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THE APPEALS CHAMBER

Before Judge Erkki Kourula
Judge Sang-Hyun Song
Judge Anita Ušacka
Judge Sanji Mmasenono Monageng
Judge Ekaterina Trendafilova

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

Public Document

Defence document in support of the appeal against Trial Chamber I's *Decision establishing the principles and procedures to be applied to reparation*, rendered on 7 August 2012

Source: Defence team for Mr Thomas Lubanga Dyilo

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

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PROCEDURAL BACKGROUND

1. On 7 August 2012, the Trial Chamber issued the *Decision establishing the principles and procedures to be applied to reparations* (hereinafter “Decision on Reparations”).¹
2. On 10 August 2012, Trial Chamber I informed the parties and participants that the decision was “[TRANSLATION] to be considered to have been officially notified in English” and that it “[TRANSLATION] was not a reparation order within the meaning of rule 150”.²
3. On 13 August 2012, the Defence sought authorisation to appeal against the Decision on Reparations on the basis of article 82(1)(d) and rule 155 with a view to safeguarding its rights.³
4. On 24 August 2012, the Office of Public Counsel for Victims and the V02 team of Legal Representatives filed an appeal against the Decision on Reparations.⁴ The V01 team of Legal Representatives filed its appeal on 3 September 2012.
5. On 29 August 2012, Trial Chamber I authorised the Defence to appeal against the Decision on Reparations on the following four issues:⁵
 - By delegating certain judicial functions to the Trust Fund for Victims (“TFV”), the commission of experts and the Registry under the supervision of a new Trial Chamber, the Trial Chamber breached the provisions of the Rome Statute;
 - By holding that the “victims of sexual and gender-based violence”⁶ may, as such, be eligible for reparations in the proceedings against Mr

¹ ICC-01/04-01/06-2904.

² E-mail from the Chamber to the parties and participants on 10 August 2012.

³ ICC-01/04-01/06-2905; ICC-01/04-01/06-2917, para. 8.

⁴ ICC-01/04-01/06-2909.

⁵ ICC-01/04-01/06-2911.

⁶ ICC-01/04-01/06-2904, para. 200.

Thomas Lubanga, the decision contravened the principle that the convicted person shall only be ordered to make reparation for damage resulting from crimes of which he was found guilty;

- By holding that the Court should apply the “proximate cause” standard to determine the existence of a causal link between the crime committed and the harm suffered,⁷ the decision adopted a vague and imprecise criterion which may infringe the rights of Mr Thomas Lubanga;
- The standard of proof adopted by the Trial Chamber at the reparations stage does not allow respect for the rights of the convicted person to be guaranteed.

6. On 6 September 2012, the Defence lodged an appeal wherein it stated its intention to appeal the entirety of the Decision on Reparations under article 82(4).
7. In accordance with regulation 58 of the Regulations of the Court, the Defence makes the following submissions.

GROUND OF APPEAL

- 1. BY DELEGATING CERTAIN JUDICIAL FUNCTIONS TO THE TRUST FUND FOR VICTIMS (“TFV”), THE COMMISSION OF EXPERTS AND THE REGISTRY, UNDER THE SUPERVISION OF A NEW TRIAL CHAMBER, THE TRIAL CHAMBER BREACHED THE PROVISIONS OF THE ROME STATUTE**
8. The impugned decision provides that, in the case at bar, reparations will be dealt with principally by the TFV, overseen by a differently composed Chamber.⁸ The Chamber delegates to the TFV, in collaboration with the Registry, OPCV and the experts designated by the TFV,⁹ the power to assess

⁷ ICC-01/04-01/06-2904, paras. 249-250.

⁸ ICC-01/04-01/06-2904, para. 261.

⁹ ICC-01/04-01/06-2904, para. 282.

the harm suffered by the victims,¹⁰ to determine the appropriate type of reparations¹¹ and to identify the beneficiaries of these reparations.¹²

9. The Defence submits that the power to make orders for reparations is vested exclusively in the Trial Chamber which conducted the trial. The Trial Chamber seized of the case may not relinquish jurisdiction to a newly constituted Chamber, and may not further delegate to a non-judicial organ the power to rule on issues which fall within the ambit of its exclusive powers.

