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THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
 THE PROSECUTOR *v.* THOMAS LUBANGA DYILO**

Public Document

Joint Response to the "Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la 'Decision establishing the principles and procedures to be applied to reparations', rendue par la Chambre de première instance le 7 août 2012"

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I. INTRODUCTION

1. Mr. Thomas Lubanga Dyilo (the “Appellant”) is appealing Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations” (the “Impugned Decision”),¹ by which the Chamber decided to (i) issue “*principles on reparations pursuant to Article 75(1) of the Statute*”; (ii) not to examine the individual application forms for reparations and have them transferred by the Registry to the Trust Fund for Victims (the “TFV”); (iii) “*remain[s] seized of the reparations proceedings, in order to exercise any necessary monitoring and oversight functions*”; and (iv) “*decline[s] to issue specific orders*” to the TFV “*on the implementation of reparations that are to be funded using voluntary contributions*”.²

2. The Appellant raises two grounds of appeal comprising twelve errors of law allegedly made by the Chamber in the Impugned Decision, namely (i) delegating certain judicial functions to the Trust Fund for Victims, a team of experts and the Registry;³ (ii) ordering the constitution of a new Trial Chamber to supervise the reparations proceedings;⁴ (iii) deciding not to examine the individual application forms for reparations submitted by victims;⁵ (iv) establishing reparations principles affecting the rights of the Defence;⁶ (v) allowing anonymous victims to participate in the reparations proceedings;⁷ (vi) establishing the burden of proof on the convicted person and setting up an unfair standard of proof to rule on reparations requests;⁸ (vii) failing to set a deadline for the implementation of the reparations plan;⁹

¹ See the “Decision establishing the principles and procedures to be applied to reparations” (Trial Chamber I), No. ICC-01/04-01/06-2904, 7 August 2012 (the “Impugned Decision”).

² *Idem*, par. 289.

³ See the “Mémoire de la Défense de M. Thomas Lubanga relatif à l’appel à l’encontre de la ‘Decision establishing the principles and procedures to be applied to reparations’, rendue par la Chambre de première instance le 7 août 2012”, No. ICC-01/04-01/06-2972, 5 February 2013, (the “Defence Document in Support of the Appeal”), paras. 9-20.

⁴ *Idem*, paras. 21-31.

⁵ *Ibid.*, paras. 32-41.

⁶ *Ibid.*, paras. 42-47.

⁷ *Ibid.*, paras. 48-78.

⁸ *Ibid.*, paras. 79-109.

⁹ *Ibid.*, paras. 110-114.

(viii) including victims of sexual and gender-based violence among the potential beneficiaries;¹⁰ (ix) finding that the victims' families and communities are entitled to reparations;¹¹ (x) failing to require proof of personal, actual, present and unrepaired damage for granting reparations;¹² (xi) establishing the "*proximate cause*" criterion to determine the existence of a causal link between the crime and the harm alleged by the victim;¹³ and (xii) ordering reparations in localities different from those contained in the charges or mentioned in the Trial Chamber's judgment.¹⁴

3. The Office of Public Counsel for Victims and the team of Legal Representatives of Victims V02 (the "Legal Representatives") concur with the Appellant that three errors arise from the Impugned Decision in relation to 1) the delegation of judicial functions to non-judicial bodies; 2) the constitution of a new Trial Chamber; and 3) the decision not to evaluate individual applications for reparations. However, they contend that the Appellant has failed to demonstrate the existence of any further error in the Impugned Decision.

II. PROCEDURAL BACKGROUND

4. On 14 March 2012, Trial Chamber I (the "Chamber") rendered its judgement pursuant to article 74 of the Rome Statute (the "Judgment"),¹⁵ finding Mr. Thomas Lubanga Dyilo guilty of the crimes of conscripting and enlisting children under the age of fifteen years into the *Force Patriotique pour la Libération du Congo* (the "FPLC") and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute from early September 2002 to 13 August 2003.¹⁶

¹⁰ *Ibid.*, paras. 125-137.

¹¹ *Ibid.*, paras. 138-152.

¹² *Ibid.*, paras. 153-171.

¹³ *Ibid.*, paras. 172-179.

¹⁴ *Ibid.*, paras. 180-184.

¹⁵ See the "Judgment pursuant to Article 74 of the Statute" (Trial Chamber I), No. ICC-01/04-01/06-2842, 14 March 2012 (the "Judgment").

¹⁶ *Idem*, par. 1358.

5. On the same day, the Chamber issued the “Scheduling order concerning timetable for sentencing and reparations”,¹⁷ inviting the parties and participants to file submissions on the principles to be applied with regard to reparations and the procedure to be followed by the Chamber.¹⁸ Furthermore, the Chamber invited “*other individuals or interested parties*” to apply in writing for leave to file submissions on reparations issues.¹⁹

6. On 28 March 2012, the Office of Public Counsel for Victims (the “OPCV” or the “Office”) filed a request for authorisation to appear before the Chamber on issues related to reparations.²⁰

7. On 5 April 2012, the Chamber rendered its “Decision on the OPCV’s request to participate in the reparations proceedings”,²¹ where it instructed (i) the Registry to appoint the OPCV as the legal representative for any unrepresented applicants and to provide the OPCV with the applications for reparations that had been received thus far, as well as any future applications from unrepresented victims; and (ii) the OPCV to file submissions on the principles to be applied by the Chamber with regard to reparations and the procedure to be followed by the Chamber on behalf of those victims who had not submitted applications but who may fall within the scope of an order for collective reparations.²²

8. On 18 April 2012, the OPCV submitted its observations on the principles to be applied with regard to reparations and on certain procedural issues related to

¹⁷ See the “Scheduling order concerning timetable for sentencing and reparations” (Trial Chamber I), No. ICC-01/04-01/06-2844, 14 March 2012.

¹⁸ *Idem*, par. 8.

¹⁹ *Ibid.*, par. 10.

²⁰ See the “Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on issues related to reparations proceedings”, No. ICC-01/04-01/06-2848, 28 March 2012.

²¹ See the “Decision on the OPCV’s request to participate in the reparations proceedings” (Trial Chamber I), No. ICC-01/04-01/06-2858, 5 April 2012.

²² *Idem*, par. 13.

reparations proceedings.²³ On the same day, the other legal representatives of victims also submitted their observations on these issues.²⁴

9. On 7 August 2012, the Chamber issued the Impugned Decision.²⁵

10. On 24 August 2012, the OPCV and the Legal Representatives of Victims V02 submitted jointly an “*Acte d’appel à l’encontre de la ‘Decision establishing the principles and procedures to be applied to reparation’ délivrée par la Chambre de première instance I le 7 août 2012*”²⁶ under article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.

11. On 3 September 2012, the Legal Representatives of Victims V01 filed an “*Acte d’appel contre la ‘Decision establishing the principles and procedures to be applied to reparation’ du 7 août 2012 de la Chambre de première instance I*” under article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.²⁷

12. On 6 September 2012, the Appellant filed an “*Acte d’appel de la Défense de M. Thomas Lubanga à l’encontre de la ‘Decision establishing the principles and procedures to be applied to reparation’ rendue par la Chambre de première instance I le 7 août 2012*”

²³ See the “Observations on issues concerning reparations”, No. ICC-01/04-01/06-2863, 18 April 2012.

²⁴ See the “Observations du groupe de victimes VO2 concernant la fixation de la peine et des réparations”, No. ICC-01/04-01/06-2869, 18 April 2012 and the “Observations sur la fixation de la peine et les réparations de la part des victimes a/0001/06, a/0003/06, a/0007/06 a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, et a/1622/10”, No. ICC-01/04-01/06-2864, 18 April 2012.

²⁵ See the Impugned Decision, *supra* note 1.

²⁶ See the “*Acte d’appel à l’encontre de la ‘Decision establishing the principles and procedures to be applied to reparation’ délivrée par la Chambre de première instance I le 7 août 2012*”, No. ICC-01/04-01/06-2909 OA 21, 24 August 2012.

