Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-01/04-01/06**
Date: **15 March 2018**

THE APPEALS CHAMBER

Before: **Judge Silvia Fernández de Gurmendi, Presiding Judge**
Judge Sanji Monageng
Judge Christine Van den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmánski

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Redacted

Public Redacted Version of 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" Filed on 15 March 2018

Source: **Defence team for Mr Thomas Lubanga Dyilo**

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

Office of the Prosecutor

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

Legal Representatives of Victims
Mr Luc Walleyn
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Paul Kabongo Tshibangu
Mr Joseph Keta Orwinyo

Office of Public Counsel for Victims
Ms Paolina Massida

REGISTRY

Registrar
Mr Herman van Hebel

Trust Fund for Victims
Mr Pieter de Baan

Victims Participation and Reparations Section
Mr Philipp Ambach

CLASSIFICATION

1. The Defence for Mr Lubanga files the present submissions as confidential as they make reference to confidential proceedings.

2. The Defence will file a public version.

PROCEDURAL HISTORY

3. On 15 December 2017, the "*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*"[1] ("Decision"), handed down by Trial Chamber II ("Chamber"), was notified to the Defence with two public annexes[2] and one confidential redacted annex.[3]

4. On 18 December 2017, the Defence requested notification of a corrected version of the Decision and its Annex I, as they incorrectly stated Mr Lubanga's term of imprisonment to be 15 years instead of 14.[4]

5. On 20 December 2017, the Chamber issued the "*Décision relative à la requête de la Défense de Thomas Lubanga Dyilo du 19 décembre 2017*"[5] granting the request for correction, although it did not consider the error to be material.

6. The Chamber also stated that it lacked jurisdiction to adjudicate the second limb of the request, *viz.* for a ruling that the time for appeal run from the date of notification of the corrected version of the Decision.

7. On 21 December 2017, the Chamber issued a corrected version of its decision of 20 December 2017 on account of a reference to the wrong paragraph number of Annex I, which was to be corrected.[6]

---

[1] ICC-01/04-01/06-3379-Conf; 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] "Defence Request to correct a substantive error in the *'Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu'* notified on 15 December 2017", 18 December 2017, ICC-01/04-01/06-3380-tENG.
[5] ICC-01/04-01/06-3382.
[6] ICC-01/04-01/06-3382-Corr.

8. That day, it issued a corrected version of the Decision[7] and Annex I thereto.[8]

9. On 16 January 2018, the Defence filed its notice of appeal[9] against the "*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*" handed down on 15 December 2017 by the Chamber, in that it:

- found that 425 of the 473 victims who may be eligible 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;

- found that those 425 victims are but a sample of the victims who may be eligible 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 from the TFV, 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.

[7] ICC-01/04-01/06-3379-Conf-Corr; ICC-01/04-01/06-3379-Conf-Corr-Anx; ICC-01/04-01/06-3379-Red-Corr; ICC-01/04-01/06-3379-Red-Corr-Anx.
[8] ICC-01/04-01/06-3379-AnxI-Corr; ICC-01/04-01/06-3379-AnxI-Corr-Anx.
[9] "Notice of Appeal by 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 way of the Decisions of 20 and 21 December 2017", 16 January 2018, ICC-01/04-01/06-3388-tENG.

10. Pursuant to regulation 58 of the Regulations of the Court, the Defence makes the following submissions.

FIRST GROUND OF APPEAL – VIOLATION OF THE PROVISIONS OF ARTICLE 75 OF THE STATUTE AND RULE 95 OF THE RULES OF PROCEDURE AND EVIDENCE

11. Article 75 of the Rome Statute provides:

> 1. 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 on its own motion in exceptional circumstances, 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.

12. Accordingly, the International Criminal Court ("Court") may determine "on its own motion" "the scope and extent of any damage, loss and injury to" victims who have not applied to the Court for reparations only "in exceptional circumstances".

13. Rule 95 of the Rules of Procedure and Evidence provides that in that eventuality

> [the Court] shall ask the Registrar to provide notification of its intention to the person or persons against whom the Court is considering making a determination, and, to the extent possible, to victims, interested persons and interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3.

14. These provisions, which make no distinction according to the individual or collective nature of the reparations envisaged, presuppose, in principle, that in matters of reparations, the Court's rulings are limited to what the applications bring before it, and that the Court is barred from evaluating "on its own motion", *proprio motu*, "the extent of any damage, loss or injury" suffered by other possible victims who did not apply for reparations in the proceedings.

15. No departure from this principle is permitted, save where justified by "exceptional circumstances" of which notice must be given in accordance with rule 95.

16. An analysis of the committees' discussions supports the general character of the principle that, save in "exceptional circumstances", a Chamber cannot, *proprio motu*, award reparations to victims who have not laid any such application before it.[10]

17. This prohibition, in principle, of the *proprio motu* examination of matters of reparations not brought for determination finds support in the rejection of any punitive approach to reparations: their sole objective is reparation, individual or collective, of harm suffered.

18. An analysis of the committees' discussions confirms that, ultimately, the framers of the Statute and the Rules of Procedure and Evidence clearly discarded the idea of punitive awards, accepting only the compensatory purpose of reparations.[11]

19. The decision to opt for collective reparations does not entail rejection of that principle.

20. The collective nature of reparations has the sole consequence of discharging the Chamber, before which the matter lies, from ruling on the quantum of the individual harm to the victims who have applied for reparations in the proceedings. It does not, however, authorize the Chamber to consider the situation of unidentified possible victims who have made no application to the Court.

---

[10] Christopher Muttukumaru, "Reparation to victims" in Roy S. Lee, The International Criminal Court – The Making of the Rome Statute Issues, Negotiations, Results (Kluwer Law International 1999), p. 269.

[11] *Ibid.*, p. 266; See also the drafting history of article 75 and the exclusion of the article from the "Penalties" Part: Preparatory Committee on the Establishment of an International Criminal Court – 4 February 1998 – Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands (A/AC.249/1998/L.13); Preparatory Committee on the Establishment of an International Criminal Court: Working Group on Penalties – 2 December 1997 – ILC draft articles 46(2) and 47 – Applicable penalties (and related issues) (A/AC.249/1997/WG.6/CRP.1); Preparatory Committee on the Establishment of an International Criminal Court: Working Group on Penalties – 12 December 1997 – Report of the Working Group on Penalties 1-12 December 1997 (A/AC.249/1997/WG.6/CRP.14); UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Working Group on Procedural Matters – 24 June 1998 – Report of the Working Group on Procedural Matters (A/Conf.183/C.1/WGPM/L.2).

21. In its decision of 3 March 2015, the Appeals Chamber rightly held that, when only collective reparations are awarded, the Chamber is not required to rule on each individual application for compensation,[12] but it nevertheless recalled the need to individually identify each victim.[13]

22. The Appeals Chamber underlined, in particular, that as part of "the reparation proceedings, the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case"[14] and it recalled the need for the order for reparations to determine the victims eligible for reparations or the criteria for eligibility.[15]

23. This individual identification through the submission of a dossier, so as to satisfy the Chamber of the victim standing of each applicant (but without its having to rule on the nature or size of the award individually requested), is clearly necessary to adjust the collective reparations to the number of victims concerned and to the nature of the harm they suffered.

24. Moreover, this has been the approach adopted by the Chamber, which, in the first place, with reference to the requirements prescribed by the Appeals Chamber, has consistently required a list of applicants for reparations as victims.[16]

25. Then, however, 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

---

[12] "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012", 3 March 2015, ICC-01/04-01/06-3129, paras. 7 and 152.
[13] "Order for Reparations (amended)", 3 March 2015, ICC-01/04-01/06-3129-AnxA, para. 57.
[14] *Ibid.*, para. 22.
[15] ICC-01/04-01/06-3129, para. 205.
[16] "Decision on the 'Request for extension of time to submit the draft implementation plan on reparations", 14 August 2015, ICC-01/04-01/06-3161-tENG, p. 5; "Order instructing the Trust Fund for Victims to supplement the draft implementation plan", 9 February 2016, ICC-01/04-01/06-3198-tENG, paras. 14-15.

"[TRANSLATION] hundreds and possibly thousands more victims" who were unidentified and had not made any application to the Chamber.[17]

26. It thus allowed itself to determine "on its own motion" the harm supposedly suffered by unidentified persons who had not put any application before it.

27. 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*.

28. The reasons advanced by the Chamber in support of this decision are without merit.

29. **First**, the Chamber maintains that the time necessary to continue the individual identification of victims, although "[TRANSLATION] desirable", would violate "[TRANSLATION] Mr Lubanga's right to notice within a reasonable time of his obligations arising from reparations".[18]

30. This reason is erroneous.

31. The time Mr Lubanga has thus far had to wait for the determination of the reparations proceedings is, in fact, unreasonable. However, the clear unreasonableness of any additional extension of time for the identification of other possible victims is no justification for compounding Mr Lubanga's situation as to his reparations obligations by making him liable for "[TRANSLATION] hundreds and possibly thousands more victims" who are unidentified.

32. 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

[17] Decision, paras. 244 and 280.
[18] Decision, para. 234.

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.

33. Far from protecting Mr Lubanga's rights, the Chamber's decision ultimately to dispense with the individual identification of those victims who qualify for reparations, and to take into consideration unidentified victims, constitutes a serious violation of his right to canvass the award against him.

34. **Second**, the Chamber is of the view that the time necessary to continue the individual identification of victims would prejudice "[TRANSLATION] the right of the victims to receive prompt reparations".[19]

35. Mr Lubanga deplores the undue length of the reparations proceedings and its adverse effects on the victims. As submitted above, however, it was for the Chamber to implement reparations measures for the identified victims promptly and not to indefinitely increase the number of persons within the purview of these measures on the basis of dubious conjecture. The failure to identify victims who may qualify for reparations and the ensuing uncertainty about the determination of appropriate measures will only further delay the implementation of reparations.

36. **Third**, the Chamber asserts that "[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."[20] In this regard, it identifies several factors which it considers may explain why some victims did not claim reparations.[21]

37. This reason is invalid.

[19] Decision, para. 234.
[20] Decision, para. 235.
[21] Decision, para. 236.