- The mandate of the Trust Fund for Victims does not empower it to exercise the functions and powers of the Trial Chamber as regards reparations whilst respecting the rights of Mr Lubanga

10. The TFV was established pursuant to article 79 by decision of the Assembly of States Parties. It is governed by the Regulations of the Trust Fund for Victims, which set forth the regulations applicable to the activities carried out by the TFV in pursuance of its double mandate, *viz.* (1) to implement court-ordered reparations and (2) to set up programmes to assist in the physical and psychological rehabilitation of victims and/or provide the material support they need.¹³
11. Under the provisions of the Statute and the Rules pertaining to the activities of the TFV, its expected role is essentially to manage the resources intended to pay for reparations ordered by the Court. For example, the Court may order that the amount of the reparations or the proceeds from fines and any other property confiscated be deposited with the TFV¹⁴ or that the amount of the reparations be paid through the TFV.¹⁵

¹⁰ ICC-01/04-01/06-2904, para. 285.

¹¹ ICC-01/04-01/06-2904, para. 282.

¹² ICC-01/04-01/06-2904, paras. 283 and 284.

¹³ <http://www.trustfundforvictims.org/legal-basis>; Regulations of the Trust Fund for Victims, articles 42 *et seq.*

¹⁴ Article 75(2); rule 98(2); regulation 118(2).

¹⁵ Rule 98(3); rule 98(4); regulation 118(2).

12. The Statute makes no provision whatsoever for the TFV to perform judicial functions. Similarly, no statutory provision or rule provides that the TFV has any power or function with regard to the determination of beneficiaries, the scope of the harm or the nature of the reparations. Moreover, the mandate vested by the Assembly of States Parties in the trust fund established for victims offers no guarantee to Mr Thomas Lubanga that his case will be heard publicly and impartially (articles 64(7) and 67(1)). As regards the activities of the TFV, none of the provisions of the Statute or the Rules provides for guarantees equivalent to those afforded to the accused before the Trial Chamber (articles 67(1) and 64(2); rule 97(3)).
13. Conversely, the relevant instruments provide that “the Court” shall determine the scope and extent of any damage, loss and injury to the victims and their beneficiaries;¹⁶ that “the Court” may make an order for reparations against the convicted person; and that “the Court” may seek measures under article 93(1) “to give effect to an order which it may make under this article”.¹⁷ Rule 218(3)(c) further states that orders for forfeiture and reparations shall specify “the scope and nature of the reparations ordered by the Court [...]”. Finally, rule 97 sets forth the procedure to be followed by “the Court” in assessing the reparations to be awarded in the event of a conviction.
14. There is therefore no doubt that States Parties vested the Court with the exclusive power to determine the beneficiaries of reparations, as well as their scope and nature, at the end of judicial proceedings.¹⁸

¹⁶ Article 75(1).

¹⁷ Articles 75(4) and 93.

¹⁸ Article 75; rules 97 and 218.

- The powers and functions of the Court in regard to reparations must be exercised by the Trial Chamber at the trial stage

15. The Defence submits that the functions and powers of “the Court” in respect of reparations must be exercised by Trial Chamber I, which is the only judicial body seized of the case at the trial stage.
16. The Statute provides that “[t]he judicial functions of the Court shall be carried out in each division by Chambers”.¹⁹
17. The impugned decision rightly recalls that “[r]eparations proceedings are an integral part of the overall trial process.”²⁰ In August 2011, the Chamber had stated that it considered that under the Statute, the trial “ends with the sentence that is imposed if the accused is convicted (Article 76 of the Statute) and any award of reparations (Article 75 of the Statute)”.²¹
18. Under the combined provisions of article 39(2)(b)(ii) and 74(1), the Trial Chamber’s functions must be carried out by three judges at each stage of the trial and all the judges must be present during all the proceedings.
19. The sole exception to this principle is contained in rule 38, which provides for the replacement, in specific conditions, of a trial chamber judge by an alternate judge for reasons such as resignation, accepted excuse, disqualification, removal from office or death. The relevant provisions of the Statute and the Rules make absolutely no provision for the transfer of powers from one trial chamber to three new alternate judges.
20. Under article 36(10), judges assigned to a trial chamber which has begun to hear a case must continue in office until completion of the case. The combined provisions of article 36(10) and rule 38(1) exclude the possibility of replacing a judge at the end of his or her term of office.