²⁷ See the “*Acte d’appel contre la ‘Decision establishing the principles and procedures to be applied to reparation’ du 7 août 2012 de la Chambre de première instance I*”, No. ICC-01/04-01/06-2914 A2, 3 September 2012.

under article 82(4) of the Rome Statute and rule 150 of the Rules of Procedure and Evidence.²⁸

13. On 17 September 2012, the Appeals Chamber issued its “Directions on the conduct of the appeal proceedings”,²⁹ ordering, *inter alia*, the OPCV and the Legal Representatives of Victims V02 to indicate the victims they represent before the Appeals Chamber,³⁰ and authorising them to file by 1 October 2012 submissions on the admissibility of appeals OA21, A, A2 et A3, and observations in response thereto, in particular on the following issues: (i) the nature of the Impugned Decision, and (ii) whether Mr. Lubanga, applicants for reparations, and victims who may be affected by an order for collective reparations have a right to appeal the Impugned Decision under article 82(4) of the Rome Statute.³¹ Moreover, the Appeals Chamber invited, *inter alia*, the OPCV and the Legal Representatives of Victims V02 to make submissions on the Appellant’s requests for suspensive effect.³² Lastly, the Appeals Chamber indicated that at a later time it would give further directions for the submission of (i) the documents in support of the appeals and/or responses to the documents in support of the appeals to be filed pursuant to regulations 59 and/or 65(5) of the Regulations of the Court, and (ii) the requests to be filed pursuant to rule 103(1) of the Rules of Procedure and Evidence.³³

14. On 28 September and 1 October 2012, the Legal Representatives of Victims V01,³⁴ the TFV,³⁵ the OPCV,³⁶ the Defence,³⁷ the Prosecution,³⁸ and the Legal

²⁸ See the “Acte d’appel de la Défense de M. Thomas Lubanga à l’encontre de la ‘Decision establishing the principles and procedures to be applied to reparation’ rendue par la Chambre de première instance I le 7 août 2012”, No. ICC-01/04-01/06-2917 A3, 6 September 2012.

²⁹ See the “Directions on the conduct of the appeal proceedings” (Appeals Chamber), No. ICC-01/04-01/06-2923 A A2 A3 OA21, 17 September 2012.

³⁰ *Idem*, par. 1.

³¹ *Ibid.*, par. 2.

³² *Ibid.*, par. 4.

³³ *Ibid.*, par. 5.

³⁴ See the “Observations sur les appels à l’encontre de la ‘Decision establishing the principles and procedures to be applied to reparation’”, No. ICC-01/04-01/06-2926 A A2 A3 OA21, 28 September 2012.

Representatives of Victims V02³⁹ submitted their observations pursuant to the “Directions on the conduct of the appeal proceedings”.⁴⁰

15. On 2 October 2012, the Legal Representatives of Victims V02 filed a *corrigendum* to their observations of 1 October 2012 on the admissibility of appeals OA21, A, A2 and A3.⁴¹ On 3 October 2012, the Prosecution filed observations on said *corrigendum*.⁴²

16. On 14 December 2012, the Appeals Chamber delivered its “Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings”,⁴³ concluding that the interlocutory appeal filed by the Appellant against the Impugned Decision under article 82(1)(d) of the Rome Statute was inadmissible, whereas appeals A, A2 and A3 filed respectively by the OPCV and the Legal Representatives of Victims V02, the Legal Representatives of Victims V01, and the Appellant against the Impugned Decision under article 82(4) of the Rome

³⁵ See the “Observations in response to the Direction on the conduct of appeal proceedings”, No. ICC-01/04-01/06-2927 A A2 A3 OA21, 1 October 2012.

³⁶ See the “Observations sur les questions relatives à la recevabilité des appels interjetés par la Défense, le BCPV et les équipes V01 et V02 à l’encontre de la ‘Decision establishing the principles and procedures to be applied to reparation’ délivrée par la Chambre de première instance I le 7 août 2012”, No. ICC-01/04-01/06-2928 A A2 A3 OA21, 1 October 2012.

³⁷ See the “Observations de la Défense conformément aux ‘Directions on the conduct of the appeal proceedings’ transmises le 17 septembre 2012”, No. ICC-01/04-01/06-2929 A A2 A3 OA21, 1 October 2012.

³⁸ See the “Prosecution’s Submissions further to the Appeals Chamber’s ‘Directions on the conduct of the appeal proceedings’”, No. ICC-01/04-01/06-2930 A A2 A3 OA21, 1 October 2012.

³⁹ See the “OBSERVATIONS DE L’ÉQUIPE V02 DE REPRÉSENTANTS LÉGAUX DE VICTIMES, CONFORMEMENT AUX DIRECTIVES ICC-01/04 01/06-2923 A A3 A4 OA31”, No. ICC-01/04-01/06-2931 A A2 A3 OA21, 1 October 2012.

⁴⁰ See the “Directions on the conduct of the appeal proceedings”, *supra* note 29.

⁴¹ See the “CORRIGENDUM AUX OBSERVATIONS DE L’ÉQUIPE V02 DE REPRÉSENTANTS LÉGAUX DE VICTIMES, CONFORMEMENT AUX DIRECTIVES ICC 01/04 01/06-2923 A A2 A3 OA21”, No. ICC-01/04-01/06-2931-Corr, A A2 A3 OA21, 2 October 2012 (dated 1 October 2012).

⁴² See the “Prosecution’s Submission on the Corrigendum to the Observations of Legal Representatives Group V02 filed on 1 October 2012”, No. ICC-01/04-01/06-2932 A A2 A3 OA21, 3 October 2012 (dated 2 October 2012).

⁴³ See the “Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings” (Appeals Chamber), No. ICC-01/04-01/06-2953 A A2 A3 OA21, 14 December 2012.

Statute were admissible.⁴⁴ The Appeals Chamber declared inadmissible the appeal filed by the OPCV against the Impugned Decision concerning unidentified individuals who had not applied for reparations but whose interests might be affected by collective reparations.⁴⁵ Moreover, the Appeals Chamber concluded that the Prosecutor cannot be considered a party to the appellate proceedings⁴⁶ and invited, *inter alia*, the OPCV and the Legal Representatives of Victims V02 to submit a joint document in support of their appeal against the Impugned Decision by 5 February 2013, and to jointly submit a response to the document in support of the appeal submitted by the Appellant by 8 April 2013.⁴⁷ Lastly, the Appeals Chamber rejected the *corrigendum* filed by the Legal Representatives of Victims V02 to their 1 October 2012 observations on the admissibility of appeals OA21, A, A2 and A3.⁴⁸

17. On 5 February 2013, the OPCV and the Legal Representatives of Victims V02 submitted their joint document in support of the appeal against the Impugned Decision (the “Joint Document in Support of the Appeal”),⁴⁹ so did the Legal Representatives of Victims V01⁵⁰ and the Appellant.⁵¹

18. On 8 March 2013, the Women’s Initiatives for Gender Justice,⁵² and NGOs *Justice Plus*, *Terre des Enfants*, *Fédération des Jeunes pour la Paix Mondiale* and *Avocats sans Frontières*,⁵³ which were previously granted leave by the Trial Chamber to

⁴⁴ *Idem*, p. 3.

⁴⁵ *Ibid.*, p. 4.

⁴⁶ *Ibid.* par. 74.

⁴⁷ *Ibid.*, p. 4.

⁴⁸ *Ibid.*, pp. 4 and 5.

⁴⁹ See the “Document déposé à l’appui de l’appel à l’encontre de la ‘Decision establishing the principles and procedures to be applied to reparations’ délivrée par la Chambre de première instance I le 7 août 2012”, No. ICC-01/04-01/06-2970 A, 5 February 2013 (the “Joint Document in Support of the Appeal”).