38. When it comes to the mass crimes under the Court's jurisdiction, there will inevitably be some victims who may claim reparations but who, for a very wide range of reasons, do not disclose their identities and do not exercise their rights. Generally, the sum-total of victims, impossible to establish with accuracy, always exceeds the number of victims identified by name. This is an unfortunate, yet common situation.

39. Article 75 of the Statute nevertheless requires "exceptional circumstances" to be established in order for the Chamber to be authorized to make a determination "on its own motion" on harm which its victims did not put before it for consideration.

40. In the instant case, the numerous factors identified by the Chamber do not in any way constitute "exceptional circumstances" and, furthermore, are not presented as such by the Chamber.

41. Moreover, the Chamber overlooks a factor that might have had a bearing on the number of victims applying for reparations in the proceedings: some child soldiers might have deliberately chosen not to seek reparations from Mr Lubanga. Yet, it is not for the Chamber to contravene their wishes.

42. An analysis of the discussions which culminated in article 75 and rule 95 shows the care taken on the part of some of the framers to ensure that the Chamber could not override the individual wishes of victims as regards the exercise of their right to request reparations.[22]

43. **Fourth**, the assertion 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] other Chambers of this Court have couched the number of victims in indeterminate or approximate terms – 'many', 'numerous',

[22] Peter Lewis and Håkan Friman, "Article 75" in Roy S. Lee (ed.), The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence (Transnational Publishers 2001), p. 481.

'hundreds'"[23] is irrelevant insofar as the decisions cited do not concern civil reparations proceedings, but convictions or sentences pronounced in criminal proceedings, which do not require the exact identification of victims.

44. **Fifth**, to support its position, the Chamber "[TRANSLATION] recalls that […] the Chamber 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."[24]

45. However, 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 this rule, specifically, of the right to file submissions which prove the lack of "exceptional circumstances" to justify the Court's ruling "on its own motion" on harm not put before it for consideration.

46. Therefore, in ruling on "the scope and extent of any damage, loss and injury to, or in respect of, victims or their beneficiaries" by factoring in not only the victims who had applied to the Court for reparations, but also "[TRANSLATION] hundreds and possibly thousands more victims" who are unidentified, and without any justification of "exceptional circumstances" and without giving the notice required by rule 95 of the Rules of Procedure and Evidence, the Chamber made an error of law.

47. As a result of this error of law, the Chamber wrongfully ordered Mr Lubanga to pay USD 6,600,000 in reparations for the harm suffered by unidentified victims "[TRANSLATION] who may be identified during the implementation of reparations."[25]

[23] Decision, para. 237.
[24] Decision, para. 234.
[25] Decision, para. 280.

48. The Appeals Chamber is accordingly asked to determine that the Trial Chamber made the error of law and to reverse the Trial Chamber's Decision in that it orders Mr Lubanga to pay USD 6,600,000 in reparations for harm to victims who have made no application for reparations to the Court.

SECOND GROUND OF APPEAL – MISAPPLICATION OF THE STANDARD OF PROOF

49. In its decision of 15 February 2011 issued in the case of *The Prosecutor v. Joseph Kony*, the Appeals Chamber underscored:

> it is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law.[26]

50. In its decision of 3 March 2015, the Appeals Chamber held that the standard of proof as to whether a victim qualifies for reparations is "a balance of probabilities".[27]

51. In its Decision of 15 December 2017, the Chamber acknowledged that that standard must apply in reparations matters[28] and recalled that "[TRANSLATION] a person seeking the *locus standi* of victim for the purposes of reparations must, upon establishing his or her identity, provide sufficient proof of the harm suffered and of the causal nexus between said harm and the crime of which the person was convicted."[29]

52. Nevertheless, the Appeals Chamber will see that 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

---

[26] *The Prosecutor v. Joseph Kony*, "Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II", ICC-02/04-179, 15 February 2011, para. 36.
[27] ICC-01/04-01/06-3129-AnxA, para. 65.
[28] Decision, para. 90.
[29] Decision, para. 65.

unidentified victims who "[TRANSLATION] may be identified during the implementation of reparations" – fall short of the requirements of that standard.

1) Possible victims identified in the proceedings

a. Uncorroborated statements

53. The Chamber noted that "[TRANSLATION] in most cases, the victims who may be eligible were not in a position to submit supporting documentation to prove their allegations",[30] and the Chamber was largely content to describe the uncorroborated statements of the applicants for reparations as "[TRANSLATION] coherent and credible" in finding that they were eligible as victims.[31]

54. This standard of proof based on the "coherent and credible" nature of statements is applied in international law only to the assessment of eligibility for refugee status under the 28 July 1951 Geneva Convention relating to the status of refugees. While the particularly low standard of proof is justified by the protective aim of the Geneva Refugee Convention, the assessment of the award for reparations for which Mr Lubanga is liable in the proceedings at hand, however, demands a significantly more stringent standard of proof: a balance of probabilities. This holds true for all judicial proceedings intended to establish the civil liability of a tortfeasor.

55. Yet, the standard of proof based on "coherent and credible" statements is substantially lower than that of a balance of probabilities.

56. The United Nations High Commission for Refugees (UNHCR) recalls in its guidelines that

> in assessing the overall credibility of the applicant's claim, the adjudicator should take into account such factors as the reasonableness of the facts alleged, the overall consistency and coherence of the applicant's story, corroborative evidence adduced by the applicant in support of his/her statements, consistency with common

[30] Decision, para. 61.
[31] Decision, paras. 94, 97, 101, 109, 142, 152 and 165.

> knowledge or generally known facts, and the known situation in the country of origin. Credibility 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. [Emphasis added].[32]

57. In this connection, it points out that

> a substantial body of jurisprudence has developed in common law countries on what standard of proof is to be applied in asylum claims to establish well-foundedness. This jurisprudence largely supports the view that there is no requirement to prove well-foundedness conclusively beyond doubt, or even that persecution is more probable than not. To establish "well-foundedness", persecution must be proved to be reasonably possible. [Emphasis added].[33]

58. It can be concluded from the foregoing that the standard of proof based on the "coherent and credible" nature of the applicants' statements is lower than the standard of a balance of probabilities.

59. The Extraordinary Chambers in the Courts of Cambodia has thus ruled that statements of civil parties uncorroborated by any other evidence are not

---

[32] "Note on Burden and Standard of Proof in Refugee Claims", UNHCR, 16 December 1998, para. 11.

[33] "Note on Burden and Standard of Proof in Refugee Claims", UNHCR, 16 December 1998, para. 17; See also: ***Supreme Court of the United States***: *INS v. Stevic*: with regard to the standard applicable in asylum proceedings, it pointed out that a moderate interpretation of the "well-founded fear" standard would indicate "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility"; *INS v. Cardoza-Fonseca*: to show a "well-founded fear of persecution" an alien "need not prove that it is more likely than not that he or she will be persecuted in his or home country", the Court reaffirmed the standard stipulated in the *Stevic* case, that of "a reasonable possibility".
The House of Lords of the United Kingdom: *Fernandez v. Government of Singapore*: the House of Lords concluded that it was not necessary to show that it was more likely than not that the individual would be detained or restricted if returned, a lesser degree of likelihood sufficed, such as a "reasonable chance", "substantial grounds for thinking" or "a serious possibility"; *R. v. Secretary of State for the Home Department ex parte Sivakumaran*: the House of Lords called for a test less stringent than the "more likely than not" standard, such as "reasonable degree of likelihood".
The Australia High Court: *Chan Yee Kin v. The Minister for Immigration and Ethnic Affairs*: the High Court used the term "real chance". Mason C.J. said, "the Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns." Dawson C.J. preferred a test which "requires there to be a real chance of persecution before fear of persecution can be well-founded". He explained there need not be "certainty" or "even probability that (a fear) will be realised". McHugh J. said, "Obviously, a far-fetched possibility of persecution must be excluded. But if there is a real chance that the applicant will be persecuted, his or her fear should be characterised as 'well-founded' for the purpose of the Convention and Protocol".
Canada: *Joseph Adjei v. Minister of Employment and Immigration*: the Court of Appeal rejected the "more likely than not" test stating "It was common ground that the objective test is not so stringent as to require a probability of persecution." MacGuigan J. adopted a "reasonable chance" standard which was equated with "good grounds for fearing persecution" and "a reasonable possibility" of persecution. See also *Federal Court of Appeal, Salibian v. Canada*.

sufficient.[34] It has also pointed out that while several reparations programmes instituted to compensate victims of armed conflict reduced the burden upon applicants on account of the lack of official or formal documents to substantiate their claims, the burden of proof was eased not by lowering the standard of proof, but by accepting a wider variety of evidence.[35]

60. In like manner, the Appeals Chamber in the case of *The Prosecutor v. Mr Al Mahdi* rejected the first ground of appeal of the Legal Representative of Victims, holding that it was for the victims seeking reparations for economic loss to provide proof of the harm they claimed to have suffered. It refused to revisit the standard of proof, underscoring that the Trial Chamber had taken into account the security and administrative situation in Timbuktu to determine what evidence it could reasonably expect the applicants to provide.[36]

61. Akin to the Extraordinary Chambers in the Courts of Cambodia, the Appeals Chamber did not lower the requisite standard of proof but accepted a wider variety of evidence.

62. It follows that the Chamber should not have regarded the applications for reparations which relied essentially on the applicants' uncorroborated statements as sufficiently established to a balance of probabilities, even where said statements may have been "coherent and credible".

63. It was the case, however, as the Chamber itself acknowledged,[37] that a significant number of the 425 persons found to be victims by the Chamber did

---

[34] ECCC, Supreme Court Chamber, Case File No. 001/18-07-2007-ECCC/SC, Appeal Judgment, Doc No. F28, para. 528 affirming the trial judgment, Doc. No. E188, para. 647.
[35] Case File No. 001/18-07-2007-ECCC/SC, Judgment, Doc. No. F28, para. 525, citing Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", pp. 156-158 (referring to the standard of plausibility that was prescribed in the CRT I and II Rules).
[36] *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, "Judgment on the appeal of the victims against the 'Reparations Order'", 8 March 2018, ICC-01/12-01/15-259-Red2, paras. 40-43.
[37] Decision, para. 61.

not provide any evidence in support of their statements about the alleged enlistment.

