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Court**

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**TRIAL CHAMBER I**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio Benito  
Judge René Blattmann

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

**Public Document**

**Defence submissions on the principles and the procedure to be applied with  
regard to reparations**

**Source:** Defence Team for Mr Thomas Lubanga

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

**Office of the Prosecutor**

Mr Luis Moreno Ocampo  
Ms Fatou Bensouda

**Counsel for the Defence**

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

**Legal Representatives of Victims**

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

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**Office of Public Counsel for Victims**

Ms Paolina Massidda

**Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Ms Fiona McKay

**Trust Fund for Victims**

Mr Pieter de Baan

## BACKGROUND

1. On 14 March 2012, Trial Chamber I issued its judgment pursuant to article 74 in the case against Mr Thomas Lubanga.<sup>1</sup>
2. In accordance with the 14 March 2012<sup>2</sup> order of the Chamber, the Defence wishes to file submissions on the principles to be applied by the Chamber with regard to reparations and the procedure to be followed.

## SUBMISSIONS

### 1 – The notion of “victim”

3. Rule 85(a) defines the notion of victim as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”.<sup>3</sup>
4. The harm suffered by such victim must be personal,<sup>4</sup> either direct or indirect,<sup>5</sup> and material to the charges confirmed against the accused.<sup>6</sup>
5. Victim participation in the proceedings is contingent on the filing of an application under rule 89. The same holds true for any application for reparations under article 75, which must be made using the form referred to in rule 94 and regulation of 88 of the Regulations of the Court.<sup>7</sup>
6. This interpretation is endorsed by Pre-Trial Chamber I which stated: “The filing of a separate application will be necessary only to obtain the procedural

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<sup>1</sup> ICC-01/04-01/06-2842.

<sup>2</sup> ICC-01/04-01/06-2844, para. 8.

<sup>3</sup> Victims may include organisations or institutions as defined in rule 85(b).

<sup>4</sup> ICC-01/04-01/06-1432, paras. 1 and 32 *et seq.*

<sup>5</sup> The Appeals Chamber held that to be authorised to participate as a victim, it is essential to show the existence of personal harm, whether direct or indirect. ICC-01/04-01/06-1432, para. 32. Harm is indirect when suffered by an individual with a close relationship to a direct victim, such as, for example, a filial relationship.

<sup>6</sup> ICC-01/04-01/06-1432, paras. 2 and 63-66.

<sup>7</sup> See also rule 143: only those victims who filed a form under rule 94 may seek a postponement of the reparations hearing.

status of victim for reparations proceedings pursuant to rules 94 and 99 of the Rules and regulation 88 of the Regulations of the Court.”<sup>8</sup>

7. It follows that only those individuals within the purview of the rule 85 definition and who filed an application for reparations within the meaning of rule 94 are eligible to apply to the Chamber for an award in respect of their harm.

## **2- The exercise of the rights of the defence**

8. At all stages of the proceedings, including the reparations stage, where effect is given to victim participation, in no circumstances must the fairness of proceedings be compromised.<sup>9</sup>
9. Hence, an allegation by a participating victim of personal harm occasioned by a crime held against the convicted person is a fresh and specific accusation against which that person must be able to mount a defence in accordance with the rights afforded to him under article 67.
10. Accordingly, the fairness of the trial ordains that the Defence be apprised of the applications for reparations submitted by the alleged victims and afforded adequate time and resources to verify the truth of the allegations made by the individuals presenting themselves as victims, particularly as regards their civil status. The Defence furthermore must be afforded the opportunity to submit the result of its analyses and verifications to the Trial Chamber, where necessary by tendering evidence and/or seeking to call witnesses.
11. Since the Defence is “entitled” to reply to applications for participation from victims,<sup>10</sup> it is entitled even more so to reply to applications for reparations submitted by victims under rule 94.

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<sup>8</sup> ICC-01/04-101-tEN, para. 67, footnote 62.

<sup>9</sup> Articles 67 and 68 and rule 97(3): 1. Victim participation at the reparations stage must be effected in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

<sup>10</sup> Rule 89.