⁵⁰ See the “Document à l’appui de l’appel contre la ‘Decision establishing the principles and procedures to be applied to reparations’ du 7 août 2012”, No. ICC-01/04-01/06-2973 A2, 5 February 2013.

⁵¹ See the Defence Document in Support of the Appeal, *supra* note 3.

⁵² See the “Women’s Initiatives for Gender Justice Request for Leave to Submit Observations”, No. ICC-01/04-01/06-2993 A A2 A3, 8 March 2013.

⁵³ See the “Demande d’autorisation d’intervenir comme *amicus curiae*”, No. ICC-01/04-01/06-2994 A A2 A3, 8 March 2013.

submit observations on reparations issues, requested leave under rule 103 of the Rules of Procedure and Evidence to submit observations on issues arising out of the documents in support of the appeals against the Impugned Decision. On the same day, Child Soldiers International also requested leave under rule 103 of the Rules of Procedure and Evidence to submit observations as *amicus curiae*.⁵⁴

19. On 26 March 2013, the Appeals Chamber granted the Appellant, the Legal Representatives of Victims V02 jointly with the OPCV, as well as the Legal Representatives of Victims V01, authorisation to file responses by 9 April 2013 to the requests by Women's Initiatives for Gender Justice, and by *Justice Plus*, *Terre des Enfants*, *Fédération des Jeunes pour la Paix Mondiale* and *Avocats sans Frontières* to file *amicus curiae* briefs.⁵⁵

20. On the same day, the Appeals Chamber ordered the re-stamping of the abovementioned filing by Child Soldiers International as part of the appeal record 01/04-01/06 A4 A5 A6, and authorised the Prosecutor and Mr. Thomas Lubanga Dyilo to file a response by 9 April 2013.⁵⁶

21. Accordingly, the Legal Representatives respectfully submit their joint response to the Defence Document in Support of the Appeal.

⁵⁴ See the "Application by Child Soldiers International for leave to submit observations to Appeals Chamber of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence", No. ICC-01/04-01/06-2995 A A2 A3, 8 March 2013.

⁵⁵ See the "Order inviting responses on two applications for leave to submit observations as *amici curiae*" (Appeals Chamber), No. ICC-01/04-01/06-3000 A A2 A3, 26 March 2013, p. 3.

⁵⁶ See the "Order inviting responses to the "Application by Child Soldiers International for leave to submit observations to Appeals Chamber of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence"" (Appeals Chamber), No. ICC-01/04-01/06-3001 A4 A5 A6, 26 March 2013.

III. LEGAL REPRESENTATIVES' RESPONSE

1. General observations

22. As a preliminary remark, the Legal Representatives submit that the majority of the issues identified by the Appellant as errors in the Impugned Decision reveals his unwillingness to admit the critical difference between, on the one hand, the proceedings leading to the establishment of the accused's criminal responsibility pursuant to article 74 of the Rome Statute and, on the other hand, the reparations proceedings pursuant to article 75 of the Rome Statute. In the present case, the charges brought by the Prosecutor against the Appellant have already been ruled upon by the Trial Chamber, but substantive issues in relation to reparations to be awarded to victims for the harms resulting from the crimes committed by the convicted person have not yet been adjudicated upon.

23. As already recognised by the different Chambers of the Court, although both said proceedings are often linked, their nature, scope, actors and consequences are different.⁵⁷ Therefore, the Appellant's reliance on provisions and decisions regulating the proceedings that have led to the establishment of his criminal responsibility during reparations proceedings is mostly inappropriate and inaccurate and will be discussed *infra*.

24. Irrespective of the nature of the decisions issued by the Chambers pursuant to article 75 of the Rome Statute, reparations proceedings are clearly distinct from the proceedings in relation to the establishment of guilt or innocence, or related to the

⁵⁷ See the "Decision on victims' participation" (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, paras. 121-122; the "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008" (Appeals Chamber), No. ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, paras. 97-100; and the "Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings", *supra* note 43, paras. 67, 70 and 86.

eventual determination of the sentence.⁵⁸ The goal of reparations proceedings, the participants therein, and the procedural rules to be applied, while being inter-related, are significantly different from those regulating the proceedings leading to the establishment of the criminal responsibility of the accused.

25. The Legal Representatives submit that the difference between, on the one hand, the proceedings leading to the establishment of the criminal responsibility of an accused and, on the other hand, the reparations proceedings is determinative for the purpose of defining the scope of rights the different parties and participants should enjoy in said proceedings. In contrast to the proceedings leading to the establishment of the criminal responsibility of the accused, the purpose of reparations proceedings is limited as far as it consists in “*determin[ing] the scope and extent of any damage, loss and injury to, or in respect of, victims*”.⁵⁹ Given the specific nature and the purpose of the reparations proceedings, victims are considered “parties” therein.⁶⁰ On the same basis, the scope of the rights of the Defence within reparations proceedings cannot arguably be as extensive as the scope of rights enjoyed by the Defence in proceedings leading to the establishment of guilt or innocence of the accused.

⁵⁸ See LEWIS (P.) and HÅKAN (F.), “Reparations to victims”, in LEE (R.S.) (Ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, New York, 2001, pp. 481 and 483.

⁵⁹ See article 75(1) of the Rome Statute.

⁶⁰ See the “Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007” (Appeals Chamber), No. ICC-01/04-01/06-925 OA 8, 13 June 2007, par. 28 (“Clear examples of where the personal interests of victims are affected are [...] in relation to proceedings for reparations [note 43: See article 75 of the Rome Statute]”); and the “Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings”, *supra* note 43, par. 67 (“under article 82 (4) of the Statute, victims are entitled to bring an appeal. They are therefore parties to the proceedings and not, as is the case at other stages of the proceedings, participants”). See also DONAT-CATIN (D.), “Article 75”, in TRIFFTERER (O.) (Ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Second Edition, Verlag C.H. Beck Hart Nomos München, 2008, p. 1407, margin 18.

26. Furthermore, as far as the Appellant refers to the jurisprudence of domestic or international(ised) criminal courts to support his submissions,⁶¹ the Legal Representatives submit that while article 21 of the Rome Statute allows in principle the reference to external sources for the purpose of interpreting provisions of the legal texts of the Court, reliance on such authorities cannot lead to a *de facto* amendment of its statutory framework.⁶²

27. In this regard, the Rome Statute provides for a unique legal framework, in particular in relation to reparations issues. No other international(ised) criminal tribunal has ever been granted as many powers and institutional avenues for awarding reparations. Only the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) are able to provide reparations to victims of international crimes, but they are far from presenting *indicia* of a permanent international criminal tribunal and from providing mechanisms and infrastructure for reparations similar to the ones provided for by the Rome Statute. In fact, the mechanism available to victims in order to seek reparations within the legal framework of the Rome Statute has been largely recognised as one of its main novelties.⁶³

28. Similarly, the Legal Representatives submit that the Appellant fails to recognise the different procedural regimes as enshrined in the Rome Statute

⁶¹ See the Defence Document in Support of the Appeal, *supra* note 3, paras. 59, 91-95, 104 and 161.

⁶² See the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled Decision on the admission into evidence of materials contained in the prosecution's list of evidence” (Appeals Chamber), No. ICC-01/05-01/08-1386 OA 5 OA 6, 3 May 2011, par. 56; the “Decision on the ‘Registrar’s Submissions under Regulation 24bis of the Regulations of the Court In Relation to Trial Chamber I’s Decision ICC-01/04-01/06-2800’ of 5 October 2011” (Appeals Chamber), No. ICC-01/04-01/06-2823 OA 20, 21 November 2011, par. 16; the “Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’” (Appeals Chamber), No. ICC-01/09-01/11-414 OA 3 OA 4, 24 May 2012, par. 31; and the “Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’” (Appeals Chamber), No. ICC-01/09-02/11-425 OA 4, 24 May 2012, par. 37.