64. In fact, 320 of the 425 applicants who were granted the standing of victim did not provide any document in support of the facts alleged: 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[38] submitted only a voter's card or an IPM [*impôt personnel minimum* (minimum personal tax)] card, without proving, in any way whatsoever, the facts that they alleged.

65. There are no cogent grounds to reasonably explain the lack of corroborating evidence.

66. The enlistment of children under the age of 15 years is inherently a crime which comes to the attention of many witnesses: family members, school staff, local authorities, soldiers from the same unit, demobilization staff, etc. Similarly, wounds and trauma resulting from military activity are usually noted in medical records. Moreover, the civil status authorities of the Democratic Republic of the Congo can issue civil status documents as legal proof of the age of the applicants.

67. Yet, no explanation was offered to give credence to the idea that it was impossible to obtain statements from witnesses. Likewise, no explanation was given as to why the civil status authorities were not approached for civil status documents as legal proof of age of the applicants.

68. A small number of victims, especially indirect victims,[39] did, however, provide one or more witness statements in support of their statements.

---

[38] ICC-01/04-01/06-3323-Conf-Anx35-Red; ICC-01/04-01/06-3323-Conf-Anx40-Red; ICC-01/04-01/06-3323-Conf-Anx41-Red; ICC-01/04-01/06-3323-Conf-Anx44-Red; ICC-01/04-01/06-3323-Conf-Anx33-Red; ICC-01/04-01/06-3323-Conf-Anx37-Red; ICC-01/04-01/06-3323-Conf-Anx38-Red; ICC-01/04-01/06-3323-Conf-Anx49-Red.

[39] See, in particular, Victims a/25243/16, a/25247/16, a/25294/16, a/30174/17, a/30105/17, a/30196/17 and a/30255/17 (ICC-01/04-01/06-3379-Conf-AnxII-Red).

69. That being so, irrespective of the "coherent and credible" nature of the statements provided, which are all of the utmost brevity, the Chamber should have considered that the lack of corroborating evidence cast serious doubt on their reliability.

70. 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 "[TRANSLATION] coherent and credible", the Chamber made an error of law.

b. Deficiencies and lack of coherence

71. The Chamber also failed to draw the necessary conclusions from the factual incoherence and evidentiary deficiencies that it identified, or should have identified.[40] In considering that the incoherence and deficiencies did not mar the credibility of the applications before it, the Chamber made a further error of law, or, at the very least, clearly misappreciated the facts against the applicable standard of proof.

72. With regard to proof of the age of direct victims between 1 September 2002 and 13 August 2003, the Chamber noted in some dossiers discrepancies between the dates of birth claimed.[41]

73. The Chamber did not, however, 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.[42]

74. Yet, since the age of the victim is a decisive factor for eligibility, the credibility of the statement is inevitably affected when the applicant gives different dates

[40] Decision, paras. 65-189; see also ICC-01/04-01/06-3379-Conf-AnxII-Red.
[41] Decision, para. 88.
[42] Decision, para. 88.

of birth on the application form for participation and on the application form for reparations, or submits identification stating different dates of birth.

75. The Chamber should not have dismissed these discrepancies without scrutinizing the dossiers of the applicants concerned and should not have refused to draw any of the necessary conclusions on the credibility of the possible victims.

76. With regard to the date of enlistment or conscription, the Chamber noted that some of the possible victims stated that they were enlisted by the UPC/FPLC before the period of the charges, i.e. before 1 September 2002. However, it considered that such statements did not affect their credibility if they established in a coherent and credible manner that they were used in the FPLC to participate actively in hostilities during the time frame of the charges and that they were under the age of 15 years then.[43]

77. The Chamber also 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.[44]

78. In so ruling, however, the Chamber failed to draw the necessary conclusions from a comparison of the applicants' statements and the evidence on record.

79. In particular, 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.[45]

80. The Defence submissions seek not to prove that the applicants gave false statements by claiming they were recruited or trained by an armed group before 1 September 2002, but to underline that such statements are not credible since they ascribe the recruitment or training to the UPC/FPLC.

[43] Decision, paras. 93-94.
[44] Decision, paras. 125-126.
[45] ICC-01/04-01/06-2842, paras. 1131 and 1133.

81. The Chamber therefore clearly misappreciated the facts by not drawing from these statements any conclusions on the credibility of those who made them.

82. With regard to the certificates of demobilization, the Chamber rejected the Defence arguments on their probative value, by commenting 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.[46]

83. The Chamber therefore clearly misappreciated the facts since Trial Chamber I's findings on the probative value of demobilization logbooks necessarily apply to the certificates of demobilization issued on the basis of the same information.

84. In fact, the testimony given at trial established that many people who presented themselves to demobilization organizations lied about their age or membership of an armed group in order to receive demobilization-related assistance.[47]

85. Trial Chamber I thus noted that the situation of extreme poverty in Ituri at the material time drove many young people to assume a false identity in order to participate in the process of demobilization and, accordingly, concluded that it could not rely on the demobilization logbooks "because of the potential unreliability of the information when it was originally provided and the apparent lack of sufficient (or any) verification."[48]

86. As the demobilization logbooks and certificates of demobilization were issued at the same time, the unreliability of the former entails the unreliability of the latter.

[46] Decision, para. 96.
[47] ICC-01/04-01/06-2773-Red-tENG, paras. 510-522 and 712.
[48] "Judgment pursuant to Article 74 of the Statute", 14 March 2012, ICC-01/04-01/06-2842, para. 740.

87. In any event, the certificates of demobilization cannot prove enlistment in the FPLC since they do not state the armed group to which a demobilized person belonged.

88. The Chamber therefore clearly misappreciated the facts.

89. With regard to the date of 2 June 2004, by which the UPC no longer had an armed wing, the Chamber determined 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.[49]

90. Without an individual examination of each dossier concerned, the Chamber should not have presumed that the applicants made an error only in the date when they stated that they were still part of the UPC/FPLC after 2 June 2004.

91. Given that the UPC no longer had an armed wing as of 2 June 2004,[50] the statements of some possible victims that they continued to fight on the side of the UPC/FPLC cast serious doubt on the credibility of their accounts.

92. The Chamber clearly misappreciated the facts.

93. With regard to the training camps enumerated, the Chamber regarded "[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."[51]

94. By deciding to take into consideration the possible victims' allegations that they were trained elsewhere than at training centres,[52] the Chamber failed to act on its own conclusions and clearly misappreciated the facts.

[49] Decision, para.130.
[50] T-341-FRA ET WT, p. 37, line 13.
[51] Decision, para. 142.
[52] Decision, para. 142.

95. With regard to the commanders enumerated, although the Chamber noted that "[TRANSLATION] [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",[53] 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."[54]

96. By failing to draw from the lack of coherence any conclusions about the credibility of the account given by the applicants concerned, and, thereby acting in contradiction with its own observations, the Chamber clearly misappreciated the facts.

97. With regard to the presence of Chief Kahwa in the UPC/FPLC, 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."[55]

98. That notwithstanding, the Chamber 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 possible victims "[TRANSLATION] might have mistaken the dates, not least given the time elapsed since the events relevant to the charges".[56]

99. These conclusions are not based on any probative material or any detailed analysis of the dossiers, and constitute a clear misappreciation of the facts.

100. The Chamber also clearly misappreciated the facts in considering that, while "[TRANSLATION] a [potential v]ictim cannot attribute the same enlistment or

[53] Decision, para. 108.
[54] Decision, para. 109.
[55] Decision, para. 114.
[56] Decision, para. 115.

conscription to both Mr Lubanga and Mr Katanga, who were in fact members of different militias", "[TRANSLATION] [i]t cannot be ruled out […] that a victim was enlisted or conscripted into, or belonged to both militias at different times,"[57] whereas there was nothing in the dossier of the possible victim to have prompted such conclusions.

101. The statements of the applicant appear, moreover, completely unrealistic given the local context in 2002 and 2003.

102. Lastly, the Chamber made an error of law by mischaracterizing the facts on record, as found at trial. Thus, 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.[58]

103. Accordingly, the Chamber could not legitimately call into question the defection of Commanders Kasangaki and Kakwavu in March 2003,[59] and fail to draw any conclusions about the credibility of the applicants who stated that they belonged to the UPC/FPLC after March 2003 when they were, in fact, the subordinates of Commanders Kasangaki or Kakwavu in another armed group.

104. This error of law and these instances of clear misappreciation of the facts led the Chamber to accord victim status to 425 of the 473 applicants registered in the proceedings, without identifying with sufficient precision who among them had duly established their victim standing to the applicable standard of proof. On this incorrect basis, it wrongfully ordered Mr Lubanga to pay USD 3,400,000 in reparations for the harm suffered by the victims identified in the proceedings.

---

[57] Decision, para. 137.
[58] T-178-Red2-ENG, p. 18, line 22 to p. 19, line 1, p. 19, line 16 to p. 20, line 5, and p. 63, line 17 to p. 64, line 8.
[59] Decision, paras. 111 and 122.

105. The Appeals Chamber is accordingly asked to determine that the Trial Chamber made an error of law and to reverse 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 possible victims

106. 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 UPC/FPLC during the time frame of the charges.[60]

107. The Chamber also relies on the demobilization lists provided to it by the Democratic Republic of the Congo.[61]

108. The relevance and reliability of these documents fall well short of the requisite standard of proof.

109. Moreover, the Chamber acknowledges that it did not undertake any detailed analysis of the reliability of the reports.[62]

a. Reports of non-governmental organizations and international organizations

110. A document cannot be admitted into evidence unless "relevant to the trial".[63] Furthermore, its probative value must be weighed against its possible prejudicial effect.[64]

111. Thus, Trial Chamber I considered that a report is reliable where it provides sufficient guarantees of impartiality and includes "sufficient information on

[60] Decision, paras. 213-231; see also ICC-01/04-01/06-3379-AnxIII.
[61] Decision, paras. 195-199 and 241; ICC-01/04-01/06-3379-AnxIII, pp.13-15.
[62] Decision, para. 216.
[63] ICC-01/04-01/06-1398-Conf, paras. 27-32.
[64] ICC-01/04-01/06-2135, para. 34.

