Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.**: ICC-01-04/01-06**
Date: **31 January 2019**

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

Public Document

OPCV Further Submissions in the appeals proceedings concerning the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable"

Source: **Office of Public Counsel for Victims**

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

The Office of the Prosecutor

Counsel for the Defence
Ms Catherine Mabille
Mr Jean-Marie Biju-Duval

Legal Representatives of V01 Victims
Mr Luc Walleyn
Mr Frank Mulenda

Legal Representatives of V02 Victims
Ms Carine Bapita Buyanandu
Mr Paul Kabongo Tshibangu
Mr Joseph Keta Orwinyo

Legal Representatives of Applicants

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for the Defence

The Office of Public Counsel for Victims
Ms Paolina Massidda
Ms Sarah Pellet
Ms Caroline Walter
Ms Bibiane Bakento

Trust Fund for Victims
Mr Pieter de Baan

States' Representatives

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for victims (respectively the "Legal Representative" and the "OPCV" or the "Office") recalls her previous submissions in the present appeals.[1]

2. In its "Order on the conduct of the proceedings",[2] the Appeals Chamber invited the parties to submit written observations on the issues outlined in the "Order scheduling an oral hearing and determining the conduct of that hearing" (the "Scheduling Order").[3] To ensure an efficient use of time and space, the present submissions will follow the breakdown provided by the Appeals Chamber in its Scheduling Order but arguments articulated in previous submissions will not be repeated. Rather, in each relevant Section, the Legal Representative will simply refer to the document number and the relevant paragraph(s) where the issues have been addressed and will use this opportunity to raise new observations, if any.

3. As far as the Observations by the Trust Fund for Victims (the "TFV")[4] are concerned, the Legal Representative welcomes the renewed stand taken by the Trust Fund underlying that its role is not "*to be construed as the same as the parties of each case*" nor "*to advocate for specific outcomes in relation to judicial determinations*" in a specific case,[5] and incorporates her few comments in the relevant parts addressing the questions raised by the Appeals Chamber.

---

[1] See the "Consolidated Response to the Appeal Briefs of the Defence and the Legal Representatives of V01 Victims against the Trial Chamber II Decision of 15 December 2017", No. ICC-01/04-01/06-3407 A7 A8, 18 May 2018 (the "Consolidated Response").
[2] See the "Order on the conduct of the proceedings" (Appeals Chamber), No. ICC-01/04-01/06-3435 A7 A8, 2 January 2019.
[3] See the "Order scheduling an oral hearing and determining the conduct of that hearing" (Appeals Chamber), No. ICC-01/04-01/06-3429 A7 A8, 6 November 2018 (the "Scheduling Order").
[4] See the "Observations pursuant to rule 103 of the Rules of Procedure and Evidence", No. ICC-01/04-01/06-3430 A7, A8, 15 November 2018 (the "TFV Observations").
[5] *Idem*, paras. 19 and 22.

II. PROCEDURAL BACKGROUND

4. On 15 December 2017, Trial Chamber II (the "Trial Chamber") issued its decision setting the size of the reparations award for which Mr Lubanga is liable (the "Impugned Decision").[6] This decision was appealed by both the Defence[7] and the Legal Representatives of V01 Victims ("LRV 01").[8]

5. On 21 September 2018, the Appeals Chamber scheduled an oral hearing.[9] In the Scheduling Order, it outlined a number of issues on which views were invited.[10]

6. On 2 January 2019, the hearing was cancelled and the Appeals Chamber invited the parties to file written submissions on the issues set out in the Scheduling Order.[11]

---

[6] See the "Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'" (Trial Chamber II), No. ICC-01/04-01/06-3379-Red-Corr-tENG, 21 December 2017 (the "Impugned Decision").

[7] On 15 January and 15 March 2018, the Defence filed its notice of appeal, followed by its appeal brief, against the Impugned Decision (the "Defence Appeal"). See the "Notice of Appeal by the Defence for Mr Thomas Lubanga Dyilo against the '*Décision fixant lemontant des réparations auxquelles Thomas Lubanga Dyilo est tenu*' Handed Down by Trial Chamber II on15 December 2017 and Amended by way of the Decision", No. ICC-01/04-01/06-3388-tENG A8, 15 January 2018; and the "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", No. ICC-01/04-01/06-3394-Conf-tENG A8 and 3394-Red-tENG A8, 15 March 2018 (the "Defence Appeal Brief").

[8] On 16 January and 19 March 2018, LRV 01 filed their notice of appeal and their appeal brief, respectively, against the Impugned Decision. See the "Notice of Appeal against Trial Chamber II's '*Décision fixant le montant des réparations auxquellesThomas Lubanga est tenu*' of 15 December 2017", No. ICC-01/04-01/06-3387-tENG A7, 16 January 2018; and the "*Mémoire dans l'appel contre la 'Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu' du 15 décembre 2017 de la Chambre de première Instance II*", No. ICC-01/04-01/06-3396-Conf-Corr-tENG A7, 19 March 2018. A corrected version was filed on 5 April 2018, see No. ICC-01/04-01/06-3396-Corr-Red-tENG A7.