⁶³ See LEWIS (P.) and HÅKAN (F.), *op. cit. supra* note 58, pp. 474-475 and DONAT-CATIN (D.), *op. cit. supra* note 60, p. 1400, margin 1.

applicable to individual and collective forms of reparations, when denying the possibility for reparations to be granted to victims of sexual and gender-based violence.⁶⁴ In fact, not all beneficiaries of reparations must be precisely identified, since the Rome Statute and the Rules of Procedure and Evidence also empower the Chambers to grant collective awards and/or *proprio motu* awards, as discussed *infra*.

29. The Legal Representatives address in detail *infra* their arguments per each issue identified by the Appellant.

2. On the delegation of judicial functions to the Trust Fund for Victims, a team of experts and the Registry

30. The Legal Representatives concur with the Appellant's argument that the delegation of judicial powers by the Chamber to non-judicial entities such as the TFV, a team of experts and the Registry is contrary to the Rome Statute and the Rules of Procedure and Evidence.⁶⁵ In this regard, the Legal Representatives reiterate *in toto* their submissions presented in the Joint Document in Support of the Appeal.⁶⁶

31. In particular, the Legal Representatives reiterate that the relevant Chamber must comply with its obligation regarding reparations, within the strict judicial framework envisaged by the legal texts of the Court,⁶⁷ and that these functions cannot be delegated to the Registry or the TFV, given the different nature and role of these entities in the proceedings.⁶⁸

32. In particular, the Legal Representatives concur with the Appellant when arguing that reparations orders must be issued by a relevant Chamber in order to

⁶⁴ See the Defence Document in Support of the Appeal, *supra* note 3, paras. 125-137.

⁶⁵ *Idem*, par. 10.

⁶⁶ See the Joint Document in Support of the Appeal, *supra* note 49, paras. 44-58.

⁶⁷ *Idem*, paras. 44 and 47.

⁶⁸ *Ibid.*, paras. 48-53.

ensure the fairness of the proceedings.⁶⁹ In this regard, the Legal Representatives reiterate their previous submissions according to which victims applying for reparations shall also benefit from a fair determination of their claims.⁷⁰ Accordingly, reparations claims must be adjudicated by a relevant Chamber only, *i.e.* a judicial body; and this function cannot be taken over by an organ entrusted with the non-judicial aspects of the administration and servicing of the Court – the Registry – or an entity established by the Assembly of States Parties – the TFV. As already concluded by the Appeals Chamber, “an ‘order for reparations’ in terms of article 82(4) of the Statute must be issued under article 75 of the Statute prior to any implementation activities by the Trust Fund”.⁷¹ It is therefore reasonable to argue that the TFV cannot be delegated the power to issue the order it is mandated to implement.

33. Therefore, the Legal Representatives request the Appeals Chamber to uphold the Appellant’s contentions in this regard.

3. On the constitution of a new Trial Chamber to supervise the reparations proceedings

34. The Legal Representatives concur with the Appellant’s argument that, as concluded in the Impugned Decision, “reparations proceedings are an integral part of the overall trial process”.⁷² Accordingly, the same three judges of the Trial Chamber must rule on the issues in relation to reparations if, as in the present case, the accused is found guilty. In this regard, the Legal Representatives reiterate *in toto* their submissions presented in the Joint Document in Support of the Appeal.⁷³

⁶⁹ See the Defence Document in Support of the Appeal, *supra* note 3, paras. 18-20.

⁷⁰ See the Joint Document in Support of the Appeal, *supra* note 49, par. 26.

⁷¹ See the “Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings”, *supra* note 43, par. 57.

⁷² See the Defence Document in Support of the Appeal, *supra* note 3, par. 25.

⁷³ See the Joint Document in Support of the Appeal, *supra* note 49, paras. 31-43.

35. In particular, the Legal Representatives concur with the Appellant⁷⁴ that the need for the same three judges to sit during the entire trial, including reparations proceedings, is warranted by the fact that they are aware of the evidence already submitted by the parties and participants at trial, including evidence related to reparations matters, and are required to rely on it to issue reparations orders.⁷⁵ The constitution of a new Trial Chamber to decide on the issues in relation to reparations is therefore contrary to the legal framework of the Court.

36. Therefore, the Legal Representatives request the Appeals Chamber to uphold the Appellant's contentions in this regard.

4. On the Chamber's decision not to examine the individual application forms for reparations submitted by the victims

37. The Legal Representatives concur with the Appellant's argument that the Trial Chamber made an error of law by not examining on the merits the individual applications for reparations already filed by victims and by transmitting them instead to the TFV.⁷⁶ In this regard, the Legal Representatives reiterate *in toto* their submissions presented in the Joint Document in Support of the Appeal.⁷⁷ In particular, they reiterate that individual applicants must be allowed to participate in the adjudication of their reparations claims by the Chamber.⁷⁸

38. However, while concurring on the substance of the Defence's contentions, the Legal Representatives disagree with the Appellant's arguments according to which (i) only persons who have filed requests for reparations pursuant to rule 94 of the Rules of Procedure and Evidence may benefit from reparations ordered by the

⁷⁴ See the Defence Document in Support of the Appeal, *supra* note 3, par. 30.

⁷⁵ See regulation 56 of the Regulations of the Court. See also the Joint Document in Support of the Appeal, *supra* note 49, paras. 32-34 and 42.

⁷⁶ See the Defence Document in Support of the Appeal, *supra* note 3, par. 32.

⁷⁷ See the Joint Document in Support of the Appeal, *supra* note 49, paras. 23-30.

⁷⁸ *Idem*, paras. 27-29.

Court,⁷⁹ and (ii) the convicted person is entitled to make observations on applications for reparations based by analogy on the provision of rule 89(1) of the Rules of Procedure and Evidence.⁸⁰

39. In this regard, the Legal Representatives contend that the Rome Statute and the Rules of Procedure and Evidence impose on the relevant Chamber the duty to examine all individual applications for reparations.⁸¹ However, the assessment of individual applications by a relevant Chamber does not prevent the latter from issuing orders for collective reparations or deciding on reparations *proprio motu*.⁸² The scope of action granted to the relevant Chamber by the Rome Statute and the Rules of Procedure and Evidence is therefore much broader than the one put forward by the Appellant.

40. The Legal Representatives submit that the legal texts of the Court clearly provide for the possibility to grant reparations without the need for victims to make a “request for reparations under article 75(1)” of the Rome Statute in accordance with rule 94(1) of the Rules of Procedure and Evidence. Indeed, article 75(1) of the Rome Statute expressly provides for said possibility, indicating that the power of the Chamber to order reparations *proprio motu* is conditioned to the existence of “exceptional circumstances”.⁸³ Therefore, the Appellant’s contention that only persons who have filed requests for reparations pursuant to rule 94 of the Rules of Procedure and Evidence may benefit from reparations ordered is clearly meritless.

41. Similarly, the relevant Chamber may order “collective reparations” pursuant to rules 97(1) and 98(3) of the Rules of Procedure and Evidence. The Legal Representatives submit that “collective reparations”, even if understood in their narrowest sense as measures which address pre-existing groups tied by a cultural or

⁷⁹ See the Defence Document in Support of the Appeal, *supra* note 3, paras. 33-34 and 41.

⁸⁰ *Idem*, par. 40.

⁸¹ See the Joint Document in Support of the Appeal, *supra* note 49, par. 24.

⁸² See article 75(1) of the Rome Statute, and rules 95 and 97(1) of the Rules of Procedure and Evidence.

⁸³ See article 75(1) of the Rome Statute.

ethnic link,⁸⁴ or the social, cultural or spiritual life of a community,⁸⁵ may not require every single beneficiary to file an individual request for reparations. In fact, victims who may benefit from an award for collective reparations will not necessarily participate in the proceedings, either in person or through their legal representatives.⁸⁶ Therefore, it is only for the purpose of implementing such collective reparations that some form of individual identification and verification process would be required.