12. Such verification by the Defence is of particular importance inasmuch as in the case at bar verification compelled the bench to disregard nine victims at the trial stage<sup>11</sup> and ten prosecution witnesses,<sup>12</sup> who had presented themselves as former FPLC child soldiers.
13. However, the extensive redactions to the applications for reparations disclosed to the Defence have hitherto concealed the identity of the vast majority of victims or persons acting on their behalf, thereby preventing the Defence from knowing with sufficient precision the identity of the alleged victims and the factual circumstances cited in support of their applications. In fact, the Defence is privy to the identity of just one of the 85 victims who submitted a form for reparations.<sup>13</sup>
14. Hence, the redactions render the Defence's right of challenge wholly ineffective.
15. In its 18 January 2008 decision, Trial Chamber I confirmed that the participation of anonymous victims could affect the fairness of the proceedings, stating:

Furthermore, the Chamber will take into account the fact that a victim is anonymous in determining the extent of his or her participation, thus safeguarding the fairness of the proceedings. In particular, the extent of participation by a victim on any issue that has a bearing on the Chamber's determination of the charges is likely to be significantly limited if a victim is anonymous. Against that background, the hypothetical possibility of participation, in exceptional circumstances, by anonymous victims is not an issue that could significantly affect either the fairness or the expeditiousness of the proceedings or the outcome of the trial.<sup>14</sup>

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<sup>11</sup> Victim a/0002/06 and his father, Victims a/00225/06, a/0229/06, a/0270/07, a/0047/06, a/0048/06, a/0050/06 and a/0052/06. See ICC-01/04/01/06-2842, paras. 484 and 502.

<sup>12</sup> Witnesses P-0007, P-0008, P-0010, P-0011, P-0298, P-0299, P-0157, P-0297, P-0213 and P-0294. See ICC-01/04/01/06-2842, paras. 247, 268, 288, 441, 473, 429, 406 and 415.

<sup>13</sup> Save for Victims a/0047/06, a/0048/06, a/0050/06, a/0052/06 and a/0002/06 who are no longer authorised to participate in the proceedings.

<sup>14</sup> ICC-01/04-01/06-1119, para. 131.

16. This approach, moreover, accords with the jurisprudence of the Extraordinary Chambers in the Courts of Cambodia (ECCC) where accused persons are apprised of the identity of civil parties.<sup>15</sup>
17. Trial Chamber I, in that same decision, made clear that “[t]he greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself”.<sup>16</sup> Consonant with the decision, the Chamber stated on 11 March 2010 that it was likely that if a victim wished to question a Defence witness, the victim would be asked to reveal his or her identity to the Defence.<sup>17</sup> Thus, at the reparations stage, with victim participation now at an end, continued total anonymity and partial concealment of the circumstances alleged in support of their applications would render the trial manifestly unfair.

- *Information to be disclosed to the Defence*

18. In order to advance meaningful submissions on each application for reparations, it is vital that certain information contained therein and, where necessary, in the corresponding applications for participation, be disclosed to the Defence.
19. Accordingly, the Defence must be in possession of the following information in particular:
- a. Full information on the civil status of the applicants*
20. Experience has shown that false declarations concerning civil status and even usurpation of identity are a real risk in the case at bar. It is therefore imperative for the applicants’ full particulars (surnames, given names and date of birth) to be disclosed to the Defence for it to undertake the necessary

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<sup>15</sup> See for example ECCC, Trial Chamber, *Decision on Protective Measures for Civil Parties*, Case No. 001/18-07-2007/ECCC/TC, 2 June 2009.

<sup>16</sup> ICC-01/04-01/06-1119, para. 131; see also ICC-01/04-01/06-2764-Conf, para. 22.

<sup>17</sup> ICC-01/04-01/06-2340, para. 36.

checks. Such checks will only really be possible where the identity of the parents, and where mentioned, of the brothers and sisters of the applicant victim are also disclosed to the Defence.