[9] *Initially scheduled* for 17 October 2018, see the "Scheduling order for a hearing before the Appeals Chamber and invitation to the Trust Fund for Victims to submit observations" (Appeals Chamber), No. ICC-01/04-01/06-3419 A7 A8, 21 September 2018; *postponed* to December 2018, see the "Order regarding the hearing scheduled by the Appeals Chamber" (Appeals Chamber), No. ICC-01/04-01/06-3423 A7 A8, 4 October 2018; *scheduled* to take place on the 11 and 12 December 2018, see the Scheduling Order, *supra* note 3; *postponed* to January 2019, see the "Order regarding the hearing scheduled for 11 and 12 December 2018" (Appeals Chamber), No. ICC-01/04-01/06-3431 A7 A8, 5 December 2018; *postponed* to 7 and 8 February; see the "Scheduling order for a hearing before the Appeals Chamber" (Appeals Chamber), No. ICC-01/04-01/06-3433 A7 A8, 20 December 2018; and *finally cancelled*, see the "Order on the conduct of the proceedings", *supra* note 2.

[10] See the Scheduling Order, *supra* note 3, pp. 4 to 10.

III. RESPONSES TO ISSUES IDENTIFIED BY THE APPEALS CHAMBER

PRELIMINARY ISSUE

Standing of the Office of Public Counsel for Victims to participate in these appeals – as raised by the Legal Representatives of the V01 group of victims

7. The issue concerning the standing of the OPCV in the present proceedings derives directly from Trial Chamber I's Decision dated 6 April 2012[12] as confirmed by Trial Chamber II throughout the reparations proceedings. This interpretation seems acknowledged by the Appeals Chamber which expressly instructed the Legal Representative to file the present submissions.[13]

FIRST GROUP OF ISSUES

1) i. Should there be a cut-off date after which potential victims can no longer come forward to claim reparations?

8. In addition to the arguments already advanced,[14] the Legal Representative submits that a cut-off date is not appropriate in the circumstances of the case. Indeed, such a course may prejudice the most vulnerable victims. In the experience of the Legal Representative, the more vulnerable victims are, the slower will they be able to come forward and engage in the reparations process.

9. Victims should be allowed to come forward throughout the entire period of the implementation phase of reparations by the TFV in accordance with the awards granted by the Trial Chamber. Indeed, the lapse of time between the commission of the crimes and the decision on reparations caused discouragement amongst victims, increased by the fact that the prospective measures (in the form of projects) as described by the TFV so far are very vague and therefore do not allow victims to decide whether to engage in said projects. Consequently, the Legal Representative

---

[11] See the "Order on the conduct of the proceedings", *supra* note 2.
[12] See the "Decision on the OPCV's request to participate in the reparations proceedings" (Trial Chamber I), No. ICC-01/04-01/06-2858, 5 April 2012.
[13] See the "Order on the conduct of the proceedings", *supra* note 2.
[14] See the Consolidated Response, *supra* note 1, paras. 32-34.

posits that, as soon as the reparations projects start to be implemented, victims will have an incentive to come forward and to decide whether to engage in the process knowing the type of services which will be provided in the framework of the collective award.

10. In this regard, the Legal Representative notes the TFV Observations in relation to the eligibility even in the case of collective reparations awards ordered under Rule 98(3) of the Rules of Procedure and Evidence.[15] She agrees with the position according to which the Court's legal framework provides for victim eligibility to reparations projects to be done without an individual application process being required.[16] Indeed, collective reparations may be awarded following an administrative screening by the TFV applying criteria and guidance from the Chambers. Here, unless specific issues arise, there should be no need for further judicial oversight of eligibility. In this framework, the convicted person should have no right to be notified of requests and even less so to make submissions on specific requests.[17]

1) ii. Is there any difference between collective reparations for identified victims and collective reparations for unidentified victims?

11. The Legal Representative posits there should be no difference between victims already identified and victims to be identified on a rolling basis during the implementation phase of reparations. Victims already identified and victims yet to be identified must be able to enjoy the same types and modalities of reparations, including any service-based component of the collective reparations awarded.

1) iii. How should collective reparations in respect of, as yet, unidentified victims be calculated? And, if collective awards are made in respect of, as yet, unidentified victims, but no such victims or a limited number of such victims materialise, what

---

[15] See the TFV Observations, *supra* note 4.
[16] *Idem*, para. 35
[17] *Ibid.*, para. 40.

becomes of the sum, if any, set aside for, or having been awarded in respect of, such victims?