[its] sources and the methodology used to compile and analyze the evidence".[65]

112. On that basis, where a Chamber intends to rely on information given in a report, it must analyse first and foremost its reliability and its relevance. It is all the more necessary for the Chamber to analyse these documents since one of the parties has brought to its attention considerations which cast doubt on their reliability.

113. The Defence has set out several arguments on that issue, referring precisely to evidence admitted at trial, which call into question the relevance and reliability of these additional documents.[66]

114. The Chamber, moreover, invited submissions from the parties on said documents,[67] and the Defence complied.

115. However, the Chamber did not respond to any of its submissions, considering, out of hand,

> [TRANSLATION] that the Additional Documents Entered on Record are relevant and that they are by way of illustration. It notes that 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. It is to be noted in this regard, that 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 Chamber sees no need to engage in a detailed analysis of the reliability of each Annex.[68]

116. The Chamber therefore made an error of law by failing 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.[69]

---

[65] ICC-01/04-01/06-2842, paras. 738-740; ICC-01/04-01/07-2635, paras. 29-30, p. 22.
[66] ICC-01/04-01/06-3374, paras. 31-49.
[67] ICC-01/04-01/06-3339-tENG, para. 11.
[68] Decision, para. 216.
[69] ICC-01/04-01/06-3379-AnxIII.

117. Yet, it is clear that the 26 additional documents entered in the record, which the Chamber relied on to set Mr Lubanga's civil liability, fall short of the requisites of relevance and reliability.

118. Annexes 3 to 5, 7, 9 to 24 and 26[70] are of no use since they describe events outside the time frame of the charges or events which concern the Democratic Republic of the Congo as a whole and not the UPC/FPLC in Ituri.

119. Although annexes 1, 2, 6, 8 and 25, provide information about the UPC/FPLC during the time frame of the charges, they cannot be used under the circumstances. Some of these reports do not specify the age of the children[71] described as former child soldiers, while others give an estimate of the number of those under 18 years of age who were allegedly enlisted into the UPC/FPLC, but make no specific assessment of the recruitment of children under the age of 15 years.[72]

120. Similarly, the estimate given by the organization Child Soldiers refers to children who were 8 to 17 years old when they were enlisted into the UPC/FPLC,[73] yet it does not specify the proportion under the age of 15 years.

121. Furthermore, the information given in these reports must be taken with the utmost caution given that its reliability is slight.

122. The testimony heard by Trial Chamber I made clear that the reports of the NGOs and MONUC could not be likened to investigative work[74] and that their legal value had to be placed in perspective.[75] In the words of Witness W-0582, an investigation team leader in the Office of the Prosecutor at the Court:

---

[70] ICC-01/04-01/06-3344-tENG, para. 3.
[71] ICC-01/04-01/06-3344-Anx6, p. 13.
[72] ICC-01/04-01/06-3344-Anx2, p. 53; ICC-01-04-01-06-3344-Anx8, p. 15; ICC-01-04-01-06-3344-Conf-Anx25, p.2.
[73] ICC-01/04-01/06-3344-Anx2, p. 53.
[74] T-208-FRA WT, p. 29, line 14 to p.30, line 19; Rule68Deposition-CONF-FRA ET, 17 November 2010, p. 49, lines 16-17 and p. 50, lines 13-23.
[75] Rule68Deposition-CONF-FRA ET, 16 November 2010, p. 22, lines 15-28.

> [TRANSLATION] it must be acknowledged that humanitarian groups' methods of investigation are, in my opinion, a sort of a general journalism rather than anything resembling police investigation activities.[76]

123. It was established that the way these organizations go about their work offers no guarantee as to the veracity of the information imparted in their reports.[77]

124. All too often the reports do nothing more than repeat statements given to others[78] with no effort to verify or corroborate them or even to confirm the identity of the person who made them.

125. Yet, the Court has frequently recalled that indirect information, hearsay, carries less probative value.[79]

126. The inadequate and, in some cases, lack of verification of sources[80] by the authors of these reports bar the attachment of any probative value to the reports in a judicial setting.[81]

127. When Mr Prunier, an expert witness, testified before Trial Chamber I, he acknowledged that some of the findings in the United Nations reports were arrived at by inference rather than observation:

> [TRANSLATION] (…) the killers' identity is inferred from the victims' identity on the basis that one particular group kills another particular group.[82]

128. The approximations in the organizations' reports also call into question their estimates of the number of child soldiers.[83]

---

[76] Rule68Deposition-CONF-FRA ET, 17 November 2010, p.48, lines 26-28.
[77] T-157-ENG RT, p. 21, lines 7-18: "In the case of MONUC reports there can be choices that are made. One chooses to say at this point in time it could be counter-productive to say one thing or another. And in an attempt to prove the situations, to calm things down, in an attempt to make progress, well, MONUC has a role to play, to have to improve the situation. Truth isn't always beneficial, it shouldn't always be expressed, especially if someone is in a situation where things are uncertain. If you think a certain interpretation is more useful, productive and could reduce the possibility of conflict, well, in such a situation if matters are uncertain one will choose the most positive solution, the most positive option."
[78] T-38-FR, p. 102, lines 20-24; T-157-ENG-CT, p. 15, lines 9-10.
[79] ICC-01/04-01/07-2635, para. 29; ICC-02/11-01/11-432, para. 28.
[80] T-208-FRA WT, p. 30, line 20 and p. 31, lines 12-13; T-39-FRA, p. 80, lines 13-21; T-38-FR, p. 84, lines 20-22; ICC-01/04-01/07-2635, para. 29; T-156-FRA-CT; p. 30, lines 2-23.
[81] Rule68Deposition-CONF-FRA ET, 17 November 2010, p. 45, lines 26-27; T-157-ENG-CT, p. 20, lines 4-10.
[82] T-157-ENG-CT, p.13, lines 2-3.

129. Witness W-0582 thus pointed out that numerous NGO reports contained "generalisations"[84] and that some NGOs tended to "over-estimate" the number of victims.[85]

130. In a similar vein, he stated that it was not uncommon for information in a report to be repeated and disseminated by other NGOs with no verification whatsoever.[86] Consequently, the repetition of an estimate in several reports does not constitute corroboration.

131. This can be said of the "Watchlist on Children and Armed Conflict"[87] report, which merely repeats the information in the United Nation's thirteenth report on the percentage of child soldiers in armed groups in the DRC. The Chamber therefore erred in citing this report as a source which corroborates the information given in the United Nation's thirteenth report.[88]

132. Lastly, these reports are not sufficiently specific about their sources and the methods of estimation, precluding the Defence's verification of their content.

133. It follows that the reports provided as annexes 1 to 26 do not satisfy the criteria for reliability and relevance set by the Court.

134. The Defence also points out that the Chamber relied on a report by the International Bank for Reconstruction and Development to determine the baseline figure C3,[89] even though this document was never imparted to the parties who were unable to make submissions on its relevance and reliability.

---

[83] Rule68Deposition-CONF-FRA ET, 17 November 2010, p.46, lines 16-17 and p. 49, lines 1-11; T-157-ENG-CT, p. 12, lines 10-11.
[84] Rule68Deposition-CONF-ENG ET, 17 November 2010, p. 44, lines 1-3.
[85] Rule68Deposition-CONF-ENG ET, 18 November 2010, p. 14, lines 11-14.
[86] Rule68Deposition-CONF-FRA ET, 17 November 2010, p. 45, lines 8-20.
[87] ICC-01/04-01/06-3344-Anx8, p. 26.
[88] Decision, para. 217.
[89] ICC-01/04-01/06-3379-AnxIII, pp. 9-10.

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

135. The Chamber relied on the demobilization lists provided by the Democratic Republic of the Congo to conclude that "[TRANSLATION] the total number of victims affected by the crimes of which Mr Lubanga was convicted is far greater than the number of persons in the sample who have established that they are victims for the purpose of reparations."[90]

136. The Chamber also used the information from these lists to determine the percentage of child soldiers under the age of 15 years.[91]

137. The two lists provided by the Democratic Republic of the Congo give a breakdown of the child soldiers enlisted in the UPC/FPLC from September 2002 to August 2003 who received assistance from the DDR programmes.

138. The Defence made submissions on the reliability of the demobilization lists,[92] to which the Chamber did not respond.

139. In fact, in the Judgment Handing Down Conviction against Mr Lubanga, Trial Chamber I considered that it could not rely on the content of 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."[93]

140. As no probative value was attached to these reports at trial, they could not be used to assess the number of possible victims.

141. Furthermore, the Defence has noticed that the large majority of these children appear to have given 27 July 2003 as the date of recruitment – a coincidence

[90] Decision, para. 199.
[91] ICC-01/04-01/06-3379-AnxIII, pp. 13-15.
[92] ICC-01/04/01/06-3374, paras. 58-64.
[93] ICC-01/04-01/06-2842, para. 740.

that strains credibility, especially as this date is close to that of the Operation Artemis deployment in June 2003.

142. That being so, by disregarding the Defence submissions and drawing conclusions contrary to those of Trial Chamber I, the Chamber made an error of law, or, at the very least, clearly misappreciated the facts.

143. Lastly, the "[TRANSLATION] methods of reasoning"[94] applied by the Chamber to these irrelevant and unreliable data result in what can only be regarded as dubious conjecture.

144. By establishing, in particular, baseline mortality figures, which were revised and then lowered,[95] and by attempting to calculate the proportions of ethnic groups within the Ituri population,[96] the Chamber's efforts are more akin to tentative conjecture than the methods and reasoning which befit judicial proceedings.

145. By proceeding on this basis to assess the number of victims "[TRANSLATION] who may be identified during the implementation of reparations", the Chamber misapplied the requisite standard of proof and thus made an error of law. As a result of this error of law, the Chamber wrongfully ordered Mr Lubanga to pay USD 6,600,000 in reparations for the harm suffered by "[TRANSLATION] hundreds and possibly thousands more victims" who are unidentified and "[TRANSLATION] who may be identified during the implementation of reparations."[97]

146. The Appeals Chamber is accordingly asked to determine that the Trial Chamber made an error of law and to reverse the Decision in that it orders Mr Lubanga to pay USD 6,600,000 in reparations for the harm suffered by

[94] Decision, para. 223; see also ICC-01/04-01/06-3379-AnxIII.
[95] ICC-01/04-01/06-3379-AnxIII, pp. 17-19.
[96] ICC-01/04-01/06-3379-AnxIII, pp. 10-12.
[97] Decision, para. 280.