42. Moreover, the Legal Representatives contend that the Appellant misinterprets the provisions of the legal texts of the Court when alleging that he is entitled to present observations on any application for reparations on the basis of an *a fortiori* interpretation of rule 89(1) of the Rules of Procedure and Evidence. The extent to which a convicted person can make observations prior to the issuance by the relevant Chamber of a reparations order is expressly regulated in article 75(3) of the Rome Statute and rules 94(2) and 95(1) of Rules of Procedure and Evidence.

43. Neither rule 94(2) nor rule 95(1) of the Rules of Procedure and Evidence provides the convicted person with an automatic right to make “representations”, *i.e.* on applications for reparations. Both provisions refer to “*representations made under article 75, paragraph 3*” of the Rome Statute. And article 75(3) of the Rome Statute expressly limits the submission of “representations” by the convicted person to a mere possibility, granting the Court the discretion to invite, or not, the convicted person to make “representations” “[b]efore making an order under this article”. Consequently, the Legal Representatives submit that, pursuant to the legal texts of

⁸⁴ See the International Commission of Jurists, *The Right to a Remedy and to Reparations for Gross Human Rights Violations: A Practitioners’ Guide*, 2006, p. 40. The document is available at: www.icj.org/dwn/database/PGReparationsENG.pdf.

⁸⁵ In this sense, see McCARTHY (C.), *Reparations and Victim Support in the International Criminal Court*, Cambridge: CUP, 2012, Chapter V. See also in this sense ROSENFELD (F.), “Collective Reparation for Victims of Armed Conflict”, *International Review of the Red Cross*, 2010, p. 732.

⁸⁶ See the “Decision on the OPCV’s request to participate in the reparations proceedings”, *supra* note 21, par. 10.

the Court, the relevant Chamber may, although exceptionally,⁸⁷ decide not to hear the convicted person prior to issuing reparations orders.

44. The Legal Representatives, therefore, request the Appeals Chamber to uphold the Appellant's contentions in this regard, subject to the observations *supra*.

5. On the standard of proof required by the Chamber to rule on reparations requests

45. The Legal Representatives challenge the Appellant's arguments that the Trial Chamber erred in not precisely defining the relevant standard of proof applicable to adjudicate on applications for reparations and that such a standard should, in any event, not be "*flexible*".⁸⁸

46. The Legal Representatives observe first that the Appellant's submissions regarding relevant standards of proof are confusing and based on an erroneous interpretation of the Impugned Decision. In particular, the Appellant seems to avoid making a clear distinction between standards of proof applicable, on the one hand, for the purpose of the issuance of an order for reparations directed against the convicted person and, on the other hand, for the purpose of collective reparations to be awarded through the TFV.

47. The Legal Representatives submit that the Impugned Decision makes a clear distinction in this regard and contains no error.

48. In particular, the Trial Chamber expressly identified the standard to establish the facts that are relevant for the purpose of the issuance of an order for reparations directed against the convicted person, namely the standard of "*a balance of*

⁸⁷ See DONAT-CATIN (D.), *op. cit. supra* note 60, p. 1408, margin 19.

⁸⁸ See the Defence Document in Support of the Appeal, *supra* note 3, paras. 105-108.

probabilities".⁸⁹ When establishing said standard, the Chamber considered in particular the "*fundamentally different nature of these reparation proceedings*" when compared to the proceedings governing the adjudication of the criminal responsibility of an accused person,⁹⁰ the discussions on the standard applicable for reparations held during the drafting of the Rome Statute,⁹¹ the relevant legal provisions related to article 75 of the Rome Statute,⁹² and the experience of other organisations dealing with mass claims processes.⁹³ The Legal Representatives submit that the Appellant failed to provide any specific argument to demonstrate how, and to which extent, the Trial Chamber's approach is not in compliance with the rights of the convicted person.

49. Moreover, as correctly stated by the Trial Chamber, a higher standard of proof would not be consistent with the nature of the reparations proceedings.⁹⁴ For the purpose of collective reparations, the Trial Chamber correctly opted for a "*wholly flexible approach*". The Legal Representatives submit that said approach is in compliance with the nature of collective reparations and is in conformity with relevant international practice.

50. In particular, mass claims mechanisms aimed at addressing harms suffered by a high number of victims have established similar standards of proof, based on the very nature of reparations proceedings and recognizing the difficulties for the victims in making out their claims:

⁸⁹ See the Impugned Decision, *supra* note 1, par. 253.

⁹⁰ *Idem*, par. 251.

⁹¹ *Ibid.*, note 436.

⁹² *Ibid.*, par. 252.

⁹³ *Ibid.*, notes 437-438.

⁹⁴ *Ibid.*, par. 251.

- “Plausible case for a claim”, pursuant to which the claimant must show *“that it is plausible in light of all of the circumstances that he or she is entitled, in whole or in part, to the dormant account”*;⁹⁵
- “Predominantly probable claim”, pursuant to which *“the causality shall be deemed to have been substantiated when the partner organisation or the arbitration commission appointed by it is convinced that the claims made by the claimant are predominantly probable”*;⁹⁶
- “Credibly demonstrated claim”, pursuant to which a fact shall be determined to be established if it has been credibly demonstrated; a claim cannot be rejected on the sole ground that it is not supported by official documentary evidence.⁹⁷

51. The Trial Chamber rejected the more “flexible” standards occasionally used by other organisations when granting collective reparations, such as the standard of “sound criticism”.⁹⁸

52. The standard of proof identified by the Trial Chamber is consistent with the scope of information that potential beneficiaries may be requested to provide for the purpose of reparations proceedings. The Appellant himself seems to be conscious that applicants for reparations may be unable to submit all the information that, in his view, they should be requested to provide.⁹⁹ Indeed, the crimes within the jurisdiction of the Court normally take place during armed conflicts or situations of crisis where civil order is seriously challenged. In these circumstances, the Legal

⁹⁵ See the Governing Rules of the Claims Resolution Tribunal for Dormant Accounts, article 17, par. 1. The document is available at: <http://www.crt-ii.org/faqs.phtml>.

⁹⁶ See the Common guidelines for the partner organisations concerning the compensation of other personal injuries, decided by the Board of Trustees of the Foundation “Remembrance, Responsibility and Future” on 21 June 2001, par. 6. The document is available at: www.stiftung-evz.de.

⁹⁷ See the International Organisation for Migration, Property Claims Commission, Supplementary Principles and Rules of Procedure, 29 January 2002, Sections 22.1 and 22.2. The document is available at: www.compensation-for-forced-labour.org.

⁹⁸ See IACHR, *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgement of 1 July 2006, Series C No. 148, par. 109.

⁹⁹ See the Defence Document in Support of the Appeal, *supra* note 3, paras. 159, 162 and 169.

Representatives submit that national standards of proof or domestic practices regarding reparations the Appellant refers to may not be directly transposable to instances of mass victimisation at international level.

53. A more relevant example is the standard of proof set up by the ECCC. At first sight, given the mass victimisation addressed by this jurisdiction, its practice may be of assistance to the Court. However, the Appellant, while referring to the ECCC practice, fails to take into consideration the fact that the reparations awarded by the ECCC relate to crimes committed almost half a century ago, leaving time for the crisis at the origin of the committed crimes to end. As a consequence, the security situation of the applicants addressing that jurisdiction is not comparable to that of applicants for reparations in the present case, who are still facing the on-going conflict in the Democratic Republic of the Congo.

54. Different Chambers of the Court have noted the significant insecurity situation in relevant parts of the Democratic Republic of the Congo.¹⁰⁰ It follows that for most potential beneficiaries of reparations the security situation remains unchanged. This reality must be taken into account when deciding on how reparations issues are to be dealt with, in light of the obligation of the Court, pursuant to article 68(1) of the Rome Statute, to protect the safety, physical and psychological well-being, dignity and privacy of victims at any stage of the proceedings.

