission of the crimes of which he was convicted vis-à-vis the specific circumstances of the case, as laid down by the Appeals Chamber.[94]

136. The Chamber was duty-bound to examine the factual and legal elements of that participation, as determined by Trial Chamber I in the Judgment Handing Down Conviction and confirmed by the Appeals Chamber in its Appeal Judgment Affirming Conviction, so as to set the size of the reparations award for which he was liable.[95]

137. In that connection, any efforts Mr Lubanga may have made to promote peace in Ituri seem less significant – to be specific, they seem less influential – to merit consideration by the Chamber.

138. By adhering to the principle applicable to the determination of the scope of liability for reparations, as enunciated by the Appeals Chamber, so as to hold

[93] Defence Brief, paras. 226-228.
[94] Decision, paras. 268-277.
[95] *Ibid*.

Mr Lubanga solely liable for full award for reparations, the Chamber did not, therefore, make an error of law let alone clearly misappreciate the facts.

139. Accordingly, the V02 LRVs request the Appeals Chamber to reject the Defence motion and to uphold the Trial Chamber's Decision in that it orders Mr Lubanga to pay USD 10,000,000.

F. SIXTH GROUND OF APPEAL: violation of the *non ultra petita* rule

140. The Defence complains that the Chamber made an error of law by ruling *ultra petita* in setting the total reparations award against Mr Lubanga at USD 10,000,000, a figure far in excess of the USD 6,000,000 unanimously requested by the Legal Representative of the Victims in their submissions, save where it had been justified by "exceptional circumstances" authorizing it to make a determination "on its own motion" as to the scope and extent of the harm suffered, subject to the conditions and according to the procedure set forth in article 75 of the Statute and rule 95 of the Rules of Procedure and Evidence.[96]

141. Although the Defence argues that the Rome Statute and the Rules of Procedure and Evidence do not expressly refer to the non *ultra petita* rule, the same is true of the principle of *ex æquo et bono* adjudication, in this instance, according to article 21(1)(c) of the Statute, the Court shall apply general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

142. Article 75 of the Statute and rule 97 of the Rules of Procedure and Evidence nonetheless task the Court with adopting principles on reparations awarded to victims and the manner of their assessment.

[96] Defence Brief, paras. 273-277.

143. Specifically, article 75(1) provides that the Court shall establish principles relating to reparations to, or in respect of, victims – including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or in exceptional circumstances on its own motion, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

144. It follows that the Court may, on the ground of exceptional circumstances, rule on its own motion only where it seeks to determine the scope and extent of the damage, loss and injury to, or in respect of, victims and not for the purpose of assessing reparations.

145. With regard to the assessment of reparations, rule 97(1) of the Rules of Procedure and Evidence provides that the Court, taking into account the scope and extent of any damage, loss or injury, may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.

146. In other words, the Court may, once it has determined the scope and extent of any damage, loss and injury, turn to the assessment of the size of the reparations award.

147. Taken together, the two provisions entail that the Court has the discretion to assess reparations, that is to say, to determine the size of the resulting award, once it has invited and taken account of representations on the extent of any damage, loss and injury to, or in respect of, victims, from or on behalf of the convicted person, victims, other interested persons or interested States.[97]

148. This discretion is brought all the more to the fore by the noteworthy fact that the size of the reparations award is not expressly stated as one of the particulars to be contained in the applications for reparations which, pursuant to article 75, victims

[97] Article 75(3) of the Rome Statute.

submit in writing and file with the Registrar,[98] and it does not, as such, have to be taken into consideration by the Chamber.

149. Moreover, it is a general principle of law that, where the existence of harm is established but the applicant does not provide certain basic information to enable the quantum of harm to be calculated, the harm must be reckoned *ex æquo et bono.*

150. In the case at bar, the Chamber thus determined:

> [Having found that 425 of the 473 victims in the sample qualify for reparations awarded in the case, and having assessed *ex æquo et bono* the value of the harm per capita, taking into account the above considerations and factors pertaining to Mr Lubanga's individual responsibility, the Chamber reckons *ex æquo et bono* Mr Lubanga's liability in respect of the 425 victims in the sample at USD 3,400,000];[99]
>
> [Recalling that hundreds and possibly thousands more victims suffered harm as a consequence of the crimes of which Mr Lubanga was convicted, and having regard to the above considerations and factors, the Chamber reckons *ex æquo et bono* Mr Lubanga's liability with respect to those other victims who may be identified during the implementation of reparations at USD 6,600,000];[100]
>
> [Accordingly, the Chamber sets the total reparations award for which Mr Lubanga is liable at USD 10,000,000].[101]

151. By setting, *ex æquo et bono*, the total reparations award for which Mr Lubanga is liable at USD 10,000,000, by virtue of the discretion vested in it by the aforementioned article 75 – whereas the V01 LRVs, the V02 LRVs and the OPCV had each requested USD 6,000,000 – the Chamber did not, therefore, rule *ultra petita*, and so did not make an error of law.

152. Accordingly, may it please the Appeals Chamber to affirm the Decision in that it orders Mr Lubanga to pay USD 10,000,000.

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[98] Rule 94 of the Rules of Procedure and Evidence, above, footnote 84.
[99] Decision, para. 279.
[100] Decision, para. 280.
[101] Decision, para. 281.