21. Furthermore, disclosure of the full date of birth of the applicants (day, month and year) appears to be particularly warranted inasmuch as age is a constituent element of the crime under article 8(2)(e)(vii) of the Statute and hence definitive of victim.
22. Disclosure of the applicants' full particulars similarly entails the lifting of redactions to any photographs they provide.
23. The Defence however will not seek disclosure of subsidiary information such as the applicants' full current address or telephone numbers.
24. Lastly, it must be underscored that although Victims a/0057/06, a/0226/06, a/0237/06, a/0239/06 and a/2911/11 have not sought any protective measure *vis-à-vis* the Defence, the Registry has redacted their identity and any information relevant to the circumstances surrounding the crimes held against Mr Lubanga. These redactions must be lifted.

*b. Information contained in the sections pertaining to the description of the alleged crimes*

25. Reparations may only be awarded where it is demonstrated that the harm suffered by the applicants is the consequence of the crimes of which Mr Thomas Lubanga has been found guilty and which are confined to a well-defined time period.
26. It is therefore vital that the Defence be able to verify the allegations contained in the applications for reparations concerning the places and dates of the allegations in order, *inter alia*, to test them against findings of fact.
27. Similarly, the Defence will only be able to advance meaningful submissions if privy to all of the information relevant to the crimes, such as the names of the

commanders cited by the victims, the hospitals where they were allegedly treated, the names of any witnesses and other victims mentioned in the applications for reparations and information on the harm suffered.

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

28. Throughout this case, the Defence has demonstrated that certain intermediaries encouraged individuals to perjure themselves and submit false applications for participation and/or reparations.
29. In this respect, the Defence is disquieted at applications for reparations from victims who have not been called to testify and in relation to whom, therefore, no detailed investigation has hitherto been possible.
30. For instance, it would appear that certain applicant victims are connected to Intermediary a/0270/07, who has been divested of his right to participate in the proceedings on account of his involvement in the usurpation of identity by Victims a/0225/06 and a/0229/06.<sup>18</sup> Victim a/0270/07 is also the legal guardian of a/0224/06, a/0226/06 and a/0230/06. This relationship casts serious doubts on the veracity of these victims' statements and the authenticity of the documents appended to their applications since two of the five individuals under the legal guardianship of a/0270/07 have already been shown to have been participating fraudulently in the proceedings.
31. Similarly, it has been established that P-0321 introduced several victims to the VPRS, encouraging them to perjure themselves,<sup>19</sup> including a/0002/06 whose victim status was withdrawn for this reason.<sup>20</sup> It therefore cannot be ruled out that other applicant victims, whose identities remain unknown to the Defence, were put in contact with the VPRS by this intermediary, for example

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<sup>18</sup> ICC-01/04-01/06-2842, para. 450.

<sup>19</sup> ICC-01/04-01/06-2842, para. 502.

<sup>20</sup> ICC-01/04-01/06-2842, para. 484.



through the association for which he worked. Such a situation would inevitably raise legitimate doubts as to the applicants' credibility.

32. Lastly, attention must be drawn to the disturbing similarities in certain applications for reparations as regards the descriptions of the crimes committed and harm suffered, which, moreover, are often incoherent and imprecise. The Defence is particularly concerned that all such applicants have indicated that they have the same legal representative.<sup>21</sup> Thus, by way of illustration, in the majority of these applications for reparations completed contemporaneously, the applicants claim to have been forcibly married to the commanders who enlisted them or dispensed their military training, or point to such commanders as responsible for their harm. Moreover, their harm is described in similar terms (headaches, chest and stomach pain, loss of household effects, insomnia and distressing recollections). Lastly, they almost all seek an award in respect of the destruction of their homes. Such similarities tend to undermine the applicants' credibility and require further verification.
33. It is therefore of the utmost importance that, in addition to the information aforesaid, and for the purposes of the appropriate investigations, the Defence be given notice of the identity of any persons who acted on behalf of the victims, who helped them complete the forms or whose name or signature appears on the application for reparations and/or participation, and of any intermediary who was in contact with the witness.
34. In sum, the Defence seeks the lifting of all of the redactions to sections A (save for questions 14 and 15), B (save for question 6), D, E, F, I and J of the forms, as well as the corresponding information in the additional statements, the follow-up sheets, the requests for further information and the supporting

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<sup>21</sup> a/0026/10, a/0027/10, a/0028/10, a/0029/10, a/0030/10, a/0031/10, a/0032/10, a/0033/10, a/0034/10, a/0035/10 and a/0037/10.

documentation appended to the applications for reparations and, where effected, to the applications for participation.