¹⁹ Article 39(2)(a).

²⁰ ICC-01/04-01/06-2904, para. 260.

²¹ ICC-01/04-01/06-2800, para. 47. [Translation note: quote is at para. 45]

21. The trial stage in the present case should end after the reparations proceedings, when all orders for reparations will have been made. Accordingly, only the bench of three judges who tried the case at the trial stage may deal with the reparations proceedings provided for in article 75.
22. It follows that statutory provisions preclude the Trial Chamber from delegating to a non-judicial body or a newly formed chamber the power to rule on issues which are exclusively within its purview.
- 2. BY HOLDING THAT THE COURT SHOULD APPLY THE “PROXIMATE CAUSE” CRITERION TO DETERMINE THE EXISTENCE OF A CAUSAL LINK BETWEEN THE CRIME COMMITTED AND THE HARM SUFFERED, THE DECISION ADOPTED A VAGUE AND IMPRECISE CRITERION WHICH MAY INFRINGE THE RIGHTS OF MR THOMAS LUBANGA**
23. The Trial Chamber considers that the Court should apply the “proximate cause” standard to determine the existence of a causal link between the crime committed and the harm suffered.²²
24. However, the Chamber could not have adopted such a standard without violating the rights of the Accused, since the “but for” inquiry²³ “relies on the imagination of the factfinder for an analysis of probabilities involving ‘facts’ that never happened”.²⁴ Relying on such a vague and imprecise standard would make the scope of the right to reparations dependent on the purely subjective appreciation by the person charged with applying it.
25. Contrary to the Trial Chamber’s holding,²⁵ there is an undeniable convergence in international courts and other international bodies towards a restrictive assessment of the causal link.

²² ICC-01/04-01/06-2904, paras. 249-250.

²³ ICC-01/04-01/06-2904, para. 250.

²⁴ D. Rue (J.), “Returning to the roots of the bramble bush: the “but for” test regains primacy in causal analysis in the American law institute’s proposed restatement (third) on torts”, *Fordham Law Review*, May 2003.

²⁵ ICC-01/04-01/06-2904, paras. 247 *et seq.*

26. Hence, the Extraordinary Chambers in the Courts of Cambodia held that “[t]he injury suffered must result directly from the criminal conduct of the Accused”²⁶ to establish a right to reparations.
27. For its part, the European Court of Human Rights has produced settled jurisprudence with regard to material harm by requiring a “clear causal connection”²⁷ between the violation of the Convention and the damage claimed to establish a right to compensation. In particular, the Defence refers to *Kallweit v. Germany* and *Jendrowiak v. Germany*, which are a perfect illustration of this approach.²⁸
28. Similarly, the Inter-American Court of Human Rights also follows the tendency to require a clear causal link with regard to reparations. In *Aloboetoe et al v. Suriname*, it held that “the immediate effects” of an unlawful act established a right to reparations.²⁹
29. Finally, the Governing Council in charge of determining the procedure applicable before the United Nations Compensation Commission (“UNCC”)³⁰ has always required the existence of a direct causal link between the alleged harm and the illegal invasion and occupation of Kuwait by Iraq.³¹ In particular, regarding commercial damage, the requirement that “the causal

²⁶ *Duch*, Trial Chamber, Judgment, 26/07/2010, Case No. 001/18-07-2007/ECCCC/TC, para. 642.

²⁷ See ECHR, *Çakici v. Turkey*, 8 July 1998, No. 23657/94, para. 127; ECHR *Akkoç v. Turkey*, 10 October 2000, Nos. 22947/93 and 22948/93, para. 133; CEDH *Z. et al v. United Kingdom*, 10/05/2001, No. 29392/95, para. 119; ECHR, *Goodwin v. UK*, 11/07/2002, no. 28957/95, para. 118

²⁸ In both cases, the ECHR refused to grant compensation which would have been awarded under the “proximate cause” doctrine: having been illegally detained on remand in violation of the Convention, the applicants argued the financial loss they had suffered in that their detention had prevented them from earning a salary (ECHR, *Kallweit v. Germany*, 13 January 2011, No. 17792/07, para. 87, and *Jendrowiak v. Germany*, 14 April 2011, No. 30060/04).