"[TRANSLATION] hundreds and possibly thousands more victims" who are unidentified.

THIRD GROUND OF APPEAL – VIOLATION OF THE RULES OF A FAIR TRIAL

147. Rule 97(3) of the Rules of Procedure and Evidence prescribes, in matters of reparations, that the rights of the convicted person be respected.

148. The reparations proceedings are part of a judicial process, are an integral part of the trial proceedings and are governed by the rules of a fair trial, foremost among which is the requirement to be afforded notice and the opportunity to be heard [*débat contradictoire*], giving the person prosecuted the opportunity to acquaint him- or herself with and to canvass the entirety of the submissions and evidence put before the bench.

149. At the reparations phase, effect is given to this fundamental principle of a fair trial by article 75(3) and rules 94(2) and 97(3), which vest in the convicted person the right to canvass the submissions and the evidence brought before the bench.

150. Article 68 of the Statute makes provision for the Court to order measures to protect the safety of victims and witnesses, on condition that those measures are not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

151. Pursuant to regulations 99 and 100 of the Regulations of the Registry, a Chamber may have to order the redaction of certain information from the dossier of the applications for participation or reparations, and even the identity of the possible victims, where the safety of the persons in question so justifies.

152. Full disclosure to all of the parties, including the Defence, nevertheless remains the rule, and redaction an exception.[98]

153. Thus, in order to decide, on the facts of the individual case, whether there is a need to redact certain information, the Chamber must conduct a careful case-by-case assessment, balancing the various interests at stake.[99]

154. The withholding of certain information must not create the risk of a manifest inequality of arms, or the risk of little, or no, prospect of a fair trial.[100]

155. It rests with a Chamber asked to rule on a matter of redaction to consider the possible risk from disclosure of the identity of the person concerned and the necessity of the protective measures, by satisfying itself that they are not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[101]

156. In the instant case, the Chamber ordered that all of the information relating to the place of residence of the victims who may be eligible and other contact information which could reveal their whereabouts be redacted from their dossiers.[102] Where possible victims objected to disclosure of their identity to the Defence, the Chamber required the Registry to redact their names and any information which could identify them.[103]

157. In determining that "[TRANSLATION] the Defence had sufficient information to impugn the evidence brought against it in a process which duly afforded it

---

[98] Appeals Chamber, *The Prosecutor v. Germain Katanga*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", 13 May 2008, ICC-01/04-01/07-475, para. 70.
[99] *Ibid.*, para. 66.
[100] *Ibid.*, para. 62.
[101] "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", 14 December 2006, ICC-01/04-01/06-773, paras. 21, 33 and 34.
[102] "Order for the Transmission of the Application Files of Victims who may be Eligible for Reparations to the Defence Team of Thomas Lubanga Dyilo", 22 February 2017, ICC-01/04-01/06-3275, para. 14.
[103] *Ibid.*, paras. 16 and 18.

notice and the opportunity to be heard, and, hence, a fair hearing",[104] despite the extensive redactions to the applications for reparations, the Chamber made an error of law or, at the very least, clearly misappreciated the facts.

158. **First**, the systematic redaction of all information which could reveal the applicants' whereabouts, even though many of them expressed no fear for their safety, violates the requirement for notice and the opportunity to be heard in that it is antithetical to the fundamental principle that disclosure of information to all of the parties to the proceedings is the rule, and redaction the exception.

159. The Chamber did not consider the dossiers of the possible victims case-by-case in order to decide whether the disclosure of the information could put them in danger.

160. The risk alleged must entail an objectively justifiable risk to the safety of the person concerned, arising directly from the disclosure of particular information to the Defence. The Appeals Chamber has held, in that particular connection, that it is important "[to determine] whether there are factors indicating that [the person prosecuted] may pass on the information to others or otherwise put an individual at risk by his or her actions". [105]

161. The Court must accordingly determine, *inter alia*, whether the risk can be averted by instructing the parties to keep the information in question confidential.[106]

162. In the instant case, to justify those sweeping redactions, the Chamber relied on the findings [REDACTED]."[107]

163. That observation makes no reference to Mr Lubanga's attitude [REDACTED].

---

[104] Decision, para. 59.
[105] ICC-01/04-01/07-475, para. 71.
[106] *Ibid.*, para. 72.
[107] Decision, para. 56; [REDACTED].

164. Moreover, [REDACTED]".[108]

165. In 13 years of proceedings, none of the victims or witnesses whose identity was disclosed confidentially to Mr Lubanga have been subjected to pressure or retaliation.

166. Consequently, in ordering systematic redactions with no justification of an objective risk to safety ensuing from the disclosure of specific information to the Defence and without inquiring whether confidential disclosure might suffice to protect the victims, the Chamber made an error of law.

167. In any event, even were such a risk found to exist and redaction were the only measure that could protect the person concerned, the Chamber had a duty to assess the relevance to the Defence of the information to be withheld[109] before balancing all the interests at stake.

168. In this instance, the redactions ordered made it impossible for the Defence to duly canvass the dossiers of the possible victims submitted to the Chamber.

169. Specifically, the disclosure of an applicant's first name and surname is clearly insufficient for the Defence to make verifications.

170. Without information about the applicants' whereabouts the Defence could not make the necessary enquiries to check the applicants' statements.

171. The Defence therefore submits that, in not allowing Mr Lubanga to duly canvass the possible victims' allegations, the Chamber deprived him of his right to be afforded notice and the opportunity to be heard and thus made an error of law.

172. That error of law has a direct impact on the number of victims the Chamber used to assess the size of the award against Mr Lubanga.

---

[108] Decision, para. 56; [REDACTED].
[109] ICC-01/04-01/07-475, para. 72.

173. **Second**, the Chamber ordered the redaction of information that could identify the persons whose statements were appended to the applicants' dossiers.

174. It decided "[TRANSLATION] that any information which could identify or give the whereabouts of a person named or referred to in a dossier, but who has not given express consent to the disclosure of his or her identity to the Defence, must […] also be redacted".[110]

175. In conditioning disclosure of that information to the Defence on the prior consent of those persons rather than on the determination of a risk to safety, the Chamber introduced a non-statutory criterion, in violation of the principles governing redactions and, hence, the rules of a fair trial.

176. **Third**, the Chamber made an error in law by ordering the redaction of the names and information that could identify the possible victims who had not consented to the disclosure of their identities to the Defence.

177. The Chamber ordered the redactions without assessing case-by-case the risk to the applicants and without stating that there was an objectively justifiable risk to safety arising from the disclosure of the applicants' identities to Mr Lubanga.

178. The justification for the redactions relied only on the understandable sense of fear voiced by the victims who may be eligible, but was not based on a real risk.

179. Additionally, some applicants who refused to disclose their identities to the Defence had, in any case, stated that they did not fear for their safety.[111]

---

[110] Decision, para. 52.

[111] Annex 1 to the Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx1, para. 176; Annex 2 to the Defence Observations of 5 May 2017, ICC-01/04-01/06-3311-Conf-Anx2, paras. 28, 36, 63, 287 and 344; Annex 1 to the Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx1, paras. 238, 259, 336 and 390; Annex 2 to the Defence Observations of 22 May 2017, ICC-01/04-01/06-3315-Conf-Anx2, para. 229; Annex 1 to the Defence Observations of 30 May 2017, ICC-01/04-01/06-3320-Conf-Anx1, paras. 94 and 147; Annex 1 to the Defence

180. [REDACTED].[112]

181. [REDACTED].[113]

182. Moreover, some of the applicants' accounts were redacted, even though the applicants had consented to the disclosure of their identities to the Defence.[114] Those redactions run counter to the wishes of those possible victims who clearly expressed a preference for their identities and the events of which they were victims to be made known to Mr Lubanga.[115]

183. The aforegoing considerations make clear that the redactions were not justified by any risk to safety arising from the disclosure of the applicants' identities to Mr Lubanga. They were therefore ordered in violation of the principles governing redactions.

184. The Defence further submits that it was unnecessary to redact the accounts to protect the applicants' identities. According to the Chamber's own conclusions, thousands of children under the age of 15 years were enlisted or used by the UPC/FPLC armed group between September 2002 and August 2003. It would therefore have been wholly impossible for the Defence to identify an applicant just from the name of a commander, a battle and/or a training site.

185. The redactions constitute a serious violation of Mr Lubanga's right to a fair trial.

Observations of 31 May 2017, ICC-01/04-01/06-3322-Conf-Anx1, paras. 166, 200 and 254; Annex 1 to the Defence Observations of 11 July 2017, ICC-01/04-01/06-3336-Conf-Anx1, paras. 45, 256 and 301.

[112] [REDACTED].

[113] See, above, paras. 160-163.

[114] See, *inter alia*, ICC-01/04-01/06-3304-Conf-Anx2-Red; ICC-01/04-01/06-3304-Conf-Anx12-Red; ICC-01/04-01/06-3304-Conf-Anx22-Red; ICC-01/04-01/06-3304-Conf-Anx25-Red; ICC-01/04-01/06-3304-Conf-Anx33-Red; ICC-01/04-01/06-3304-Conf-Anx34-Red.

[115] See, *inter alia*, ICC-01/04-01/06-3287-Conf-Anx3-Red; ICC-01/04-01/06-3287-Conf-Anx6-Red; ICC-01/04-01/06-3287-Conf-Anx28-Red.

186. In the case of *The Prosecutor v. Mr Al Mahdi*, the Appeals Chamber held that the withholding of the applicants' identities from the Defence during the Trust Fund's victim screening process was legitimate only because the Trial Chamber had already set the convicted person's monetary liability and that, therefore, Mr Al Mahdi's rights were not thereby affected.[116]

187. The same is not true here, since the Chamber set Mr Lubanga's financial liability at a total of USD 3,400,000 on the basis of the number of applicants who were accorded victim status.[117]

188. Mr Lubanga was directly prejudiced by his being prevented from duly canvassing the merits of the applications for reparations submitted to the Chamber.