- *Allegations of insecurity*

35. As regards any allegations of insecurity on the part of these victims, the Defence wishes to make clear that it takes witness and victim protection very seriously, as has been evident throughout the proceedings.
36. The Defence will undertake its investigations and verifications with the utmost consideration for the confidentiality of any information it receives, in accordance with the 3 June 2008 order of the Chamber governing disclosure of confidential information to members of the public.<sup>22</sup>

### **3 – Adjudication of the applications for reparations**

37. It behoves the Trial Chamber to ensure that those victims seeking reparations establish harm with a direct nexus to one of the crimes held against Mr Thomas Lubanga and falling within the period of September 2002 to 13 August 2003.
38. The Chamber clearly identified the direct victims of the crimes of which Mr Thomas Lubanga stands convicted, namely those children who were enlisted into the FPLC between September 2002 and 13 August 2003 when under the age of fifteen years.<sup>23</sup> Indirect victims are those who suffered harm arising from harm to direct victims with whom they have a close relationship (parents of children), or are persons who suffered harm when intervening to prevent the commission of the crime.<sup>24</sup>

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<sup>22</sup> ICC-01/04-01/06-1372.

<sup>23</sup> ICC-01/04-01/06-1813, para. 47.

<sup>24</sup> ICC-01/04-01/06-1813, paras. 48-51.

39. Applications filed by persons seeking an award in respect of their harm must contain all of the information itemised in rule 94 and the necessary supporting material.
40. In order to preserve the rights of the Accused safeguarded by article 67, the onus rests with the victims to produce proof of their harm and of the causal link between the harm and the crimes held against Mr Lubanga on the balance of probabilities. In effect, the reparations stage requires a higher standard of proof than that applied by the Chamber [to] victim participation (*prima facie*),<sup>25</sup> but lower than that applicable to the conviction of the accused (beyond reasonable doubt).<sup>26</sup>
41. This standard of proof was adopted by the Trial Chamber of the ECCC (“‘more likely than not to be true’ or ‘preponderance of evidence’”), a decision upheld by the Supreme Court Chamber of the ECCC, which stated that “this standard is common to civil claims across the world.”<sup>27</sup>
42. The Supreme Court Chamber of the ECCC confirmed that statements by civil parties uncorroborated by any other evidence were insufficient.<sup>28</sup> It further confirmed that although three victims undoubtedly suffered physical and psychological harm, there was, however, insufficient evidence to establish to the standard of proof applied by the Chamber that their harm arose from the criminal conduct of the accused.<sup>29</sup>

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<sup>25</sup> ICC-01/04-01/06-1119, para. 99.

<sup>26</sup> Article 66(3).

<sup>27</sup> Supreme Court Chamber of the ECCC, Case File No. 001/18-07-2007-ECCC/SC, Appeal Judgement, Doc No. F28, para. 531.

<sup>28</sup> Supreme Court Chamber of the ECCC, Case File No. 001/18-07-2007-ECCC/SC, Appeal Judgement, Doc No. F28, para. 528 upholding ECCC, Case File No. 001/18-07-2007-ECCC/SC, Judgement, Doc No. E188, para. 647.

<sup>29</sup> Supreme Court Chamber of the ECCC, Case File No. 001/18-07-2007-ECCC/SC, Appeal Judgement, Doc No. F28, paras. 576, 593 and 598. The Supreme Court Chamber upheld the Trial Chamber’s ruling as concerns three victims (E2/23, E2/32 and E2/33 as direct victim). See ECCC, Case File No 001/18-07-2007-ECCC/SC, Judgement, Doc No. E188, para. 647.