12. In the *Katanga* case, which concerned individual reparations, the Appeals Chamber set out that :

> *"rather than attempting to determine the 'sum-total' of the monetary value of the harm caused, trial chambers should seek to define the harms and to determine the appropriate modalities for repairing the harm caused with a view to, ultimately,* ***assessing the costs of the identified remedy****. The Appeals Chamber considers that focusing on the cost to repair is appropriate, in light of the overall purpose of reparations, which is indeed to repair"*.[18]

13. The Legal Representative submits that this interpretation applies *a fortiori* in a case concerning collective reparations. Financial resources must be allocated to cover the costs of projects to ensure broader benefit, as opposed to the harm suffered by specific individuals. In relation to collective reparations that include service-based components, it may happen that less victims than envisaged stand out for instance in a location where services are made available. If, as a result, sums of money are not applied to cover reparations, they could be used to balance shortages arising in other locations/projects.

2) a. and b. How should collective reparations be calculated? Must the cost of repair (for example, the nature and extent of repair) be calculated in order to determine the value of reparations. If so, why and what is the best method to do so?

14. The Legal Representative proposed her method of calculation in previous submissions.[19] It is important to add that a meaningful estimation of the cost of the

[18] See the "Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute'" (Appeals Chamber), No. ICC-01/04-01/07-3778-Red A3 A4 A5, 8 March 2018 (the "*Katanga* Appeals Judgment on Reparations"), para. 72 (emphasis added).

[19] See the "Submissions on the Evidence Admitted in the Proceedings for the Determination of Thomas Lubanga Dyilo's Liability for Reparations" (the "OPCV Submissions on the evidence"), No. ICC-01/04-01/06-3360-tENG, 8 September 2017, paras. 16, 31-32 and 50. The proposal was made on the basis of information from the field, collected though meetings with resource persons, intermediaries, teachers, etc. to discuss: average costs concerned in housing; annual school fees; various types of medical care; and costs of access to psychological care in the Democratic Republic of Congo (DRC). See the "Annex 1 to the Submissions on the Evidence Admitted in the Proceedings for

identified remedies requires some details as to what remedies might be available and what it takes financially to put them into effect. This information is yet to be provided by the TFV. As an additional difficulty, the anticipated costs vary considerably depending on the availability of infrastructure(s) in Ituri and whether said infrastructure(s) can be used to implement the reparations projects.[20]

15. The TFV has made significant efforts to design a programmatic framework for collective service-based reparations[21] and its proposals have been approved by the Trial Chamber.[22] The Draft Implementation Plan,[23] first developed on the basis of the views and proposals submitted by the then 139 victims participating in the earlier reparations proceedings, the community consultations the Trust Fund undertook in Ituri and insights expressed during an expert conference held in Belfast, lacked an important element. As acknowledged by the TFV, the Draft was at fault to incorporate "*a detail appreciation of the concrete needs and wishes of the victim population affected by Mr Lubanga's crimes*".[24]

16. Such consultation was undertaken in a subsequent effort by LRV01, LRV02, the TFV and the OPCV.[25] The victims interviewed provided proposals as to possible projects and activities they considered to be most responsive to the harm they have

---

the Determination of Thomas Lubanga Dyilo's Liability for Reparations", No. ICC-01/04-01/06-3360-Anx1, 8 September 2017.

[20] See the "Information Regarding Collective Reparations", No ICC-01/04-01/06-3273, 13 February 2017, paras. 51 to 57.

[21] *Idem*, paras. 58 *et seq*.

[22] See the "Order approving the proposed programmatic framework for collective service-based reparations submitted by the Trust Fund for Victims" (Trial Chamber II), No. ICC-01/04-01/06-3289, 6 April 2017.

[23] See the "Draft Implementation Plan for collective reparations to victims Submitted to the Amended Reparations Order of 3 March 2015 in the case against Thomas Lubanga Dyilo", No. ICC-01/04-01/06-3177-Red, 3 November 2015. See paras. 46 to 50 for details about the Belfast meeting. See also the "Further information on the reparations proceedings in compliance with the Trial Chamber's order of 16 March 2018", No. ICC-01/04-01/06-3399-Red, 4 December 2018, para. 27.

[24] See the "Further information on the reparations proceedings in compliance with the Trial Chamber's order of 16 March 2018", *idem*, para. 30.

[25] A comprehensive report about the interviews conducted by the OPCV is on record. See the "Information regarding the Issues as well as the Concerns and Wishes of the Potentially Eligible Victims in the Reparations Proceedings", No. ICC-01/04-01/06-3293-Red-tENG, 25 April 2017, paras. 28 *et seq*.

suffered.[26] Gaps in the Trust Fund's programme framework were then identified.[27] Hence potential projects and activities already agreed upon will need to be amended or new remedies will need to be identified. This adds uncertainty as to the costs of the projects and activities to be put in place.

2) c. Is there any relationship between the cost to repair harm and the value of the harm?