55. The Legal Representatives submit that the use of presumptions seems to be the most appropriate avenue when establishing facts relevant to reparations

¹⁰⁰ See the “Decision inviting the parties’ observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08” (Trial Chamber I), No. ICC-01/04-01/06-1308, 6 May 2008, paras. 26 and 31; and the “Corrigendum to Decision on the applications by victims to participate in the proceedings” (Trial Chamber I), No. ICC-01/04-01/06-1556-Corr-Anx1, 13 January 2009 (dated 15 December 2008), paras. 70-71.

proceedings. Other international tribunals, such as the Inter-American Court of Human Rights (the “IACHR”), have made use of presumptions in relation to establishing certain facts. For instance, the IACHR held:

“[i]n determining whether or not the State is responsible for violations of the substantive rights under the American Convention, the Court freely takes into account circumstantial evidence, presumptions of fact, and to draw inferences. In this regard, the Court has recognized that: in the exercise of its jurisdictional function, and in the process of obtaining and assessing the evidence it needs to decide the cases it hears, it may, in certain circumstances, use both circumstantial evidence and indications or presumptions as a basis for its pronouncements, when consistent conclusions regarding the facts can be inferred from same”.¹⁰¹

Similarly, in the case of *Cantoral-Benavides*, the IACHR noted:

“[i]n addition to direct evidence, be it testimonial, expert or documentary, international courts, as well as domestic courts, can base their judgments on circumstantial evidence, indications and presumptions, provided same lead to sound conclusions regarding the facts”.¹⁰²

56. National truth telling commissions have also resorted to presumptions. For instance, the National Commission on Illegal Detention and Torture in Chile indicated that victims who were able to prove to have being detained in certain detention facilities in Chile at a certain time were presumed to have been tortured due to evidence of systematic torture being used in those facilities at that time.¹⁰³

¹⁰¹ See IACHR, *Castillo-Petruzzi et al. v. Peru*, Merits, Reparations and Costs, Judgement of 30 May 1999, Series C No. 52 (1999), par. 62; *Loayza-Tamayo v. Peru*, Reparations and Costs, Judgment of 27 November 1998, Series C No. 42 (1998), par. 51; *Paniagua Morales et al. v. Guatemala* (the *White Van* case), Merits, Judgements of 8 March 1998, Series C No. 37 (1998), par. 72; *Blake v. Guatemala*, Merits, Judgement of 24 January 1998, Series C No. 36, par. 49 (1998); and *Gangaram-Panday v. Suriname*, Merits, Reparations and Costs, Judgment of 21 January 1994, Series C No. 16 (1994), par. 49.

¹⁰² See IACHR, *Cantoral-Benavides v. Peru*, Merits, Judgement of 18 August 2000, Series C No. 69 (2000), par. 47.

¹⁰³ See the *Informe de la Comisión Nacional sobre Prisión Política y Tortura* (Santiago, 2005), highlighted in DE GRIEF (P.), Paper on “Implementation of Reparations”, 2006. The document is available at: <http://www.redress.org/downloads/events/CollectiveReparationsMG.pdf>.

57. In light of said relevant practice, the Legal Representatives submit that requiring potential beneficiaries to provide all the information for the purpose of reparations proceedings as submitted by the Appellant would be burdensome and simply unnecessary.

58. Accordingly, the Legal Representatives strongly oppose the Appellant's submissions based on an alleged general principle of law that the standard of proof for reparations purposes should be apparently higher than the one identified by the Chamber,¹⁰⁴ for the following reasons.

59. Firstly, while referring to national law and practice on the applicable standard of proof for reparations, the Appellant fails to establish the existence of a "*general principle of law derived by the Court from national laws of legal systems of the world*" envisaged in article 21(1)(c) of the Rome Statute. The Appeals Chamber determined the exceptional character of the use of article 21(1)(c) of the Rome Statute when it examined the alleged existence of a general principle of law allowing the "*reviewability of decisions of an hierarchically lower court disallowing an appeal to a higher court*".¹⁰⁵ In said decision, the Appeals Chamber concluded that the alleged principle could not be found, after an exhaustive consideration of the law and practice of over twenty jurisdictions belonging to three different legal traditions.¹⁰⁶ By contrast, the Appellant argues the existence of a general principle of law based only on the legislation of two Romano-Germanic jurisdictions and the case-law of two common law jurisdictions.¹⁰⁷ In these circumstances, the Legal Representatives submit that the Appellant's contention is meritless.

¹⁰⁴ See the Defence Document in Support of the Appeal, *supra* note 3, paras. 89-95.

¹⁰⁵ See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (Appeals Chamber), No. ICC-01/04-168 OA 3, 13 July 2006, par. 25.

¹⁰⁶ *Idem*, paras. 26-32.

¹⁰⁷ See the Defence Document in Support of the Appeal, *supra* note 3, par. 90.

60. Secondly, the Appellant's contention that the ECCC Supreme Court Chamber ruled that the standard of proof of "more likely than not to be true" or "preponderance of evidence" is "*common to civil claims across the world*"¹⁰⁸ is misleading. Although the ECCC Supreme Court Chamber reached said conclusion,¹⁰⁹ the consequences of its finding are not correctly identified by the Appellant because the context in which said finding was made and how said principle was applied are not duly taken into account. Indeed, the ECCC Supreme Court Chamber stressed in the decision referred to by the Appellant that "*in practice, significant differences may occur between the pre-trial and reparations stages of a case, including the quantity and quality of evidence affecting a civil party's standing and reparation claims, resulting from evidence adduced by the civil party and from the findings as to the criminal responsibility of the accused person*".¹¹⁰ It eventually sanctioned the practice of the ECCC Trial Chamber, which "*presumably in recognition of objective difficulties in providing official documents, showed flexibility and broadly accepted any documentary evidence capable of supporting the claim directly or indirectly*".¹¹¹

61. Thirdly, the Court is certainly not bound by the findings of the ECCC, including the ones as to the existence or content of the "general principle of law" as alleged by the Appellant,¹¹² and in any event the Court should not see this alleged "general principle" as "*automatically applicable to the ICC without detailed analysis*".¹¹³ Regardless of the more or less authoritative sources relied upon by the Appellant, the Court itself should examine whether or not the principle in question exists as alleged and should consider whether it is applicable to the legal framework of the Court. In this regard, the Legal Representatives note that "*the national laws of States that would*

¹⁰⁸ *Idem*, par. 92.

¹⁰⁹ See ECCC, Case File No. 001/18-07-2007-ECCC/SC (Kaing Guek Eav alias 'Duch'), "Appeal Judgment" (Supreme Court Chamber), 3 February 2012, par. 531.

¹¹⁰ *Idem*, par. 512.

¹¹¹ *Ibid.*, par. 527.

¹¹² See the "Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya" (Pre-Trial Chamber II), No. ICC-01/09-19-Corr, 31 March 2010, Dissenting Opinion of Judge Hans-Peter Kaul, paras. 30-31.

¹¹³ See the "Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial" (Trial Chamber I), No. ICC-01/04-01/06-1049, 30 November 2007, par. 44.

normally exercise jurisdiction over the crime”, i.e. the Democratic Republic of the Congo, are not addressed in the ECCC decision relied upon by the Appellant, contrary to the requirement of article 21(1)(c) of the Rome Statute for ascertaining general principles of law.

62. Lastly and most importantly, the “general principle of law” alleged by the Appellant is not applicable pursuant to article 21(1)(c) of the Rome Statute. As recognised by the Appeals Chamber, this provision refers to the law applicable as a last resort, failing the Rome Statute, the Elements of Crimes, the Rules of Procedure and Evidence, and applicable treaties and principles and rules of international law.¹¹⁴ In contrast, the Chamber found that the standard of “balance of probabilities” arises from *inter alia* an interpretation of the Rules of Procedure and Evidence.