43. For example, the absence of objective evidence such as registers, photographs or confessions to corroborate the allegations of victims E2/23 and E2/33 of their time in the S-21 complex resulted in the dismissal of their applications.<sup>30</sup> The inconsistencies and contradictions between the information contained in the application and the testimony of E2/32 also resulted in the dismissal of that victim's application.<sup>31</sup>
44. As to indirect victims, the Trial Chamber of the ECCC excluded several applicants who had failed to demonstrate the existence of a direct victim or the existence of particular ties to a direct victim.<sup>32</sup>
45. In the instant case, the victims must therefore furnish proof on the balance of probabilities of their identity, date of birth, enlistment into the FPLC or their participation in the hostilities as an FPLC soldier during the period from September 2002 to 13 August 2003, and of the existence of harm connected to such facts.

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<sup>30</sup> Supreme Court Chamber of the ECCC, Case File No. 001/18-07-2007-ECCC/SC, Appeal Judgement, Doc No. F28, paras. 593 and 597 upholding ECCC, Case File No. 001/18-07-2007-ECCC/SC, Judgement, Doc No. E188, para. 647.

<sup>31</sup> ECCC, Case File No 001/18-07-2007-ECCC/SC, Judgement, Doc No. E188, para. 647. It must be noted that the appellate chamber found that Victim E2/32 was an indirect victim on account of her father's time in S-21, but upheld the Trial Chamber's ruling that she had not shown that she herself had been in S-21. Supreme Court Chamber of the ECCC, Case File No. 001/18-07-2007-ECCC/SC, Appeal Judgement, Doc No. F28, paras. 575-576.

<sup>32</sup> This ruling was upheld by the Supreme Court Chamber of the ECCC. See for example Case File No. 001/18-07-2007-ECCC/SC, Appeal Judgement, Doc No. F28, para. 547 (Victim E2/69) and 551 (E2/73). ECCC, Case File No. 001/18-07-2007-ECCC/SC, Judgement, Doc No. E188, para. 648.

#### 4 – The applicable procedure at the reparations stage

##### *- The jurisdiction of the Chamber in respect of reparations*

46. The Registry proposes that the functions of the Trial Chamber as regards reparations be delegated to another forum, such as the Pre-Trial bench, a single judge or even the Registry.<sup>33</sup>
47. This proposal runs counter to article 39(2)(b)(ii) which reads: “The functions of the Trial Chamber shall be carried out by three judges of the Trial Division”. Article 74(1) further provides: “All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations.” (Emphasis added)

##### *- The possibility for the Chamber to act “on its own motion” pursuant to article 75*

48. Article 75(1) provides that, in its decision, the Chamber may, on its own motion, determine the scope and extent of any damage, loss and injury to, or in respect of, victims. Since the Chamber has received the forms from 85 victims wherein they set out their harm, the Chamber need not, in this instance, be moved to act on its own motion.
49. This provision can in no circumstances be construed as extending the reach of the Chamber to crimes which have not been charged or to victims who have not made submitted their application correctly by filing a form.
50. There is no exceptional circumstance, therefore, to warrant in the instant case any departure by the Chamber from the ordinary procedure contemplated by the texts requiring reparations to be determined on the basis of information furnished by the victims themselves in a dedicated form.

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<sup>33</sup> ICC-01/04-01/06-2806, para. 152 *et seq.*

## 5 - The nature of the award and determination of the harm

### - *The form of reparations*

51. Rule 97(1) makes provision for the Court to award reparations on a collective or individual basis or both.
52. The Defence is of the view that a distinction must be drawn between a “collective award”, aimed at the collective reparation of harm individually suffered by several victims recognised by the Court, and an award aimed at a “community” claiming to be victim of a crime in the Ituri region, without any individual identification of its members.
53. Although the Registry acknowledges that the community cannot qualify as victim within the meaning of rule 85, it postulates that collective awards to the “community” are possible.<sup>34</sup> Such an approach is undeniably inconsistent with the victim participation and reparations regimes and Appeals Chamber jurisprudence on the matter.
54. Indeed, the Appeals Chamber has held that the jurisdiction of the Trial Chamber must be confined to those charges confirmed by the Pre-Trial Chamber and that any determination of the Chamber “in relation to a victim’s status and/or participatory rights which is unrelated to the specific charges against the accused would fall outside this framework.”<sup>35</sup>
55. The Trial Chamber is therefore bound as regards any matter concerning victim status and the concomitant award of reparations to adhere to the charges held against the accused and upheld in its Judgment rendered pursuant to article 74.