189. The withholding from the Defence of the identities of most of the victims who may be eligible and, with them, factual details that could directly or indirectly identify them, precluded any investigation or scrutiny of the merits of the redacted dossiers.

190. The identity of the applicant, the facts alleged (date and site of enlistment, training camps, battles, activities, names of commanders, site and date of demobilization, etc.) and the description of the harm claimed are information essential to the Defence if it is to have the opportunity to analyse and canvass the information put before the Bench.

191. That information is of fundamental significance in reparations proceedings where the size of the convicted person's liability for reparation turns on the number of possible victims.

192. Its redaction necessarily deprives the Defence of any notice and the opportunity to be heard.

---

[116] ICC-01/12-01/15-259-Red2, para. 93.
[117] Decision, paras. 259 and 279.

193. For example, the only information regarding indirect Victim a/30009/17[118] disclosed to the Defence was the month and duration of the direct victim's enlistment. The first names and surnames of the direct victim and the indirect victim, the site of enlistment, the names of the camps and sites of service, the types of wounds inflicted, the site of demobilization and the full identity of the witness were redacted from the form.

194. Similarly, on Victim a/30011/17's form, as disclosed to the Defence, information about the applicant's identity, the applicant's place of residence at the time of enlistment, the sites of battles, the names of commanders, the activities and roles performed in the militia, and the details of the physical harm and photographs in support were redacted.

195. Regarding direct Victim a/30028/17,[119] the Defence was privy only to the date of enlistment and the date of separation from the armed group. The site of enlistment, the names of the camps where the victim was allegedly taken, the names of battle sites, the role in the armed group, the description of the wounds inflicted, the sites of escape and demobilization, and the names of the commanders were redacted from the form disclosed.

196. Those examples are not isolated examples since identical, extensive redactions were applied to most of the dossiers disclosed to the Defence.

197. The withholding from the Defence of essential information in the applications for reparations deprived it of notice and the opportunity to be heard and precluded a fair trial.

198. Consequently, the Chamber made an error of law or, at the very least, clearly misappreciated the facts in ruling that "[TRANSLATION] the Defence had sufficient information to impugn the evidence brought against it in a process

[118] ICC-01/04-01/06-3287-Conf-Anx14-Red.
[119] ICC-01/04-01/06-3287-Conf-Anx33-Red.

which duly afforded it notice and the opportunity to be heard, and, hence, a fair hearing".[120]

199. The Chamber could not legitimately consider that Mr Lubanga had been afforded notice and the opportunity to be heard on the ground that "[TRANSLATION] the Defence was in a position to make submissions on dossiers of victims which are similar to the dossiers of those victims who may be eligible who had refused to disclose their identity to the Defence".[121]

200. The redactions to the dossiers of the possible victims who had refused to disclose their identity to the Defence cannot be mitigated by the statements and/or supporting documentation submitted by other applicants who had consented to the disclosure of their identity.

201. Each account is particular to the possible victim concerned and must be assessed individually, however similar[122] it may be to the account of another applicant.

202. At the reparations phase, therefore, the identification of the victims is necessary and entails scrutiny of each application for reparations dossier submitted to the Chamber.

203. Moreover, the Chamber itself analysed case-by-case each of the 473 dossiers[123] to determine whether a direct victim was under the age of 15 years at the time of enlistment, conscription or use in the UPC/FPLC between 1 September 2002 and 13 August 2003.

204. In denying victim standing to the 48 applicants whose dossiers were rejected, the Chamber took into consideration each piece of information supporting the account given and based its decision on, *inter alia*, inconsistencies between the

[120] Decision, para. 59.
[121] Decision, para. 58.
[122] *Idem*.
[123] ICC-01/04-01/06-3379-Conf-AnxII-Red.

applications for participation and the applications for reparations,[124] the lack of any ties to the UPC/FPLC,[125] or the absence of information confirming that the recruitment into or use by the armed group took place during the time frame of the charges.[126]

205. Since the Chamber conducted a detailed, individualized examination of each of the dossiers before it, the requirements of a fair trial demand that the Defence have the opportunity to make detailed, individualized submissions on each of those dossiers.

206. The above observations show that the extensive redactions to the applications for reparations deprived of all effect the right vested in Mr Lubanga by article 75(3) and rules 94(2) and 97(3) to canvass the submissions and evidence put before the Bench, and were in serious violation of the fairness of the trial.

207. The Appeals Chamber is accordingly asked to determine that the Chamber made an error of law and to reverse the Decision in that it orders Mr Lubanga to pay USD 10,000,000.

FOURTH GROUND OF APPEAL – VIOLATION OF THE PROVISIONS OF RULES 97 AND 98 OF THE RULES OF PROCEDURE AND EVIDENCE

208. It follows from rules 97 and 98 of the Rules of Procedure and Evidence, read together in the light of the principle of fundamental fairness, that an award against a convicted person necessarily amounts only to all or part of the actual cost of the reparations ordered.

209. Rule 98 refers to "an award for reparations against a convicted person" [Emphasis added].

---

[124] ICC-01/04-01/06-3379-Conf-AnxII-Red, see, *inter alia*, Victims a/0003/06, a/0149/08, a/0156/07, a/0188/07 and a/0405/08.
[125] ICC-01/04-01/06-3379-Conf-AnxII-Red, see, *inter alia*, Victims a/0149/08, a/0272/07, a/25252/16, a/25287/16 and a/30014/17.
[126] ICC-01/04-01/06-3379-Conf-AnxII-Red, see, *inter alia*, Victims a/0169/07, a/0188/07, a/25278/16 and a/30040/17.

210. That wording clearly signifies that an award against a convicted person necessarily amounts only to all or part of the reparations ordered, and not the quantum of the aggregate individual harm assessed independently of that of the reparations actually awarded by the Court.

211. In the case of collective reparations, the award against a convicted person can be assessed only on the basis of the actual cost of the collective award.

212. That is consistent with the position taken by the Appeals Chamber in the case of *The Prosecutor v. Germain Katanga*:

> In the view of the Appeals Chamber, 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. This approach is also appropriate in light of the need to ensure that reparations proceedings advance efficiently. In assessing the cost of repair, the Trial Chamber may seek the assistance of experts and other bodies, including the TFV, before making a final ruling thereon. This ruling on the cost of repairing the harm is to be taken by the trial chamber, in the exercise of its judicial functions under the Statute.[127]

213. National and international courts have also taken that approach on the rare occasions that they have had to make full or partial collective reparations awards, which have consisted of imposing on the State at fault an obligation to do [*obligation de faire*] and/or monetary payment equal to the cost of a specified measure.[128]

214. As to the case at bar, in assessing the award against Mr Lubanga, the Chamber, proceeding by approximation, held that the award had to be equal to the aggregate individual harm, without regard for the actual cost of the collective reparations envisaged.

---

[127] "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'", 8 March 2018, ICC-01/04-01/07-3778-Red, para. 72.
[128] A Court H.R., *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment on the reparations, 19 November 2004, para. 104; A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, "Judgment of August, 31 2001 (Merits, Reparations and Costs)", para. 167.

215. The Chamber states that it "[TRANSLATION] now assesses the average harm suffered by each victim"[129] and concludes "[TRANSLATION] the Chamber reckons *ex æquo et bono* the harm suffered by each victim, direct or indirect victims, at USD 8,000"[130] [Emphasis added].

216. The Chamber thus awarded against Mr Lubanga USD 3,400,000 in respect of the 425 identified victims[131] and USD 6,600,000 in respect of the "*hundreds*" of unidentified victims,[132] that is, a total of USD 10,000,000 .[133]

217. Those figures were assessed without any reference to the cost of the collective reparations award to be made, whose nature and size the Chamber never considered.

218. Yet, the liability for reparations which Mr Lubanga may attract can be no greater than the collective award, instead of no greater than the quantum of the aggregate individual harm.

219. The Chamber therefore should not have set the award against Mr Lubanga without first ruling on the content and the cost of the collective reparations.

220. But it did not: the Chamber set the award for reparations against Mr Lubanga without assessing the cost of the reparations.

221. The calculation method used by the Chamber is even less justified since the collective nature of the reparations means that none of the victims will personally be awarded USD 8,000 and that figure cannot, therefore, in any way be considered "an award for reparations" within the meaning of rule 98.

222. Moreover, the size of the collective award envisaged, as yet unknown, can evidently only be lower than the aggregate individual harm. By making an

[129] Decision, para. 251.
[130] Decision, para. 259.
[131] Decision, para. 279.
[132] Decision, para. 280.
[133] Decision, para. 281.

award against Mr Lubanga that clearly exceeds the actual cost of the forthcoming collective reparations, the Chamber gave its decision a punitive character that has no legal basis.

223. By setting the size of the award for which Mr Lubanga is liable at that of the aggregate individual harm rather than the actual cost of the collective reparations, the Chamber misconstrues the purpose of reparations proceedings and wrongfully gives its award an essentially punitive character, in violation of the principles enshrined in the Statute and the Rules of Procedure and Evidence.

224. By so ruling, the Chamber committed a blatant error of law.

225. The Appeals Chamber is accordingly asked to determine that the Chamber made an error of law and to reverse the Decision in that it orders Mr Lubanga to pay USD 10,000,000.

FIFTH GROUND OF APPEAL – VIOLATION OF THE PRINCIPLES APPLICABLE TO A CONVICTED PERSON'S LIABILITY FOR REPARATIONS

226. The Appeals Chamber has held:

> The convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case.[134]

227. The convicted person's liability for reparations depends on the mode of individual criminal responsibility established vis-à-vis that person and on the specific elements of that responsibility.[135]

228. In holding Mr Lubanga liable for the full award for reparations without taking into account the plurality of co-perpetrators, the degree of his participation in the commission of the crimes, his efforts to promote peace, and the specific

[134] ICC-01/04-01/06-3129-AnxA, para. 21.
[135] ICC-01/04-01/06-3129, para. 118.

circumstances of the case,[136] the Chamber made an error of law or, at the very least, clearly misappreciated the facts.

a. The existence of a plurality of co-perpetrators

229. In the order of 24 March 2017, handed down in the case of *The Prosecutor v. Germain Katanga*, the Chamber held, correctly, that the principle of holding any one of the perpetrators and accessories liable for the totality of the harm suffered by the victims [*responsabilté solidaire*] "cannot be imported into the particular context of cases before this Court",[137] and that, consequently, contrary to the view taken by the Trust Fund for Victims, Mr Katanga could not, by way of that principle, be held liable for the totality of the harm caused by the crimes of which he was convicted.