²⁹ Inter-American Court of Human Rights, *Aloboetoe et al v. Suriname*, 10 September 1993, para. 49.

³⁰ See report S/22559 of the United Nations Secretary-General of 2 May 1991 pursuant to paragraph 19 of Security Council resolution 687(1991).

³¹ For urgent claims, see Decision 1 of the Governing Council, *Criteria for Expedited Processing of Urgent Claims*, S/AC.26/1991/1, 2/08/1991, para. 18; Decision 7, *Criteria for Additional Categories of Claims*, S/AC.26/1991/7/Rev.1, 17/03/1992, para. 6.

link must be direct”³² was expressly recognised as a *sine qua non* for admissibility. Such a restrictive approach is also evident in the exclusion of applications for reparations linked to the embargo,³³ as well as the requirement to provide detailed factual descriptions of the circumstances of the claimed loss.³⁴

30. Accordingly, the Trial Chamber lacked basis to assert that “there is no settled view in international law on the approach to be taken to causation”, whereas all the international courts and bodies competent to deal with reparations apply the rule of a direct and immediate causal link.
31. Furthermore, the Defence emphasises that the proceedings of the International Law Commission recommend taking into consideration the deliberate nature of the violation in determining the scope of the reparations.³⁵ If such an approach can be adopted with regard to States, it should be all the more applicable to individuals. Instead, “[t]he 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.”³⁶ Hence, it would be unfair to accept a flexible causal link to the Accused in order to award reparations when the Accused’s actual involvement in the enlistment and conscription of the child soldiers did not result in deliberate acts to this end, as can be seen even with the mode of liability retained and the Chamber’s clarification above.

³² Decision 15, *Compensation for Business Losses Resulting from Iraq’s Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures Were also a Cause*, S/AC.26/1992/15, 4/01/1993, para. 3 (hereinafter, “Decision 15”)

³³ Decision 15, para. 3; see Decision 9, *Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation*, S/AC.26/1992/9, 6/03/1992, para. 6.

³⁴ Decision 15, para. 5.

³⁵ Draft articles on the responsibility of States for internationally wrongful acts, with commentaries thereto, 2001, article 31, paras. 9 and 10, adopted by the International Law Commission at its 53rd session in 2001 and submitted to the UN General Assembly in the ILC’s report covering the work of that session (A/56/10).

³⁶ ICC-01/04-01/06-2901, para. 52

3. BY HOLDING THAT THE “VICTIMS OF SEXUAL AND GENDER-BASED VIOLENCE” MAY BE ELIGIBLE FOR REPARATIONS IN THE PROCEEDINGS AGAINST MR THOMAS LUBANGA, THE DECISION CONTRAVENED THE PRINCIPLE THAT THE CONVICTED PERSON SHALL ONLY BE ORDERED TO MAKE REPARATIONS FOR DAMAGE RESULTING FROM CRIMES FOR WHICH HE WAS FOUND GUILTY

32. The impugned decision provides that “[t]he Court should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence.”³⁷
33. The Defence submits that this decision contravenes the principle that the convicted person shall only be ordered to make reparation for damage resulting from crimes of which he was found guilty.
34. An order for reparations seeks to remedy the harm caused directly by the crime or crimes for which the accused person was convicted.³⁸ The crime or crimes must have been proven beyond reasonable doubt,³⁹ after the Defence has been allowed to present evidence and make submissions.⁴⁰ Indeed, the Prosecutor supports this view.⁴¹
35. The Appeals Chamber confirmed that the jurisdiction of the Trial Chamber should be limited to the charges confirmed by the Pre-Trial Chamber and that all decisions of the Chamber “in relation to a victim’s status and/or participatory rights which is unrelated to the specific charges against the accused would fall outside this framework”.⁴²
36. Sexual violence was not one of the charges for which Mr Lubanga was prosecuted or found guilty.⁴³ Accordingly, the Defence did not call any

³⁷ ICC-01-04/01/06-2904, para. 207.