IV. RESPONSE TO THE BRIEF OF THE LEGAL REPRESENTATIVES OF THE V01 GROUP OF VICTIMS

A. FIRST GROUND OF APPEAL: violation of rules 97(1) and 98(3) which apply to exclusively collective reparations

153. The V01 LRVs submit that the Chamber made an error of law by undertaking an individual assessment of the eligibility of the potential victims already identified, and by treating the reparations forms prepared by the Trust Fund as applications for reparations submitted pursuant to rule 98, whereas a final determination had been made that collective reparations would not be based on individual applications.[102]

154. The V02 LRVs request the Appeals Chamber to adjudicate the arguments therein and to draw all the necessary legal consequences.

B. SECOND GROUND OF APPEAL: violation of the principle of non-discrimination in international law

155. The V01 LRVs submit that the Trial Chamber also made an error of law by assessing the victims' eligibility for the collective reparations on the basis of different procedures depending on the category to which they belonged and on the body tasked with compiling their dossiers, which in practice discriminated against the participating victims.[103]

156. The V02 LRVs likewise request the Appeals Chamber to adjudicate the V01 LRVs' arguments and to allow them, in particular by automatically according the *locus standi* of victim for the purpose of collective reparations to those victims who were admitted to participate in the proceedings by Trial Chamber I, in accordance with its previous decisions.[104]

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[102] V01 LRV Appeal Brief, paras. 14-18.
[103] V01 LRV Appeal Brief, paras. 33-36.
[104] *Al Mahdi*. Reparations Order of 17 August 2017, ICC-01/12-01/15, para. 39.

157. Specifically, the Chamber's decision to exclude some participating victims borders on discrimination within this community, which has been identified as eligible for collective reparations.

158. By way of illustration, of the 137 participating victims represented by the V02 LRV team – 58 of whom were part of the sample interviewed by the Trust Fund – only 37 were considered to qualify for reparations and 21 were rejected primarily on the basis of, among other factors, interviews conducted by the Trust Fund and the team of experts, whereas the participating victims were found to qualify as such by Trial Chamber I on the basis of their applications for participation and/or reparations.[105]

159. This approach "of automatically considering the participating victims as eligible for reparations" presents the advantage of not disappointing the victims participating in the proceedings while including a greater number of eligible victims to secure the intended aim of collective reparations – which is, as the Chamber has duly recalled, to address the harm that the victims suffered on an individual and collective basis.[106]

160. Furthermore, this approach is in line with the Defence position:

> The unreasonableness of that time imposed on Mr Lubanga should, on the contrary, have led the Chamber to determine that, over the course of 11 years of proceedings, the possible victims had had adequate time and facilities to make themselves known, which should have prompted it to consider that, in the circumstances, it should stop at the victims duly identified in the proceedings.[107]

C. THIRD GROUND OF APPEAL: failure to apply the probability test, which is its own criterion for eligibility for reparations

161. According to the V01 LRVs, the Trial Chamber did not apply the principles enunciated in its Decision to the individual dossiers and erred in law by failing to

[105] ICC-01/04-01/06-3379-tENG, Annex II, table B.
[106] Decision, paras. 192-193.
[107] Defence Brief, para. 32.

provide sufficient reasons for the rejections, which did not take into account the assessments conducted by the Trust Fund and its experts.[108]

162. The V02 LRVs request the Appeals Chamber to adjudicate the arguments of the V01 LRVs pertaining thereto and to draw all the necessary legal consequences.

D. REQUEST TO INVOLVE THE TRUST FUND FOR VICTIMS

163. For all these reasons – *viz.* the issues canvassed which go directly to the general mandate of the Trust Fund for Victims, as defined by the Assembly of States Parties when it established the regulations of the Trust Fund, and which go to the manner in which the specific task given by the Chamber was discharged by the Trust Fund, whose conclusions the Decision *a quo* considered invalid – in addition to the fact that the Trust Fund took part in the trial proceedings, the V01 LRVs request the Appeals Chamber to invite submissions from the Trust Fund on the appeals lodged.[109]

164. The LVR02 request the Appeals Chamber to adjudicate this request in accordance with the provisions of regulation 59 of the Regulations of the Court and to draw all the necessary legal consequences.

[108] V01 LRV Appeal Brief, paras. 44-47.
[109] *Ibid*.

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER TO:

- **ENTERTAIN** this response;

- **ENTERTAIN** the Defence appeal, but **FIND** it without merit;

- Accordingly, **DISMISS** the Defence Brief in every respect;

- **ENTERTAIN** the appeal of the Legal Representative of V01 Victims and **FIND** it has partial merit;

- Accordingly:

  - ADJUDICATE their brief and GRANT their request to amend the Decision in that it determines the eligibility for the collective reparations of the potential victims in the sample of dossiers submitted to the Chamber;

  - In ruling thereon, **DIRECT** the Trust Fund to consider, during the implementation process, the victims participating in the proceedings as automatically eligible for collective reparations in view of their application forms for participation and/or for reparations;

  - In so doing, **VARY** the impugned Decision in relation to its exclusion of some victims participating in the proceedings from the number of victims who are candidates for reparations.

- **DECLARE** that Trial Chamber II has duly disposed of all the other issues;

- Accordingly, **AFFIRM** the impugned Decision of 15 December 2017 in every respect, save where varied, as sought above.

Dated this 9 May 2018

At Kinshasa, Democratic Republic of the Congo, and Paris, France.

[signed] [signed] [signed]

Carine Bapita Buyangandu Joseph Keta Orwinyo Paul Kabongo Tshibangu

Legal Representatives of Victims