230. It follows that the burden of the reparations award must be apportioned among the co-perpetrators and accessories where criminal responsibility was incurred by participation in a common plan, regardless of whether the other co-perpetrators have been prosecuted, convicted or even identified.

231. In the case at bar, by Judgment of 14 March 2012, Trial Chamber I convicted Mr Lubanga of the crimes of conscripting, enlisting and using children under the age of 15 years in the FPLC as a co-perpetrator for his participation in the implementation of a common plan.[138]

232. Trial Chamber I thus found a plurality of co-perpetrators responsible, foremost among them Floribert Kisembo, Bosco Ntaganda and Chief Kahwa.[139] Trial Chamber I also mentioned Chief Tchaligonza and Chief Kasangaki as among the co-perpetrators.[140]

233. Since each co-perpetrator contributed substantially to the commission of the

[136] Decision, paras. 268-281.
[137] ICC-01/04-01/07-3728-tENG, para. 263.
[138] ICC-01/04-01/06-2842, paras. 1353-1358.
[139] *Ibid.*, para. 1353.
[140] *Ibid.*, para. 1128.

crimes, each incurs their own share of the liability.

234. It follows that liability for reparations must be apportioned among the co-perpetrators according to their respective participation in the commission of the crimes. Regardless of the degree of his participation, no single co-perpetrator bears all of the liability for the crimes committed.

235. The fact that none of the co-perpetrators referred to in the Judgment has been prosecuted or definitively convicted[141] is no justification for holding Mr Lubanga liable for the totality of the reparations, as a court of law has established that he is only one of the co-perpetrators of the crimes of which he was convicted, regardless of the identity of the co-perpetrators.

236. Since the principle of apportioning full liability for the same harm to any of the multiple wrongdoers [*solidarité*] has been ruled out, it cannot be otherwise.

237. Put differently, were another of the co-perpetrators to be convicted of acts identical to the crimes of which Mr Lubanga was found guilty, an order against Mr Lubanga for the totality of the reparations would be a legal nonsense.

238. The reason for this is that since the aforesaid principle is not applicable at the Court, that other co-perpetrator could not be found liable for the entire reparations award made in the case.

239. The corollary is that no reparations award could be ordered against that other co-perpetrator, lest the victims be compensated twice for the same harm.

240. That analysis is not purely theoretical, since one of the co-perpetrators referred to in the Judgment handed down by Trial Chamber I, Mr Bosco Ntaganda, is currently standing trial before the Court as an indirect co-perpetrator and/or a direct perpetrator for the war crimes of conscripting or enlisting children

[141] Decision, para. 277.

under the age of 15 years into the armed forces or armed groups or using them to participate actively in hostilities.[142]

241. In imposing upon Mr Lubanga liability for the full award required to make reparation to the victims of the crimes of which he was convicted as a co-perpetrator,[143] the Chamber made an error of law.

242. The Appeals Chamber is accordingly asked to determine that the Chamber made an error of law in holding Mr Lubanga liable for the full award for reparations.

b. Degree of participation in the commission of the crimes

243. The Chamber relied on the findings of Trial Chamber I to assess Mr Lubanga's liability as a result of the commission of the crime.

244. In so doing, it gave consideration to the gravity of the crime, the scale of the crime, Mr Lubanga's role as army chief and political leader of the UPC/FPLC and his involvement within the armed group.[144]

245. Yet in the Judgment of 10 July 2012, Trial Chamber I recalls that it

> determined that Mr Lubanga agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. The Chamber did not conclude that Mr Lubanga meant to conscript and enlist boys and girls under the age of 15 into the UPC/FPLC and to use them to participate actively in hostilities. Instead, the Chamber decided Mr Lubanga was aware that, in the ordinary course of events, this would occur. It was in this context that Mr Lubanga was convicted as a co-perpetrator who made an essential contribution to the common plan [Emphasis added].[145]

[142] "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda", 9 June 2014, ICC-01/04-02/06-309, paras. 74 and 97.
[143] Decision, paras. 279-281.
[144] Decision, paras. 270, 271 and 275.
[145] ICC-01/04-01/06-2901, para. 52

246. According to Trial Chamber I, the "ordinary course of events" refers to the concepts of "possibility" and "probability", which are inherent in the concepts of "risk" and "danger".[146] Departing from Pre-Trial Chamber II's strict interpretation, which was based on the concept of "virtually certain consequence",[147] Trial Chamber I relied on the concept of *dolus eventualis*, described by Pre-Trial Chamber I as the most indirect form of criminal intent.[148]

247. The indirect and third-degree form of criminal intent ascribed to Mr Lubanga should therefore have been taken into consideration by the Chamber in assessing his share of the liability for reparations.

248. Furthermore, although Trial Chamber I held, having regard to the body of the evidence tendered, that the letters, notes, minutes, reports and decrees referring to measures for the demobilization of minors were insufficient to establish the absence of criminal intent, those items of evidence were relevant to the determination of the degree of his participation in the commission of the crimes.

249. For instance, the authenticity and sincerity of the minutes dated 25 February 2003 recording the discussion at the meeting that day between delegates from the self-defence committees and the convicted person were never called into question. Yet, they clearly show that, despite strong opposition from the self-defence committees, Mr Lubanga stressed the importance of disarming the children and the need to not expose them to combat.[149] Mr Lubanga's words at that meeting, and the minutes that record them, cannot in any way be construed as a ruse intended to deceive the international community. There is nothing to cast doubt on the fact that they express Mr Lubanga's genuine

---

[146] ICC-01/04-01/06-2842, para. 1012.
[147] ICC-01/04-01/06-2773-Conf-tENG, footnote 72.
[148] ICC-01/04-01/06-803-tEN, para. 352.
[149] EVD-D01-01095; Witness D-0007: T-348-FRA-ET, p. 25, lines 4-24; See also ICC-01/04-01/06-2773-Conf-tENG, paras. 922-933.

sentiments and intentions with regard to the minors involved in the hostilities at the time.

250. Similarly, the authenticity and the sincerity of the report of the "*réunion du CEMG avec les commandants des grandes unites*" [TRANSLATION: meeting between the Chief of the General Staff and commanders of major units] of 16 June 2003[150] were never questioned.[151] That document, which proves that demobilization of the minors was of foremost concern at the time, shows that Mr Lubanga made clear to the military authorities that he wanted all the minors bearing arms – without exception – to be demobilized. The sentence "*voilà l'argument présenté par le Président et que nous avons adopté*" [TRANSLATION: this is the argument presented by the President, which we adopted] confirms without doubt the nature of the intentions that Mr Lubanga expressed personally to the military leaders. That document, which remained confidential until it was presented at trial, cannot in any way be suspected of having served as a disinformation ruse. Regardless of what the outcome of the meeting may have been, there can be no doubt that the report shows plainly the true nature of Mr Lubanga's intentions towards the enlisted minors.

251. The same can be said of the other documents relating to the measures for demobilization, most of which remained confidential until they were presented at trial. In particular, the report of 16 February 2003,[152] to which the Chamber attached probative value,[153] confirms Mr Lubanga's willingness to demobilize the minors from the self-defence forces.

252. Thus, beyond the indirect nature of the criminal intent imputed to Mr Lubanga, the evidence presented at trial establishes, at the very least, that Mr Lubanga, far from being indifferent to the fate of the minors involved in

[150] EVD-D01-01098.
[151] Similarly, see ICC-01/04-01/06-2842, paras. 1166, 1331 and 727.
[152] EVD-D01-01097.
[153] ICC-01/04-01/06-2842, para. 906.

the hostilities, on numerous occasions made the situation his concern and attempted to remedy it.

253. Those considerations, essential for the assessment of the degree of Mr Lubanga's participation in the commission of the crimes, were not, however, analysed by the Chamber in its determination of Mr Lubanga's liability for reparations.

254. The Appeals Chamber will determine that the Chamber made an error of law or, at the very least, clearly misappreciated the facts.

c. Mr Lubanga's efforts to promote peace

255. Fairness demands that Mr Lubanga's efforts to promote peace and reconciliation during the time frame of the charges be taken into consideration in the determination of his liability for reparations.

256. There is much evidence that Mr Lubanga strove, through numerous initiatives, in a sincere attempt to restore peace in Ituri;[154] in the course of those pacification and reconciliation efforts, he sometimes faced opposition from some FPLC leaders, but always endeavoured – sometimes in vain – to make peaceful means prevail over military means.[155]

---

[154] For example, video excerpt showing that a UPC/RP delegation was sent by Thomas Lubanga to meet representatives of the Lendu community in the region of Lipri to discuss pacification (T-128-CONF-FRA-CT, p. 59, line 1, to p. 60, line 13; EVD-OTP-00572, 00:00:00 to 00:19:00); Minutes of the meeting of 25 February 2003 between representatives of the self-defence committees, including D01-0007, and Thomas Lubanga, during which Mr Lubanga refers to his efforts to bring about reconciliation between the Hema and the Lendu so that total calm prevails in the region (EVD-D01-01095); Presidential decree of 3 September 2002 appointing the members of the UPC/RP executive, including John Tinanzabo as National Secretary for Pacification and Reconciliation (EVD-OTP-00721); Mr Tinanzabo was reappointed to the same post by the decree of 11 December 2002 reshuffling the UPC/RP executive (EVD-OTP-00740); Speech by the National Secretary for Pacification and Reconciliation on the occasion of the official establishment of the *Comité Vérité, Paix et Réconciliation* (CVPR) [Truth, Peace and Reconciliation Committee] (EVD-OTP-00713); Speech by Thomas Lubanga at the opening of the proceedings of the CVPR (EVD-OTP-00121); Mission order of 24 December 2002 to send a delegation of different ethnic communities to Arua, Uganda, as part of the Ituri pacification process (EVD-D01-01090); Order of 13 January 2003 appointing the members of the CVPR (EVD-D01-01091).