³⁸ See, in this regard, ICC-01/04-01/06-1432, paras. 63-66. The Trial Chamber states that reparations fulfil two main purposes: they oblige those responsible for serious crimes to repair the harm they caused to victims and make it possible to ensure that offenders account for their acts (ICC-01/04-01/06-2904, para. 179 [emphasis added]).

³⁹ Statute, article 66(3).

⁴⁰ Statute, article 67(1).

⁴¹ ICC-01/04-01/06-2867, para. 17 (Prosecutor).

⁴² ICC-01/04-01/06-1432, para. 63.

⁴³ ICC-01/04-01/06-2901, paras. 60 and 67-75.

evidence in his defence and did not cross-examine the Prosecution witnesses whose testimony the Chamber analysed at paragraphs 890 to 896 of the judgment in regard to this issue, with the exception of a question put to P-0016 solely for the purpose of highlighting a major contradiction between the witness's statement and his testimony before the Court.⁴⁴

37. Furthermore, the Chamber's judgment did not set forth any findings in regard to these charges for the purposes of establishing the responsibility of Mr Lubanga.⁴⁵
38. In its sentencing decision, the majority of the Chamber instead stated that "nothing suggests that Mr Lubanga ordered or encouraged sexual violence, that he was aware of it or that it could otherwise be attributed to him in a way that reflects his culpability".⁴⁶
39. The Chamber further rejected the argument that enlistment, conscription or the use of children under the age of 15 years would necessarily lead to the commission of sexual violence on the children, confirming that in light of the body of evidence tendered at trial, it was "unable to conclude that sexual violence [...] was sufficiently widespread that it could be characterised as occurring in the ordinary course of the implementation of the common plan for which Mr Lubanga is responsible."⁴⁷ No reparations can therefore be awarded on that basis.⁴⁸

⁴⁴ This fact seriously affects the credibility of the witness in regard to his statements about sexual violence: Witness P-0016 had stated in 2005 that he had no knowledge of rape committed by one soldier on another soldier within the FPLC. Statement of 2005, para. 232, quoted in T-191-CONF-FRA CT, p. 10, lines. 5-6.

⁴⁵ ICC-01/04-01/06-2842, para. 896.

⁴⁶ ICC-01/04-01/06-2901, para. 74.

⁴⁷ ICC-01/04-01/06-2901, para. 74.

⁴⁸ The Defence refers to its submissions before the Trial Chamber on this point: ICC-01/04-01/06-2885, para. 44.

40. Accordingly, not having been prosecuted, established or held against Mr Lubanga, acts of sexual violence cannot, contrary to the Chamber's decision, found an award for reparations against Mr Lubanga for the harm they caused.

4. THE STANDARD OF PROOF ADOPTED BY THE TRIAL CHAMBER AT THE REPARATIONS STAGE DOES NOT ALLOW RESPECT FOR THE RIGHTS OF THE CONVICTED PERSON TO BE GUARANTEED

41. The Trial Chamber considers that the appropriate standard of proof at the reparations stage is the balance of probabilities, but that a "wholly flexible" approach is more appropriate when reparations are awarded from the resources of the TFV.⁴⁹ It justifies this decision by invoking "the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence."⁵⁰

42. Nonetheless, the Chamber neglects to define exactly the standard of proof which should be applied by the TFV in determining the facts in relation to victims' applications for reparations.

43. The instruments governing proceedings before the Court do not provide for a standard of proof to be applied to the determination of factual issues during the reparations proceedings. It is merely stated that the Court must respect "the rights of the victims and the convicted person" (rule 97(3)).⁵¹

44. As an integral part of the trial,⁵² the reparations stage is subject to the same procedural exigencies as the other aspects of the trial, in particular with regard to the fundamental rights of the accused and the rights and responsibilities of the other participants.

45. The Defence contends that in order to safeguard the fundamental rights accorded to the convicted person, and respect the rights of the victims, a much

⁴⁹ ICC-01/04-01/06-2904, paras. 253-254.

⁵⁰ ICC-01/04-01/06-2904, para. 252.

⁵¹ See also articles 68(3) and 67.