17. In addition to the observations already developed,[28] the Legal Representative submits that there is indeed a relationship between the value of the harm and the cost to repair the harm. Such a finding emerges already from the ICC jurisprudence. In the *Al Mahdi* case, for instance, Trial Chamber VIII set the liability of the convicted person in relation to the restoration of the 10 protected buildings on the basis of the actual cost of the work in restoring the mausoleums.[29] However, even in this case where reparations addressed a specific typology of harm, the financial liability of the convicted person also included calculations concerning the consequential damage and the moral harm.[30]

2) d. Is it correct that the amount of a collective award can only be lower than the value of the aggregate of the individual harms?

18. The Legal Representative is of the view that a collective award can be calculated on the basis of the "aggregation of the individual harm" or the "calculation of the cost to repair". These are two independent formulas and there is no reason of principle on the basis of which one should put a limit onto the other one. In practice, however, the aggregated value of the individual harms assessed in relation to the potential number of victims will likely be higher than the costs of the projects necessary to repair the harm.

[26] *Idem*, para. 33.
[27] *Ibid.*, referring to shortcomings in "*appropriate and responsive activities for family members of child soldiers killed or seriously injured in combat as well as various vulnerable groups, such as former girl soldiers*".
[28] See the OPCV Submissions on the evidence, *supra* note 19, paras. 45 and 49.
[29] See the "Reparations Order" (Trial Chamber VIII), No. ICC-01/12-01/15-236, 17 August 2017, paras. 116 to 118.
[30] *Idem*, paras. 119 to 134.

2) e. N/A

2) f. How should the Court identify and assess the different types of harm which can arise in different types of victims in a collective reparations assessment – *e.g.* direct victims, indirect victims, collective victims, individual victims?

19. In addition to the observations already put forward,[31] the Legal Representative submits a clarification. In the jurisprudence of the Appeals Chamber, there are no "collective victims" as such. The Court's framework defines victims as natural person and organisations or institutions. For instance, where an award for reparations is made to the benefit of a "community", only members of said community meeting the relevant criteria are eligible.[32]

20. In order to identify and assess the different types of harms which can arise in relation to direct and indirect victims, the OPCV carried out more than 400 interviews with individuals coming from more than 70 localities in the DRC.[33] In the course of these interviews it became clear that the types of harms suffered by indirect victims are different from those suffered by direct victims. The projects that seem appropriate to redress the harm suffered by direct victims may not be appropriate for indirect victims, and *vice versa*.[34]

2) g. How should the Court repair the harm of ex-child soldiers who, among other damages, may have suffered harm to their life project and expectations?

21. In addition to the observations already submitted,[35] the Legal Representative underlines that the recruitment and use of children under the age of 15 to actively participate in hostilities causes, amongst others, a very specific typology of harm :

[31] See the "Information regarding the Issues as well as the Concerns and Wishes of the Potentially Eligible Victims in the Reparations Proceedings", *supra* note 25, paras. 37-42. See also the OPCV Submissions on the evidence, *supra* note 19, paras. 17 and 23.
[32] See the "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012" (Appeals Chamber), No. ICC-01/04-01/06-3129 A A2 A3, 3 March 2015, paras. 201 to 215.
[33] See the "Information regarding the Issues as well as the Concerns and Wishes of the Potentially Eligible Victims in the Reparations Proceedings", *supra* note 25, paras. 8 and 9.
[34] *Idem*, paras. 37 *et seq*.
[35] See the OPCV Submissions on the evidence, *supra* note 19, para. 54.

"loss of childhood". Usual forms of reparations are inapt to provide redress for this type of harm. The most appropriate notion to reflect this specific harm is one originating from the jurisprudence of the Inter-American Court on Human Rights (the "IACtHR) and is referred to as the concept of "*project of life*".

22. Said concept was first developed by the IACtHR in the *Loayza Tamayo* case.[36] The Court observed that material damages and lost wages are generally insufficient to grant the victim's *restitutio in integrum*. It then introduced the notion of a person's life plan, which considered the full self-actualisation of the person concerned,[37] including the loss or severe diminution of her or his prospects of self-development.[38]

23. This ruling is dated 1998 and, at the time, the IACtHR did not find the jurisprudence sufficiently evolved to order a compensation under this category. Subsequent jurisprudence of the IACtHR endorsed measures to repair damages to one's life plan, accepting additional non-pecuniary damages under this category.[39] The notion has also been incorporated into the jurisprudence of the European Court on Human Rights by the Grand Chamber.[40]