[155] See, for example, T-169-ENG-RT, p. 49, line 15, to p. 50, line 3 (P-0012); T-114-CONF-FRA-CT, p. 71, line 24, to p. 73, line 12 (P-0038).

257. In particular, it is established that upon taking office in September 2002, and until his arrest by the Congolese authorities, Mr Lubanga involved representatives of all the communities and all the regions of Ituri in all the Iturian political and administrative institutions in order to bring the different communities together and achieve a lasting end to the unrest.[156]

258. Mr Lubanga's many oral statements at trial confirm that he was anxious for a return calm to and for pacification.[157] At no time did he foment hatred or violence; at no time did he make discriminatory remarks about a community of Ituri.

259. Mr Lubanga's involvement in efforts to bring an end to the conflict and to shield all the communities of Ituri from its ravages should also have been considered by the Chamber in its assessment of the size of the reparations award against him.

260. Those factors were not entertained by the Chamber, and yet they are essential to the determination of Mr Lubanga's liability for reparations.

261. The Appeals Chamber will hold that the Chamber made an error of law or, at the very least, clearly misappreciated the facts.

d. The "specific circumstances of the case"

262. The Chamber did not respond to the Defence arguments about the specific circumstances of the case. The Appeals Chamber has nonetheless expressly

[156] For example, List of the members of the UPC/RP executive dated 26 January 2003 giving the ethnic and geographical representation on the UPC/RP national secretariats (EVD-D01-01093); Order of 13 January 2003 appointing the members of the CVPR (EVD-D01-01091); P-0041: T-126-CONF-FRA-CT, p. 25, line 4, to p. 31, line 10; p. 37, line 20, to p. 38, line 2; EVD-OTP-00721; P-0055: T-178-CONF-FRA-CT, pp. 48-62.

[157] For example, Speech by Thomas Lubanga at the Rwampara training camp, where he emphasized that the FPLC was not an ethnic army and that all the communities in Ituri must be protected (EVD-OTP-00570; T-128-CONF-FRA, p. 38, line 14, to p. 39, line 17); Television interview by Mr Lubanga, in which he stated that he works for all ethnic groups (EVD-OTP-00584; T-130-CONF-FRA-CT, p. 56, lines 17-25).

held that a convicted person's liability must be determined in the light of the specific circumstances of the case.

263. In this instance, the state of affairs confronting Mr Lubanga during the time frame of the charges was such that it is reasonable to think that the context of the crimes of which he was convicted must be considered in the determination of his liability at the reparations stage.

264. **First**, there is much evidence to show that the "common plan" aimed at building an armed force and the voluntary enlistment of a large number of youths during 2002 and 2003 was prompted by a need to contend with systematic and widespread massacres.[158] The creation of the organized armed force, named the FPLC, in September 2002 was thus seen as meeting a vital need for the survival of the communities targeted by the massacres; Mr Lubanga's actions during that period fell squarely within that need.

265. **Second**, there is much evidence to show that the communities subjected to the massacres could not in any way turn to the central Government authorities for protection. Worse still, the Congolese Government authorities appear to have been directly involved in organizing and perpetrating some of the massacres and/or were active accomplices of the direct perpetrators of the massacres.[159]

266. **Third**, there is much evidence to show that the United Nations forces, despite being present in Ituri before and during the time frame of the charges, and

[158] On the existence of systematic and widespread massacres: Expert P-0360: T-156-CONF-FRA-CT, p. 41, line 8, to p. 44, line 15; D-0004: T-243-CONF-FRA-CT3, p. 30, line 20, to p. 33, line 18 and p. 38, line 10, to p. 40, line 11; D-0037: T-349-FRA-ET, p. 6, lines 18-20; D-0006: T-254-CONF-FRA-CT, p. 76, line 21, to p. 77, line 4; P-0017: T-160-CONF-FRA-CT, p. 35, line 20, to p. 38, line 10; D-0011: T-346-FRA-ET, p. 62, lines 2-8; D-0007: T-348-FRA-ET, p. 48, line 28, to p. 49, line 7 and p. 51, line 27, to p. 52, line 1.

[159] On Kinshasa's involvement in the massacres, see P-0360: T-156-FRA-CT, p. 61, lines 12-16 and p. 65, lines 9-24. Witnesses W-0360, W-0055 and W-0017 confirm the major involvement of Uganda as an occupying power: T-156-FRA-CT, p. 40, lines 16-25 (P-0360); T-174-CONF-FRA-CT, p. 25, lines 11-12 (P-0055); and T-154-CONF-FRA-CT, p. 66, lines 7-20 (P-0017).

being fully aware of the massacres taking place, failed to take the appropriate measures to protect the civilian population.[160]

267. In that regard and in the light of the conduct of the national and international authorities who had a responsibility to protect the civilian population, fairness demands fair apportionment of the burden of the reparations for the crimes of which Mr Lubanga was convicted.

268. The Appeals Chamber is accordingly asked to determine that the Chamber made an error of law or, at the very least, clearly misappreciated the facts, and to reverse the Decision in that it orders Mr Lubanga to pay USD 10,000,000.

SIXTH GROUND OF APPEAL – VIOLATION OF THE *NON ULTRA PETITA* RULE

269. Although the Rome Statute and the Rules of Procedure and Evidence do not refer expressly to the *non ultra petita* rule, article 21 of the Statute requires the Court to apply the principles and rules of international law.

270. The *non ultra petita* rule is an established principle of international law. The jurisdiction of a civil court asked to rule on an application for reparations is circumscribed by the submissions brought by the parties. An applicant cannot, therefore, be awarded more compensation than the amount claimed, lest the court exceed the limits of its jurisdiction and the bounds of the matter put before it.[161]

271. Where a court departs from the rule that the judicial discussion is limited to what is sought, it rules *ultra petita*.

272. The International Court of Justice has held, for example, that it "is the duty of the Court not only to reply to the questions as stated in the final submissions

[160] P-0046: T-207-FRA-ET, p. 55, line 9, to p. 58, line 6 and T-208-FRA WT, p. 7, lines 4-21 and p. 2, line 19, to p. 5, line 10; P-0360: T-156-FRA, p. 44, line 24, to p. 45, line 24.
[161] D. W. Prager, "Procedural Developments at the International Court of Justice", *The Law and Practice of International Courts and Tribunals*, Vol. l (2002), p. 414.

of the parties, but also to abstain from deciding points not included in those submissions".[162]

273. Those principles barred the Court from ordering against Mr Lubanga reparations not sought in the submissions of the parties,[163] save where justified by "exceptional circumstances", which would authorize 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.

274. The foregoing shows that that exception is not applicable here.[164]

275. In fact, the V01 and V02 Legal Representatives, and the Office of Public Counsel for Victims claimed USD 6,000,000 in their respective submissions.[165]

276. The Chamber nevertheless set the reparations award against Mr Lubanga at USD 3,400,000 in respect of the 425 victims in the sample[166] and at USD 6,600,000 in respect of the "[TRANSLATION] hundreds and possibly thousands more victims",[167] that is, a sum-total of USD 10,000,000.[168]

277. By setting the total reparations award against Mr Lubanga at USD 10,000,000, a figure far in excess of that unanimously requested by the Legal Representatives of the Victims in their submissions, the Chamber ruled *ultra petita*.

---

[162] *Asylum case*, I.C.J. Reports 1950, p. 402; *Corfu Channel case*, Judgment of April 9th, 1949, I.C.J. Reports 1949, p. 4.
[163] Stanislas Kabalira, *The Right to Reparations under the Rome Statute of the International Criminal Court (ICC)* (Wolf Legal Publishers, 2016), p. 247.
[164] Paras. 9-46, above.
[165] ICC-01/04-01/06-3363, para. 29; ICC-01/04-01/06-3360-tENG, para. 60; ICC-01/04-01/06-3359-tENG, para. 76.
[166] Decision, para. 279.
[167] Decision, para. 280.
[168] Decision, para. 281.

278. The Appeals Chamber is accordingly asked to determine that the Chamber made an error of law and to reverse the Decision in that it ordered Mr Lubanga to pay USD 10,000,000.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER:

TO ALLOW this appeal;

TO DETERMINE that Trial Chamber II:

- made an error of law and violated the provisions of article 75 of the Statute and rule 95 of the Rules of Procedure and Evidence by taking into consideration hundreds and possibly thousands more unidentified victims who did not apply to the Chamber for reparations in assessing the scope and extent of the damage, loss and injury to the victims;

- made an error of law or, at the very least, clearly misappreciated the facts, and misapplied the standard of proof in determining the number of victims who qualify for reparations;

- made an error of law and violated the rules of a fair trial by determining that the redactions to the submissions and evidence did not violate the fairness of the proceedings;

- made an error of law and violated the provisions of rules 97 and 98 of the Rules of Procedure and Evidence in ruling that the award for which Mr Lubanga is liable was to be equal to the aggregate individual harm without regard for the cost of the collective reparations;

- made an error of law or, at the very least, clearly misappreciated the facts, and violated the principles applicable to the convicted person's liability for reparations;

- made an error of law and ruled *ultra petita* by setting the award for which Mr Lubanga is liable at USD 10,000,000;

And accordingly,

TO SET ASIDE the Decision of 15 December 2017 handed down by Trial Chamber II in that it:

- found that 425 of the 473 victims who may be eligible 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 to award those 425 victims collective reparations approved by the Chamber in the case;

- found that those 425 victims are but a sample of the victims who may be eligible and that hundreds and possibly thousands more victims suffered harm as a consequence of the crimes of which Mr Lubanga was convicted;

- set the reparations award for which Mr Lubanga is liable at a total of USD 10,000,000;

- directed from the Trust Fund submissions on the possibility of continuing to seek and identify victims with the assistance of the OPCV and the Legal Representatives of V01 and V02 Victims;

And so,

ADJUDGE AND DECLARE that, as matters stand, no monetary award for reparations can be made against Mr Thomas Lubanga Dyilo.

[signed]

Ms Catherine Mabille, Lead Counsel

Dated this 15 March 2018,

At The Hague, Netherlands