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<sup>34</sup> ICC-01/04-01/06-2806, para. 68.

<sup>35</sup> ICC-01/04-01/06-1432, para. 63.

56. Accordingly, even in the event of collective reparations, those victims recognised as beneficiaries in the trial against Mr Thomas Lubanga must be individually identified.
57. This does not prevent the TFV from funding, as has hitherto been the case, projects of a general nature for victims in Ituri which are unconnected to the present case.<sup>36</sup>

*- Determination of harm*

58. Irrespective of the form reparation takes, rule 85 requires proof of harm suffered by a clearly identified natural person or direct harm suffered by an organisation or institution specifically identified as directly connected to the crimes of which Mr Thomas Lubanga stands convicted.
59. Save for a handful of established principles in the matter, it must be noted that the founding instruments and jurisprudence of the Court are silent as to the determination of harm. The Defence therefore invites the Chamber in its adjudication of reparations to refer to the systems in force in other competent criminal jurisdictions, in particular the French courts and the Extraordinary Chambers in the Courts of Cambodia insofar as the ECCC draws on the former.
60. The Defence takes the view that the only harm amenable to reparation is personal harm which has actually come into being, or is certain, and has not heretofore accrued reparation.

*Harm must be personal*

61. The Defence recalls the decision of the Appeals Chamber that harm must be personal.<sup>37</sup>

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<sup>36</sup> See for example the numerous projects funded by the TFV to help victims rebuild their community and which have already helped more than 81,500 victims in the DRC and Uganda: TFV/DRC/2007/R2/027, TFV/DRC/2007/R1/004, etc. <http://www.trustfundforvictims.org/projects> . See "Earmarked Support at the Trust Fund for Victims", p. 6, available at <http://www.trustfundforvictims.org>.

62. Its personal nature means that only the victim who suffered the harm may be awarded reparations. This definition accordingly enfolds, first and foremost, the direct victims of the crimes of which Mr Lubanga was found guilty, in other words, those individuals who, during the material time, were enlisted, conscripted or used in the FPLC whilst under the age of fifteen years.
63. Lastly, the Defence takes the view that while harm to indirect victims may in certain cases be presumed, it lies with them to demonstrate the existence of a direct victim, namely a child who was enlisted into the FPLC while under the age of fifteen years between September 2002 and 13 August 2003. Furthermore, each indirect victim must, where relevant, demonstrate family ties to the direct victim or that he or she attempted to prevent the commission of the crime against the direct victim.

*The harm must have actually come into being or be certain*

64. The Trial Chamber of the ECCC held that harm must have actually come into being.<sup>38</sup> Otherwise put, the harm must exist at the time when the victim seeks its reparation. It is nonetheless possible for future – and hence as yet non-existent – harm to accrue reparation provided that it is certain to materialise and is a direct consequence of the crime.<sup>39</sup>
65. Furthermore, the Defence would draw the attention of the Chamber to the notion of loss of opportunity. According to this concept, a victim may be awarded reparations for harm entailing a lost opportunity for a beneficial event to materialise occasioned by the commission of the crime, provided that the existence of the opportunity is antecedent to the crime and that the opportunity is not improbable.<sup>40</sup>

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<sup>37</sup> ICC-01/04-01/06-1432, para. 32.

<sup>38</sup> ECCC, Case File No. 001/18-07-2007-ECCC/SC, *aforecited*, para. 640.

<sup>39</sup> In this respect see French Court of Cassation, Criminal Division: mixed division, 29 May 1970, Bull. crim. 1970, No. 176; Cass. Crim. 20 October 1971, Bull. crim. 1971, No. 279.

<sup>40</sup> French Court of Cassation, Criminal Division: Crim., 16 February 1981, No. 80-92326.