⁵² ICC-01/04-01/06-2904, para. 260.

higher standard of proof should be applied at the reparations stage than the one applied by the Chamber when ruling on victims' applications for participation (*prima facie*).⁵³ The victims must provide proof of the harm they suffered, and the causal link between that harm and the crimes held against Mr Lubanga based on a standard of proof at least equivalent to that of the preponderance of probabilities.

46. On this point, the Appeals Chamber is prayed to find that:
- There is no well-founded argument to justify the application of a more "flexible" standard of proof at the reparations stage;
 - The Chamber cannot disregard the internationally recognised principle that the burden of proof for civil claims lies with the applicant;
 - The difficulties encountered by victims in obtaining proof in support of their applications does not justify violating the rights of the convicted person;
 - The flexibility of the standard of proof adopted by the Trial Chamber contravened the principle of legal certainty.
- The convicted person's lack of sufficient resources to fund reparations cannot be advanced as justification for lightening the burden of proof for the victims**

47. The Trial Chamber concurs that the "most probable hypothesis" or the "balance of probabilities" is "sufficient and proportionate to establish the facts that are relevant to an order for reparations when it is directed against the convicted person".⁵⁴

⁵³ ICC-01/04-01/06-1119, para. 99.

⁵⁴ ICC-01/04-01/06-2904, para. 253.

48. Nonetheless, it considers that “[w]hen reparations are awarded from the resources of the Trust Fund for Victims or from any other source, a wholly flexible approach to determining factual matters is appropriate, taking into account the extensive and systematic nature of the crimes and the number of victims involved.”⁵⁵
49. The Defence emphasises in this regard that Mr Lubanga’s indigence cannot be relied on to justify a lightening of the burden of proof incumbent on the victims, since the impugned decision provides specifically for the seizure of the assets of the convicted person for the payment of any awards for reparations.⁵⁶
50. Moreover, the Defence points out that the obligation to make reparation for the harm caused should only be considered in light of the crimes for which Mr Lubanga was found responsible, and not in light of his capacity to contribute to the funding of reparations.
- The Chamber cannot disregard the internationally recognised principle that the burden of proof for civil claims lies with the applicant, in accordance with article 21(1)(c)**
51. The Defence submits that the Chamber cannot disregard the internationally recognised principle that the burden of proof in civil claims lies with the applicant.
52. Both in Civil Law and Common law, the burden of proof lies with the applicant, who must prove the facts adduced in support of his or her application according to the balance of probabilities.⁵⁷

⁵⁵ ICC-01/04-01/06-2904, para. 254.

⁵⁶ ICC-01/04-01/06-2904, para. 276-280. See also, in particular, regulation 117 of the Regulations of the Court.

⁵⁷ Article 1315 of the French Civil Code; articles 2803 and 2804 of the Québec Civil Code; Supreme Court of Canada, *F.H. v. McDougall*, [2008] 3 S.C.R. 41, 2008 SCC 53, para. 49; United Kingdom: *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35, para. 13.

53. This approach is, moreover, consonant with the rules applicable before the only other international criminal court which provides for reparations for victims of war crimes and crimes against humanity, the Extraordinary Chambers in the Courts of Cambodia (ECCC).⁵⁸ This standard of proof was applied by the ECCC Trial Chamber in *Duch* (“‘more likely than not to be true’ or ‘preponderance of evidence’”).
54. The Supreme Court Chamber of the ECCC upheld this decision, stating that this “standard of proof is common to civil claims across the world”.⁵⁹
55. The Supreme Court Chamber of the ECCC confirmed that the statements of civil parties which are not corroborated by any other material do not appear to be sufficient.⁶⁰ It further confirmed that although there was no doubt that three victims suffered physical and psychological harm, there was still not sufficient evidence to establish, in light of the standard of proof applied by the Chamber, that the harm they suffered resulted from the Accused’s criminal conduct.⁶¹
56. By way of example, the absence of objective evidence, such as registers, photographs or confessions for the purpose of corroborating the allegations of Victims E2/23 and E2/33 that they had passed through the S-21 complex, caused their applications to be rejected.⁶² The inconsistencies and contradictions between the information contained in Victim E2/32’s

⁵⁸ Article 23 *bis*, para. 1 [emphasis added]: the Internal Rules provide: “When considering the admissibility of the Civil Party application, the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true.”