---

[36] See IACtHR, *Loayza-Tamayo v. Peru*, Reparations and costs, 27 November 1998.
[37] *Idem*, para. 147: the concept "*takes account of her calling in life, her particular circumstances, her potentialities, and her ambitions, thus permitting her to set for herself, in a reasonable manner, specific goals, and to attain those goals*".
[38] *Ibid*., para. 150.
[39] See IACtHR, *Cantoral Benavides v. Peru*, Judgment of 3 December 2001 (Reparations and Costs), where Peru was ordered to provide the victim with the means to carry out and complete his studies at a university of recognised academic excellence, since his unlawful imprisonment denied his life project to pursue a university degree. See operative para. 99(6). In IACtHR, *Tibi v. Ecuador*, Judgment on Preliminary Objections, Merits, Reparations and Costs, 7 September 2004, paras. 245-246, a case dealing with unlawful detention and torture, the IACtHR, stated that Daniel Tibi's expectations for personal, professional, and family development, possible under normal conditions, were abruptly interrupted which clearly altered his life plan. The damage to the victim's "life plan" was considered as part of the Court's assessment that Mr. Tibi should receive €82,850.00 in compensation for non-pecuniary damages.
[40] See ECtHR, *Thlimmenos v. Greece*, Judgment 6 April 2000, para. 70, recognising as part of the assessment of non-pecuniary damages that the violation suffered by the victim had harmed "*the applicant's access to a profession, which is a central element for the shaping of one's life plans*". The award for this type of damages, calculated on equitable basis, took into account this factor.

24. The Legal Representative posits that the concept of "*project of life*" is particularly relevant in the context of former child soldiers, and especially of female child soldiers who, in addition, were, for a vast majority, sexually abused. The active involvement of children below 15 in military activities, exposing them to fear, anxiety and inhuman treatment creates significant psychological trauma that persists long after their demobilisation from the armed group(s). It may also have adverse effects on brain development, and delays in cognitive, language, and academic skills impairing the child's learning abilities and affecting later performance in school, workplace, and community. Victims are deprived of vital aspects of their childhood, such as education and family life. Former child soldiers who were raped and became pregnant during their time in the militia face the same and additional major disruptions. They are rejected from their families and communities; unable to marry; denied access to productive activities and schooling. Moreover, they may suffer from HIV/AIDS or other sexually transmitted diseases.

25. The concept of a "*project of life*" is an effective tool to assess the harm suffered by former child soldiers. Reparations that take into account the "*project of life*" include measures aiming at reintegration into society, physical and mental health care, and provision of some form of education or vocational training, as well as sustainable work opportunities. The Legal Representative also notes that the IACtHR has "presumed" the affection to the "life plan".[41] Therefore, the Legal Representative requests that the notion of life plan be: (i) acknowledged by the Appeals Chamber; (ii) presumed with respect to the harm suffered by the victims in the present case; and (iii) incorporated in the assessment of the liability of Mr Lubanga for reparations.

[41] See IACtHR, *Tibi v. Ecuador*, *supra* note 39, para. 245: "*It is reasonable to consider* that the violations against Daniel Tibi clearly altered his life plan" (emphasis added).

3) a., b. and c. Are collective reparations necessarily at odds with, and thus a bar to, the examination and determination of individual applications for reparations? Was it necessary for the Trial Chamber to individually assess the eligibility of victims for reparations in this case? What procedure, rather than the one used, should the Trial Chamber have used to assess collective reparations in this case?

26. As already submitted, collective reparations are not necessarily at odds with, nor do they constitute a bar to the examination and determination of individual applications for reparations.[42] Trial Chamber II was clear throughout the proceedings that it needed a sufficient pool of victims' dossiers in order to understand whether the information collected was "*representative of all victims*".[43] Compiling a sufficient sample was a step towards drawing conclusions for "all victims". At the same time, assessing the individual applications against the eligibility criteria (eligibility assessment) was necessary to ensure that the sample was composed by genuine victims. Otherwise, the sample would not have been deemed representative of the victims in the case, rendering the exercise obsolete.

27. The Legal Representative therefore shares the view of the TFV that "*the Court's case law demonstrates that it is not necessary to have previously identified the number of victims eligible in order to have a valid reparations order, for the purpose of determining the amount of the convicted person's liability*".[44]

3) d. Noting that victims can both participate in the proceedings and seek reparations, should victims who were permitted to participate in proceedings automatically receive reparations and what would the implications of this be on the procedure to apply to participate in proceedings?

28. In the view of the Legal Representative, victims who participated at trial should automatically receive reparations, unless by virtue of the scope of the conviction or new information eventually collected by their Legal Representatives they no longer qualify as victims. A re-assessment would imply a waste of the

[42] See the Consolidated Response, *supra* note 1, paras. 15-22.
[43] See *inter alia* the "Order for the Transmission of the Application Files of Victims who may be Eligible for Reparations to The Defence Team of Thomas Lubanga Dyilo" (Trial Chamber II), No. ICC-01/04-01/06-3275-tENG, 22 February 2017, para. 12.
[44] See the TFV Observations, *supra* note 4, para. 46.

Court's time and resources, prolong the proceedings even further, and could lead to re-traumatisation for the victims concerned.

29. In its previous composition, in the present case, the Appeals Chamber decided that reparations are voluntary and therefore it is necessary to "*seek the victims consent when a collective award is made*".[45] Further, with reference to Regulations 118(2) of the Regulations of the Registry, the Appeals Chamber noted that victims should be consulted through their Legal Representatives on their consent to disclosure of confidential information contained in their application forms to the TFV for purposes of participation in the eventual collective projects.[46]

30. The Legal Representative invites the Appeals Chamber to abandon the aspects of the jurisprudence set out *supra*. Instead, said consent should be presumed and *de facto* confirmed once the victims come forward to benefit from reparations. Similarly, victims who submitted applications for reparations should be presumed to have consented to their details being provided to those who will run the projects delivering the reparations measures they requested.