66. In this respect, it must be noted, for example, that certain applications for reparations allege that the crime committed disrupted schooling and consequently occasioned a lost opportunity to pursue a specific professional activity.
67. Such allegations must, perforce, be appraised against the factual circumstances prevailing in the Democratic Republic of the Congo at the material time, namely the overall civil war context. Such context, whose causes may not be ascribed to Mr Thomas Lubanga, inevitably disrupted the educational system at the time. Accordingly, it is difficult if not nigh-on impossible to determine to what extent the crimes of which Mr Thomas Lubanga was found guilty disrupted the schooling of victims who were already affected by the ravaged educational system.

*The harm must not already have accrued reparation*

68. The Defence is of the view that reparation of harm must satisfy the principle of full reparation in accordance with which no loss or gain may accrue from the sum awarded as reparation to the victim of an offence.<sup>41</sup>
69. It follows that should certain victims already have been awarded reparations for harm suffered on account of the crimes for which Mr Lubanga was found guilty, such victims may not seek reparation anew.
70. In this regard, it must be noted that the TFV has already funded six projects directly aimed at former child soldiers of Ituri.<sup>42</sup> Figures provided by the TFV indicate that several individuals presenting themselves as former child soldiers were afforded reintegration and vocational training measures.<sup>43</sup>

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<sup>41</sup> French Court of Cassation, Criminal Division: Crim., 5 November 1997, No. 96-85366; Crim., 3 November 2011, No. 11-80077.

<sup>42</sup> <http://www.trustfundforvictims.org/projects>.

<sup>43</sup> The projects are TFV/RC/2007/R2/030, TFV/RC/2007/R1/026 & TFV/DRC/2007/R2/028, TFV/DRC/2007/R1/011; TFV/RC/2007/R2/031 & TFV/DRC/2007/R2/033 & TFV/DRC/2007/R2/043 and TFV/DRC/2007/R2/029. The TFV stated that approximately 1,600 children were beneficiaries of project TFV/DRC/2007/R1/019 without, however, distinguishing between former child soldiers, orphans or

71. Accordingly, it is highly likely that among those who filed applications for reparations, a number of victims have already benefited from these measures. In short, it therefore cannot be excluded that certain victims will be awarded reparations twice, in violation of the principle of full reparation.
72. Similarly, it is clear that several demobilisation and rehabilitation programmes have been effected in Ituri, such as for example, the establishment of transit and orientation centres [*centres de transit et d'orientation*] (CTO)<sup>44</sup> by various non-governmental organisations. The numerous children who have already benefited from these programmes probably include certain individuals now seeking reparation.
73. It follows that only full and accurate identification of the beneficiaries of the projects implemented by the TFV and certain NGOs would obviate the risk of double reparation.
74. The Defence wishes furthermore to bring to the attention of the Chamber the manifest exaggeration and lack of merit of certain applications for reparations. For example, it cannot be validly argued that an individual aged around ten or twelve at the time of the crimes of which he or she claims to be a victim could personally own cattle.<sup>45</sup> In any event, even were these allegations to be established, it cannot be argued that this species of harm (theft of cattle or destruction of homes)<sup>46</sup> is a direct result of the crimes of which Mr Thomas Lubanga was found guilty.

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other children left vulnerable by the war. In any event, this figure increases the number of individuals coming forward as former child soldiers of Ituri and who have already benefited from reparation measures.

<sup>44</sup> See in particular ICC-01/04-01/06-2773-tENG, paras. 662-663.

<sup>45</sup> See for example applications for reparation a/0055/07, a/0027/10, a/0031/10, a/0033/10, a/0037/10, a/0035/10 and a/2916/11.

<sup>46</sup> See for example a/0032/10, a/0033/10 and a/0034/10.