⁵⁹ ECCC, Supreme Court Chamber, Case No. 001/18-07-2007-ECCC/SC, Judgment, Doc No. F28, para. 531 [emphasis added].

⁶⁰ ECCC, Supreme Court Chamber, Case No. 001/18-07-2007-ECCC/SC, Judgment, Doc No. F28, para. 528, upholding the Trial Chamber’s findings, Doc No. E188, para. 647.

⁶¹ ECCC, Supreme Court Chamber, Case No. 001/18-07-2007-ECCC/SC, Judgment, Doc No. F28, paras. 576, 593 and 598. The Supreme Court Chamber upheld the Trial Chamber’s decision as regards 3 victims (E2/23, E2/32 and E2/33 as direct victims). See ECCC, Case No. 001/18-07-2007-ECCC/SC, Judgment, Doc No. E188, para. 647.

⁶² ECCC, Supreme Court Chamber, Case No.001/18-07-2007-ECCC/SC, Judgment, Doc No. F28, paras. 593 and 597 upholding ECCC, Case No 001/18-07-2007-ECCC/SC, Judgment, Doc No. E188, para. 647.

application and the victim's testimony contributed to the rejection of this victim's application.⁶³

57. As regard indirect victims, the ECCC Trial Chamber rejected several applicants who were unable to demonstrate the existence of a direct victim or the existence of specific links with a direct victim.⁶⁴
58. Finally, the experience garnered in the case at hand has demonstrated that the standard of proof adopted by the Trial Chamber is insufficient. In all situations in which it was in possession of complete information concerning the identity of a victim and the alleged circumstances of that victim's enlistment, Defence investigations enabled the Chamber to find that the totality of these victims had provided false information to the Court.⁶⁵ On the basis of the information collected by the Defence, the Chamber withdrew the authorisation it had granted these nine victims to participate in the proceedings.⁶⁶
59. It cannot therefore be claimed that the statements of the applicants alone are sufficient to establish their identity and their status as victims of the crimes held against Mr Lubanga.

⁶³ ECCC, Case No. 001/18-07-2007-ECCC/SC, Judgment, Doc No. E188, para. 647. It is worth noting that the Supreme Court Chamber held that Victim E2/32 was an indirect victim in that the victim's father had passed through S-21, but upheld the Trial Chamber's finding that the victim had failed to prove having personally passed through S-21. ECCC, Supreme Court Chamber, Case No. 001/18-07-2007-ECCC/SC, Judgment, Doc No. F28, paras. 575-576.

⁶⁴ This finding was upheld by the ECCC Supreme Court Chamber. See, for example, Case No. 001/18-07-2007-ECCC/SC, Judgment, Doc No. F28, paras. 547 (Victim E2/69) and 551 (Victim E2/73). ECCC, Case No. 001/18-07-2007-ECCC/SC, Judgment, Doc No. E188, para. 648.

⁶⁵ The Defence considers that it has also provided proof that Victims a/0049/06 and a/0051/06, who were presented by Intermediary W-00143, gave false statements to the Office of the Prosecutor. See, in particular, the following exhibits: EVD-D01-00763 and EVD-D01-00765.

⁶⁶ See ICC-01/04-01/06-2842, paras. 222-288; 430-441; 485-502.

- The difficulties encountered by victims in obtaining proof in support of their applications does not justify violating the rights of the convicted person

60. The Trial Chamber lacked grounds for its finding that “the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence”⁶⁷ was justification for lightening their burden of proof to the detriment of the convicted person, who sees a reversal of the burden of proof.
61. In the case at hand, it has been demonstrated that in spite of the situation which prevailed in Ituri at the material time, it was perfectly possible to obtain evidence in order to establish the alleged facts. Accordingly, the lightening of the burden of proof in favour of the victims, as proposed by the Chamber violates the rights of the convicted person.
62. Although it may be difficult for certain victims to obtain evidence that would allow them to substantiate their applications for reparations, such as documents attesting to their age and identity, that the victims are in a region prey to the effects of war should not serve to justify a lightening of the burden of proof regarding the validity of their applications. The risks of abuse ensuing from a lightening of the burden of proof have been amply demonstrated in the case at hand.
63. In his opening statement, the Prosecutor stated the following with regard to the documents enabling the determination of the ages of those witnesses who were portrayed as child soldiers: “[TRANSLATION] As a result of the conflict, most of them [*kadogos*] were never issued with birth certificates or had lost all their identity documents. They had been displaced, their houses had been burnt down, their families lost. The records of the State or of schools in the Ituri region were very largely ‘destroyed’”.⁶⁸

⁶⁷ ICC-01/04-01/06-2904, para. 252.