4) a. What impact, if any, did the alleged discrimination in the procedure set up by the Trial Chamber to decide on the eligibility of victims for reparations in this case have on the award for reparations?

31. The Legal Representative reiterates her firm opposition to the submission according to which the procedure set up by the Trial Chamber to decide on the eligibility of victims would have had any discriminatory impact.[47] She adds that it is not uncommon that victim applications forms will be collected by different actors. Today, victims' applications forms can be downloaded from the Court Website and sent to the Registry by email. Guidelines as to how to fill-in the forms are also

[45] See the "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012", *supra* note 32, para. 160.
[46] *Idem*, paras. 161 and 162.
[47] See the Consolidated Response, *supra* note 1, paras. 24-26.

provided online.[48] That victims may have been assisted by different actors through the application process cannot mean that those who failed in their applications have been discriminated against. This is an inherent consequence of a decentralised application process rather than an intrinsic discrimination against victims. Decentralising the application process was necessary in the circumstances of the *Lubanga* case, where the security situation and the dissemination of victims made it clear that without a joint effort from the Registry, LRVs, TFV and OPCV they could not be located (not even in a number sufficient for sampling purposes). Moreover, the Code of Professional Conduct for Counsel imposes contact restrictions that make it inevitable that the applications forms are collected by different actors.[49] In any event, victims assessed by the TFV are expected to undergo scrutiny, with similar criteria applied, to those assessed by the Chamber. The eligibility process put in place prevents inequality with no impact on whether or not an award was apposite.

4) b. Were the victims adequately on notice that the Trial Chamber intended to decide on their eligibility, such that they had the opportunity to provide adequate information?

32. The victims interviewed by the Legal Representative were adequately informed.

SECOND GROUP OF ISSUES

5) a. Did the Trial Chamber apply the standard of proof of a balance of probabilities? If not, what are the reasons to say that the Trial Chamber did or did not apply the standard of a balance of probabilities?

33. The Legal Representative maintains her opposition to the submission according to which the Trial Chamber would have failed to apply the balance of probabilities standard.[50] She adds that the analysis shall be focussed on the seven instances where the Defence suggests that the Chamber resorted to a standard lower

---

[48] The Guideline are set out in the document "How to complete the individual application form for participation and/or reparations in ICC proceeding" which is also available online.
[49] See the "Code of Professional Conduct for Counsel", No. ICC-ASP/4/Res.1, 2 December 2005, article 28.
[50] See the Consolidated Response, *supra* note 1, paras. 36-37.

than "*balance of probabilities*", *i.e.* the "*coherent and credible*" standard.[51] The Trial Chamber indeed mentioned that it had taken into account, as part of its assessment, whether the victims' accounts were coherent and credible.[52] However, in the view of the Legal Representative, this does not indicate that a lower standard was applied. The analysis of coherence and credibility is applicable to standards that are more exacting than balance of probabilities.[53] The evidence may be so riddled with ambiguities, inconsistencies, contradictions or doubts as to credibility, that it is insufficient to meet the balance of probabilities standard. In this context, the Trial Chamber was entitled to entertain these considerations.

34. The Defence alleges that "*the methods relied on by the Chamber to determine the number of victims who qualify for reparations fall short of the requirements of* [the balance of probabilities] *standard*".[54] The allegation is that the evidence submitted and considered did not meet the standard. The Legal Representative posits that what the Defence is actually alleging is a set of *errors of fact*.

35. Such errors must be properly substantiated. It is insufficient to merely put forward a different interpretation of the evidence. On appeal, the Defence should have set out why the Trial Chamber's findings were unreasonable.[55] Rather, the Defence limited its challenge to the repetition of submissions made before the Trial

---

[51] See the Defence Appeal Brief, *supra* note 7, footnote 31, referring to paras. 94, 97, 101, 109, 142, 152 and 165 of the Impugned Decision.

[52] The Impugned Decision sets out, for instance, that: "*Be that as it may, the Chamber considers that in the specific circumstances of the case at bar a death certificate is unnecessary if the indirect victim's account is coherent and credible and corroborated by other evidence*", *supra* note 6, para. 165.

[53] With respect to the '***beyond reasonable doubt***' standard, see *inter alia* the "Judgment pursuant to article 74 of the Statute" (Trial Chamber II), No. ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 187. In relation to the '***substantial grounds to believe standard***', see the "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", No. ICC-01/04-01/10-514 OA 4, 30 May 2012, para. 46.

[54] See the Defence Appeal Brief, *supra* note 7, para. 52.