63. In particular, the Chamber reached its conclusion regarding said standard of proof by referring to rule 94(1)(g) of the Rules of Procedure and Evidence, which provides that victims’ applications for reparations shall contain, “to the extent possible”, any relevant supporting documentation, including names and addresses of witnesses.¹¹⁵ The Legal Representatives submit that this conclusion is supported by rule 94(1)(c) of the Rules of Procedure and Evidence, which provides that applications for reparations shall also contain the location and date of the incident and, “to the extent possible”, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm. Moreover, as confirmed by the literal wording of article 21(1)(c) of the Rome Statute, as well as by the Appeals Chamber,¹¹⁶ general principles of law derived by the Court from national laws cannot be resorted to if they are inconsistent with the legal instruments of the Court.

¹¹⁴ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 105, par. 23.

¹¹⁵ See the Impugned Decision, *supra* note 1, par. 252.

¹¹⁶ See the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, *supra* note 62, par. 56.

64. Therefore, the Legal Representatives request the Appeals Chamber to dismiss the Appellant's arguments in this regard.

6. On the scope of the Appellant's rights in reparations proceedings

65. The Legal Representatives oppose the Appellant's arguments that the Impugned Decision does not provide "*aucun dispositif permettant à la Défense de faire valoir ses droits*"¹¹⁷ and "*crée un déséquilibre évident entre les droits de la Défense et ceux des victimes*".¹¹⁸ They observe in this regard that, as already recognised in the Impugned Decision and admitted by the Appeals Chamber in its ruling on the admissibility of the Appellant's appeal,¹¹⁹ the convicted person in the present case remains a party to the reparations proceedings.

66. The Legal Representatives wish to emphasize again that, given the specific nature and the purpose of the reparations proceedings, victims are considered "parties" therein.¹²⁰ On the same basis, the Defence cannot arguably request to be provided, within reparations proceedings, with the same rights it usually enjoys in proceedings leading to the establishment of criminal responsibility of the accused.

67. Furthermore, the Legal Representatives submit that the rights of the convicted person in reparations proceedings must have a different scope depending on the type of reparations requested by the victims and/or the scope of the reparations eventually considered by the relevant Chamber. This is the consequence of the necessary use of presumptions in dealing with reparations issues and the possibility for the Court to grant reparations to communities in the large sense, as already argued *supra*.¹²¹ However, the convicted person's right to participate in reparations

¹¹⁷ See the Defence Document in Support of the Appeal, *supra* note 3, par. 42.

¹¹⁸ *Idem*, par. 45.

¹¹⁹ See the Impugned Decision, *supra* note 1, par. 267; and the "Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings", *supra* note 43, par. 66.

¹²⁰ See *supra* note 60.

¹²¹ See *supra* paras. 41 and 55-56.

proceedings, as provided for in the legal texts of the Court, will remain intact since the relevant Chamber may allow him or her, pursuant to article 75(3) of the Rome Statute, to make representations before issuing an order for reparations.¹²²

68. Moreover, contrary to the Appellant's contention,¹²³ the Trial Chamber did not lighten the victims' burden of proof by relying on the Appellant's unfortunate financial situation. The Legal Representatives read the Impugned Decision as stating the obvious: the standard of proof for the adjudication of applications for reparations should be lower than the one used for the determination of the Appellant's criminal responsibility. Hence, as correctly stressed by the Chamber, the consideration of the evidence submitted by the applicants for reparations need not be as demanding or rigid as the examination of evidence relied upon to determine the Appellant's criminal responsibility.¹²⁴ This conclusion is not, in any way, linked to the Appellant's financial situation. It arises from the very unique nature of reparations proceedings before the Court, expressly recognised by the Appellant.¹²⁵ Accordingly, the Legal Representatives submit that the connection alleged by the Appellant between the standard of proof found applicable by the Chamber and the Appellant's financial situation is meritless.

69. For similar reasons, the Legal Representatives contend that the lack of an express deadline for the implementation of the reparations order(s) eventually rendered by the Chamber as alleged by the Appellant¹²⁶ does not infringe the fair trial guarantees. In particular, the lack of an express deadline, which is not explicitly warranted by the legal texts of the Court, was not arbitrary but justified by the circumstances in this particular case.

¹²² See the Joint Document in Support of the Appeal, *supra* note 49, par. 65.

¹²³ See the Defence Document in Support of the Appeal, *supra* note 3, paras. 85-88.

¹²⁴ See the Impugned Decision, *supra* note 1, paras. 251, 253 and 254.

¹²⁵ See the Defence Document in Support of the Appeal, *supra* note 3, par. 112.

¹²⁶ *Idem*, paras. 110-114.

70. Finally, regarding the Appellant's contention that participation by the OPCV in the implementation of the reparations plan is inappropriate because the OPCV is representing some applicants, the Legal Representative briefly observe the following.¹²⁷ The Appellant's appears to suggest that the OPCV may be party and adjudicator regarding the applications brought by the individual applicants it represents in the reparations proceedings. In this regard, it is noted that the Office was mandated by the Chamber to assist the TFV, the Registry and the experts in the preparation of proposals for "*collective reparations [...] which are then to be presented to the Chamber for its approval*".¹²⁸ In other words, the Impugned Decision gave the OPCV the mandate of "*advising on and assisting with the detailed factual circumstances of the case*", pursuant to regulation 81(4)(a) of the Regulations of the Court, while making it very clear that the assessment of harm and the identification of victims and beneficiaries should be carried out by the TFV alone.¹²⁹ Accordingly, the mandate given to the OPCV in the Impugned Decision is different from and cannot be mistaken with the legal representation of applicants for reparations, entrusted to the OPCV by other decisions pursuant to former regulation 80(2) and current regulation 81(4)(d) and (e) of the Regulations of the Court.¹³⁰

71. Therefore, the Legal Representative request the Appeals Chamber to dismiss the Appellant's arguments in this regard.

¹²⁷ See the Defence Document in Support of the Appeal, *supra* note 3, par. 46.

¹²⁸ See the Impugned Decision, *supra* note 1, paras. 282 and 289(c).

¹²⁹ *Idem*, par. 283.

¹³⁰ See the "Corrigendum to Decision on the applications by victims to participate in the proceedings", *supra* note 100, par. 137(a); the transcript of the hearing of 16 January 2009, ICC-01/04-01/06-T-104-FRA ET WT, pp. 32-34; the "Decision on the OPCV's request to participate in the reparations proceedings", *supra* note 21, par. 13(a); and the "Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings", *supra* note 43, par. 72.

7. On the participation of anonymous victims in reparations proceedings

72. The Legal Representatives oppose the Appellant's contention according to which the fairness of the reparations proceedings requires the disclosure to the convicted person of all identifying information regarding the victims participating in said proceedings.¹³¹ The Legal Representatives submit that given the specific nature and the limited purpose of reparations proceedings, the convicted person is not entitled to be provided with the information regarding victims on the same basis than during the proceedings leading to the establishment of his criminal responsibility.

73. Firstly, the Appellant bases his contention on article 67 of the Rome Statute, rule 89 of the Rules of Procedure and Evidence and the jurisprudence of another international criminal tribunal. The Legal Representatives submit that reliance on these sources is inaccurate, inappropriate, and simply inapposite, respectively.

74. Regarding article 67 of the Rome Statute, the Legal Representatives oppose the Appellant's contention according to which "*l'allégation par une victime participante d'un préjudice personnel résultant d'un crime retenu contre la personne condamnée constitue une accusation nouvelle et spécifique*".¹³² The Legal Representatives argue that said contention fails to take into account that the harm alleged by the "*participating victim*" requesting for reparations results from one or more of the crimes for which the Appellant has been convicted, and has already been assessed by the Chamber. Accordingly, the Appellant cannot argue that participating victims, when requesting for reparations, bring new allegations against him.

75. The Appellant's reliance on rule 89 of the Rules of Procedure and Evidence to argue *a fortiori* a right to respond to applications for reparations¹³³ is equally

¹³¹ See the Defence Document in Support of the Appeal, *supra* note 3, paras. 60 and 62.