⁶⁸ T-107-FRA, p. 15.

64. However, this statement turned out to be inaccurate. With its limited resources for investigation, the Defence was able to find identity documents and school records in connection with the individuals presented as being former child soldiers. This evidence led to the exclusion of all of the evidence pertaining to these purported children, and the authorisation for all those who had the dual status of victim and witness to participate in the case at bar was withdrawn.

65. Moreover, although in exceptional circumstances some victims were materially unable to produce official documents to substantiate their applications, there is no impediment to their using other means to bring alternate proof, provided the reliability of such proof is established.⁶⁹

66. The ECCC Supreme Court Chamber pointed out in this regard that in practice, several reparations programmes instituted to compensate victims of armed conflict reduced the burden incumbent upon the applicants on account of the lack of official or formal documents to substantiate their claims not by reducing the standard of proof, but by accepting a wider variety of evidence.⁷⁰

- The “wholly flexible” standard of proof adopted by the Trial Chamber contravened the principle of legal certainty

67. By neglecting to set out precisely in its decision the standard of proof to be applied by the TFV in determining the facts relating to the victims’ applications for reparations, the Trial Chamber contravened the principle of legal certainty.⁷¹

⁶⁹ The Trial Chamber had in fact adopted this solution for documents presented in support of applications for participation. ICC-01/04-01/06-1119, para. 87.

⁷⁰ Case No. 001/18-07-2007-ECCC/SC, Judgment, Doc No. F28, para. 525, quoting 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).

⁷¹ Court of Justice of the European Union, Order of the Court (Eighth Chamber) of 16 February 2012, (reference for a preliminary ruling: *Tribunale di Milano* - Italy) – criminal proceedings against Vincenzo Veneruso, No. C-612/11; ECHR: *Jecius v. Lithuania*, Judgment, 6 October 2010, No 34578/97, para. 56; *Baranowski v. Poland*, 28 March 2000, Application No. 28358/95, para. 52.

68. The result of this lack of precision is that the TFV has full discretion to rule on the admissibility of the applications for reparations without needing to justify its decisions on the basis of objective criteria.
69. Moreover, the flexible approach adopted by the Chamber with regard to the standard of proof applicable to the reparations stage does not enable the convicted person to determine with precision the standard of proof he himself must meet to demonstrate that an individual is not a victim of the crimes held against him within the meaning of rule 85, if necessary.
70. Unable to foresee the applicable standard of proof, the convicted person is therefore unable meaningfully to exercise his right to raise a challenge.
71. The Defence submits in conclusion that it is for the individuals who claim to be victims of the crimes held against Mr Lubanga to provide proof, based on the preponderance of probabilities, as to their identity, date of birth, enlistment into the FPLC or participation in hostilities as FPLC soldiers from September 2002 to 13 August 2003, and the existence of harm in direct connection with these facts.

SUSPENSIVE EFFECT OF THE APPEAL

72. Under article 82(3) and rule 156(5), the Defence requests the suspension of the implementation of the impugned decision.
73. As Trial Chamber I notes, the implementation of the impugned decision would directly affect the rights of the convicted person.⁷²
74. Moreover, the irreversibility of the effects of implementing the impugned decision, *viz.* the implementation of the orders for reparations made, could be irretrievably prejudicial to the convicted person.

⁷² ICC-01/04-01/06-2911, para. 23.

75. Accordingly, it is appropriate to suspend the implementation of the impugned decision so as to avoid irremediable harm to the Accused.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER

TO ORDER the immediate suspension of the impugned decision; and

TO SET ASIDE the decision rendered on 7 August 2012 by Trial Chamber I.

[signed]

Ms Catherine Mabile, Lead Counsel

Done this 10 September 2012 at The Hague