[55] See the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/13-2275-Red A A2 A3 A4 A4, 8 March 2018 (the "*Bemba* et al. Appeal Judgment"), paras. 109-111.

Chamber as to how the evidence should be assessed. The Defence failed to properly substantiate its argument. Accordingly, it should be dismissed without analysing it in substance.

36. Importantly, in the *Katanga* Judgment on the Appeal against the Reparations Order, the Appeals Chamber noted that "*in reparations proceedings, the standard applicable is generally the balance of probabilities. Therefore, on appeal, the standard of review by the Appeals Chamber will be applied with this in mind*".[56] The Appeals Chamber should not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts.[57]

37. In sum, the Legal Representative posits that the Trial Chamber properly applied the balance of probabilities standard and that the Defence failed to substantiate its argument. In any event, in its evaluation, the Appeals Chamber must defer to the Trial Chamber's findings.

5) b. Does a standard of proof based on a 'coherent and credible' claim differ from one which is based on a balance of probabilities and, if so, how?

38. In the submission of the Legal Representative, the Chamber did not apply a "*coherent and credible*" claim standard but analysed the coherence and credibility of the evidence on file to meet the balance of probabilities standard. However, the submission of the Defence is that the Chamber applied a lower "*coherent and credible*" standard imported from the Convention Relating to the Status of Refugees of 28 July 1951 (the "1951 Refugee Convention").[58]

---

[56] See the *Katanga* Appeals Judgment on Reparations, *supra* note 18, para. 42.
[57] *Idem*, para. 41.
[58] See the Defence Appeal Brief, *supra* note 7, paras. 54-55.

39. The Legal Representative observes that the standard incorporated in the 1951 Refugee Convention[59] has been addressed in various documents produced by the United Nations High Commissioner for Refugees (the "UNHCR").[60] The UNHCR 1998 Note on Interpreting Article 1 of the 1951 Convention indicates that "[c]*redibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed*".[61] This standard has been considered to equate the balance of probabilities standard.[62] However, one of the elements of the claim, the "*well-founded fear of persecution*" is made out when its occurrence is "*reasonably possible*".[63] The "*well-foundedness*" has been assessed to require less than balance of probabilities.[64]

40. In turn, the Appeals Chamber described "*balance of probabilities*" as a "*preponderance of proof*" referring that "*the greater the weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; 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*".[65]

---

[59] The Convention defines the term '*refugee*' and outlines the rights of displaced persons, as well as the legal obligations of States to protect them. It enacts the core principle of *non-refoulement*, which in essence asserts that refugees should not be returned to a country where they face serious threats to life or freedom. See the Convention Relating to the Status of Refugees, 28 July 1951.

[60] See UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, para. 205(a)(iii): "[The applicant] *should be asked to give a coherent explanation of all the reasons invoked in support of his application for refugee status and he should answer any questions put to him*". In turn, see *idem*, para. 205(b)(ii): "[t]*he examiner* […] should *assess the applicant's credibility and evaluate the evidence (if necessary giving the applicant the benefit of the doubt), in order to establish the objective and the subjective elements of the case*".

[61] See UNHCR, Note on Interpreting Article 1 of the 1951 Convention, para. 11.

[62] See UNHCR, "Note on Burden and Standard of Proof in Refugee Claims", 16 December 1998, paras. 7-12.

[63] *Idem*, paras. 13-15.

[64] *Ibid*., para. 17.

[65] See the "AMENDED order for reparations (Annex A) to the Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012", No. ICC-01/04-01/06-3129-AnxA A A2 A3, 3 March 2015, footnote 37.

41. It follows that, save for the "*well-founded fear of persecution*" element, the "*coherent and credible*" claim standard is not less exacting than the balance of probabilities standard.

5) c. Need for corroboration

42. In the view of the Legal Representative, the extent to which a piece of evidence, standing alone, is sufficient to prove a fact at issue is entirely dependent on the issue in question and the strength of the evidence. There is no legal requirement of corroboration within the Court framework for purposes of establishing a material fact underlying a finding, beyond reasonable doubt, on the guilt of the person.[66] The Appeals Chamber reaffirmed this principle in the present case, noting that a video of a person may provide a sufficient basis to assess her or his age with no other corroboration necessary.[67] The Legal Representative submits that it is even less so necessary to provide corroboration for the limited purposes of establishing, on balance of probability, the eligibility of a victim to receive collective reparations.

43. In addition, the Legal Representative submits that in relation to the story about what happened to a given victim, the issue of "*lack of corroboration*" will not likely arise in the present case. Given the multitude of victims and the specificities of the crimes at stake, the accounts provided by victims in their application forms tend to be similar on many points. Accordingly, they do corroborate each other.

44. Finally, the Legal Representative submits that conclusions reached on the basis of evidence that is not corroborated by other evidence must be challenged as errors of fact. As indicated *supra*, such errors shall be properly substantiated and, in its evaluation, the Appeals Chambers must defer to the Trial Chamber's findings.[68]

---

[66] Rule 63(4) of the Rules is explicit that no legal requirement of corroboration is required in order to prove a crime within the jurisdiction of the Court.
[67] See the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction" (Appeals Chamber), No. ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 218.
[68] See *supra* paras. 34 to 37.