## 6 – The presentation of evidence pertaining to the reparations stage

### - *The presentation of evidence*

75. The rules applicable to the presentation of evidence at trial are applicable to the reparations stage, a constituent of the “trial” within the meaning of the Statute.<sup>47</sup> Indeed, rules 63 *et seq.* appear under Chapter 4 of the Rules of Procedure and Evidence entitled “Provisions relating to various stages of the proceedings” (Emphasis added).
76. The same holds true for the article 67 safeguards.<sup>48</sup>
77. The Defence must therefore be afforded the opportunity to cross-examine the witnesses, to adduce the evidence it deems relevant at this stage of the trial, to contest the credibility of the evidence tendered and supporting material appended to any application for reparations.<sup>49</sup>
78. These rights of the accused are safeguarded by article 67(1) and rule 97(3).

### - *Experts*

79. Rule 97(2) provides for the appointment of experts to help the Court assess the scope and extent of any injury to victims.
80. The Defence submits that it falls to the victims to demonstrate the existence of harm which has actually come into being or is certain (*see supra*), including by calling experts. In particular, where a victim claims physical harm, he or she must undergo medical assessment, absent which the harm cannot accrue reparation due to insufficient proof.
81. Rules 63 *et seq.* and rule 140 pertaining to evidence, including the right of the Defence to put questions to any witness called to testify, are applicable to all

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<sup>47</sup> ICC-01/04-01/06-2800, para. 45.

<sup>48</sup> ICC-01/04-01/06-2800, para. 45.

<sup>49</sup> Rule 94(1)(g).

stages of the proceedings.<sup>50</sup> Regulation 44 vests parties with the right, on receipt of an expert report, to seek a further expert opinion. Lastly, the combined provisions of article 67 and rule 97(3) provide, in all cases, for the right of the Defence to cross-examine witnesses.

### **7 – The participation of the Prosecutor at the reparations stage**

82. The provisions applicable to reparations do not in any way envision the participation of the Prosecutor at this stage of the trial: she is not afforded notice of the reparations proceedings under rule 95, her representations are not required under article 75(3), she may not request an expert under rule 97 and may not appeal the Decision under article 82(4). Finally, no mention of the Prosecutor appears in rule 97(3) which prescribes respect for the rights of the Defence and victims.

83. Hence, the procedural regime governing the reparations stage of the trial, which canvasses exclusively “civil” (or “private” or “individual”) interests, contemplates the participation only of the Defence and victims represented by their counsel and therefore excludes the Prosecutor whose intervention at this stage in the proceedings, devoid of any foundation, would be prejudicial to the rights of the convicted person.

### **8 – The right of the Defence to reply**

84. The Defence requests the opportunity to file written submissions in reply to all submissions filed by the participants and actors concerning the proceedings and principles applicable to the reparations stage.

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<sup>50</sup> They fall under the head of “Chapter 4 Provisions relating to various stages of the proceedings”. Emphasis added.

## 9 - *Ex parte* proceedings

85. The Defence notes that the reports filed by the Registry and the TFV on 1 September 2011 at the behest of the Chamber were, for reasons which are unclear, not transmitted to the Defence until March 2012.<sup>51</sup>

### FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I:

TO TAKE FORMAL NOTE of these submissions;

TO ORDER the disclosure of the unredacted versions of the application forms for reparations and participation and all documents pertaining thereto filed by those victims who applied to intervene at the reparations stage and for the reparation of harm;

TO ADJUDGE AND DECLARE that reparations may be awarded only to those victims having duly applied to the Chamber in accordance with rule 94 and who on the balance of probabilities substantiated the existence of personal harm which has actually come into being, is current or is certain, and has yet to accrue reparation;

TO ADJUDGE AND DECLARE that only those victims who substantiate personal harm arising directly from one of the crimes held against the convicted person are eligible to seek reparations;

TO ADJUDGE AND DECLARE that from an *a contrario* reading of rule 98(1), only those orders awarding individual reparations may be made against the convicted person; and

TO ADJUDGE AND DECLARE that the Prosecutor has no grounds to intervene in any respect whatsoever in the reparations proceedings.

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<sup>51</sup> ICC-01/04-01/06-2806 and ICC-01/04-01/06-2803-Red.

[signed]

Ms Catherine Mabilie, Counsel

Dated this 18 April 2012,

At The Hague, The Netherlands