5) d. How exactly do the 'deficiencies' and 'lack of coherence' in the evidence, as alleged in paragraphs 71 – 105 of Mr Lubanga's Appeal Brief, have a material effect on the decision under appeal? In respect of which victims?

45. The Defence submits that the Chamber made errors with regard to proof of the age of direct victims; date of enlistment or conscription; certificates of demobilisation; the date of 2 June 2004, by which the UPC allegedly no longer had an armed wing; the training camps enumerated; the commanders enumerated and the presence of Chief Kahwa in the UPC/FPLC.[69]

46. The Legal Representative refers to her previous submissions on the matter[70] and cannot assist the Appeals Chamber further with regard to the question at hand. Indeed, the Defence has alleged factual errors without properly referring to the record of the case. In so doing, the Defence failed to abide to the requirements of Regulation 58 (2) of the Regulations of the Court, which specifies that the appeal brief shall set out the legal and/or factual reasons in support of each ground of appeal and make reference to any relevant part of the record or document as regards any factual issue. The Defence failed to refer to the relevant parts of the record of the case and failed to properly substantiate its arguments. Therefore, the Legal Representative submits that they should be dismissed without analysing the substance thereof.[71]

6) a. and b. Liability *in solidum*

47. In addition to the submission already advanced,[72] the Legal Representative recalls that the Appeals Chamber in the *Katanga* case embraced the principle of "*liability in solidum*".[73] She requests the Appeals Chamber not to depart from this jurisprudence.

---

[69] See the Defence Appeal Brief, *supra* note 7, paras. 71 to 105.
[70] See the Consolidated Response, *supra* note 1, paras. 36 and 37.
[71] See the *Bemba* et al. Appeal Judgment, *supra* note 55, paras. 109-111.
[72] See the Consolidated Response, *supra* note 1, paras. 44-46.
[73] See the *Katanga* Appeals Judgment on Reparations, *supra* note 18, paras. 174 *et seq*. In principle, the question of whether other individuals may also have contributed to the harm resulting from the crimes for which the person has been convicted is irrelevant to the convicted person's liability to

6) c. Relevance of ongoing trial proceedings against alleged co-perpetrators

48. In addition to the submission already advanced,[74] the Legal Representative refers to the jurisprudence of the Appeals Chamber in the *Katanga* case.[75] Accordingly, unless ongoing trial proceedings against co-perpetrators are being undertaken for the same crimes at the same time, the question of apportioning liability for the costs to repair does not arise. The present situation does not fit within the exceptions spelled out by the Appeals Chamber in the quoted jurisprudence.

49. The ongoing trial against a co-perpetrator is an irrelevant factor in the Appeals Chamber's analysis of the Impugned Decision. The cases are different from each other in terms of reparations.

6) d. What effect, if any, would subsequent convictions of co-perpetrators have on an existing or completed order for reparations against a convicted perpetrator?

50. The Legal Representative is of the view that the subsequent conviction of a co-perpetrator would have no impact on an existing or completed order for reparations against Mr Lubanga.

6) e. What is the legal basis for a Trial Chamber to take into account, when fixing liability, Mr Lubanga's alleged efforts to promote demobilisation and the alleged failure of the United Nations forces and national authorities to take measures to protect civilians?

51. In addition to the submissions already put forward,[76] the Legal Representative indicates that the Defence failed to set out the legal basis supporting its contention. Regulation 58(2) of the Regulations of the Court requires an appellant to file an appeal brief which sets out the legal and/or factual reasons in support of each ground of appeal and makes reference to any relevant part of the record or document as

repair that harm; and it is not, *per se*, inappropriate to hold the person liable for the full amount necessary to repair the harm (para. 178).

[74] See the Consolidated Response, *supra* note 1, paras. 44-46.

[75] See the *Katanga* Appeals Judgment on Reparations, *supra* note 18, paras. 174 *et seq*.

[76] See the Consolidated Response, *supra* note 1, para. 47.

regards any factual issue. The Defence failed to properly substantiate its argument and therefore it must be dismissed without analysing its substance.

52. In addition, the amount of financial liability of a convicted person must be fixed on the basis of the costs to repair. The factors invoked by the Defence have no impact on the costs to repair and are therefore irrelevant.

53. As a final and general note, as observed during various field missions, the situation of the victims is worsening with the passage of time. All the more that the Legal Representative notes that the physical injuries, psychological distresses and/or economic harm have not been addressed since the commission of the crimes in 2002-2003. In addition, due to the transgenerational impacts of many of the harms suffered, many more victims are in need for support compared to the situation at the time.

Respectfully submitted.

Paolina Massidda
Principal Counsel

Dated this 31st day of January 2019

At The Hague, Netherlands