¹³² *Idem*, par. 52 (emphasis added).

¹³³ *Ibid.*, par. 53.

misguided. Considering the different nature and purpose, on the one hand, of the proceedings leading to the establishment of his criminal responsibility and, on the other hand, the reparations proceedings, acknowledged, *inter alia*, by the Appeals Chamber¹³⁴, the provisions applicable in one of these proceedings cannot be simply applied by analogy in the other proceedings.

76. The Appellant also refers to an ECCC decision on protective measures as a further basis for his contention that applicants for reparations cannot remain anonymous *vis-à-vis* the Defence.¹³⁵ The Legal Representatives argue that, as already recognised by the Appeals Chamber, and regardless of the merits of the ECCC decision, the jurisprudence of other international criminal tribunals is not binding on this Court.¹³⁶ Moreover, as already argued *supra*, the ECCC jurisprudence is not directly transposable to proceedings in the current case, given its different factual and legal environment.¹³⁷ In conclusion, the Legal Representatives submit that the legal authorities relied upon by the Appellant do not constitute a relevant basis allowing him to require the disclosure of all the information concerning the victims requesting reparations.

77. The Legal Representatives also observe that the Chamber found that “*victims who may benefit from an award for collective reparations will not necessarily participate in the proceedings, either in person or through their legal representatives*”.¹³⁸ Said finding was not challenged by the Appellant at the time. Therefore, the Legal Representatives

¹³⁴ See *supra* note 57.

¹³⁵ See the Defence Document in Support of the Appeal, *supra* note 3, par. 59.

¹³⁶ See the “Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’”, *supra* note 62, par. 31; and the “Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’”, *supra* note 62, par. 37.

¹³⁷ See *supra* paras. 53 and 61.

¹³⁸ See the “Decision on the OPCV’s request to participate in the reparations proceedings”, *supra* note 21, par. 10.

contend that the Appellant recognises that some degree of anonymity may be justified where the relevant Chamber decides to award collective reparations.

78. The Appellant relies on two decisions by the Trial Chamber on victims' participation to support his view that victims requesting reparations cannot remain anonymous.¹³⁹ On this basis, the Appellant requests the disclosure of applicants' pictures and of information concerning their identity, date of birth, the time and places where they suffered the crimes, and the identity of those who witnessed their harm and those who assisted them in filling in their application forms for reparations.¹⁴⁰ The Legal Representatives submit again in this regard that the decisions relied upon by the Appellant were issued during the proceedings leading to the establishment of the criminal responsibility of the accused, with a purpose, scope, actors and consequences of different nature.¹⁴¹ In particular, in those proceedings, victims enjoy the right to lead evidence pertaining to the guilt or innocence of the accused.¹⁴² By contrast, the criminal responsibility of the convicted person is no longer in question during the reparations proceedings. In fact, the Appeals Chamber has ruled that the Impugned Decision cannot be executed until the decision on conviction is confirmed on appeal.¹⁴³ Accordingly, the Legal Representatives submit that reparations proceedings will not result in any manner in an increase or decrease of the finding of guilt of the convicted person reached by the Chamber in the present case.

¹³⁹ See the Defence Document in Support of the Appeal, *supra* note 3, paras. 58 and 60.

¹⁴⁰ *Idem*, paras. 63-65, 68-69 and 76.

¹⁴¹ See the "Decision on victims' participation", *supra* note 57, paras. 121-122; the "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", *supra* note 57, paras. 97-100; and the "Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings", *supra* note 43, paras. 67, 70 and 86.

¹⁴² See the "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", *supra* note 57, paras. 3, 94 and 104-105.

¹⁴³ See the "Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings", *supra* note 43, par. 86.

79. Moreover, the Legal Representatives submit that the Appellant has not justified his alleged need to access *all* the requested information, and equally important, whether the disclosure of *all* the requested information can take place without endangering the safety and well-being of the applicants for reparations.¹⁴⁴ As argued in the preceding paragraph, the events underlying reparations are not to be contested at the reparations stage of proceedings, having been proven to a higher standard. More importantly, the Legal Representatives note that the obligation pursuant to article 68(1) of the Rome Statute to take appropriate measures to protect the safety, well-being, dignity and privacy of the victims is applicable through all stages of the proceedings.¹⁴⁵ Accordingly, the applicable standards to authorise redactions must be the same as those already used and confirmed by the Appeals Chamber during the proceedings leading to the establishment of the criminal responsibility.¹⁴⁶

80. Lastly, a similar assessment must be made when deciding on the anonymity of individual applicants for reparations. A careful consideration of the risks to the safety of the applicants and other persons that the disclosure of all the information

¹⁴⁴ See the "Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08", *supra* note 100, par. 25, relying on the "Judgment on the prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision establishing general principles governing applications to restrict disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence'" (Appeals Chamber), No. ICC-01/04-01/06-568 OA3, 13 October 2006, par. 37; and the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First decision on the prosecution request and amended requests for redactions under Rule 81'" (Appeals Chamber), No. ICC-01/04-01/06-773 OA5, 14 December 2006, paras. 33-34.

¹⁴⁵ See the "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007" (Appeals Chamber), No. ICC-01/04-556 OA4 OA5 OA6, 19 December 2008, par. 50.

¹⁴⁶ See the "Judgment on the prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision establishing general principles governing applications to restrict disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence'", *supra* note 144, par. 37; and the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First decision on the prosecution request and amended requests for redactions under Rule 81'", *supra* note 144, paras. 33-34.

requested by the Appellant may entail is required. The Legal Representatives submit that the principle of proportionality is of the essence in this scenario.¹⁴⁷

81. Additionally, the Legal Representatives stress out that due regard should be given to the difficulty faced by many applicants to obtain evidence supporting their applications for reparations. Contrary to the Appellant's contention,¹⁴⁸ the Chamber's consideration of the difficulties arising from the destruction or unavailability of evidence is not merely theoretical. Regrettably, the hindrances encountered by victims to obtain documents, let alone official ones, are not exceptional. The Chamber experienced difficulties in this regard when obliged to postpone the consideration of many applications for participation because of the inability of the applicants to obtain the required documents.¹⁴⁹ And in this regard, the fact that the Appellant managed to obtain some official documents must only be seen as an exception.¹⁵⁰

82. Therefore, the Legal Representatives request the Appeals Chamber to dismiss the Appellant's arguments in this regard.

8. On the provision of reparations to victims of sexual and gender-based violence

83. The Legal Representatives strongly disagree with the Appellant's contention that the Impugned Decision is erroneous in recognizing victims of sexual and gender violence, and inhumane treatment the right to obtain reparations.¹⁵¹ Contrary to the Appellant's arguments and for the reasons advanced *infra*, the Legal Representatives submit that the Chamber made no error when finding that former child soldiers, women and girls who suffered sexual and gender violence, torture and inhumane

¹⁴⁷ *Idem*.

¹⁴⁸ See the Defence Document in Support of the Appeal, *supra* note 3, paras. 99-100.

¹⁴⁹ See the "Corrigendum to Decision on the applications by victims to participate in the proceedings", *supra* note 100, paras. 112-113.

¹⁵⁰ See the Defence Document in Support of the Appeal, *supra* note 3, par. 102.

¹⁵¹ *Idem*, paras. 125-127 and 137.

and degrading treatments as a result of the crimes for which the Appellant has been convicted have the right to participate in and benefit from the reparations proceedings in the present case.¹⁵²

84. To support his contentions, the Appellant makes reference to a ruling of the Appeals Chamber whereby victims unrelated to the charges confirmed against the accused were not authorised to participate in the trial.¹⁵³ The Legal Representatives submit that in the judgment the Appellant relies upon, the Appeals Chamber made reference to the “*participation of victims at trial [...] through the procedure of rule 89 (1) of the Rules*”¹⁵⁴ and ruled out the participation of victims of crimes other than those charged against the Appellant “*given that the purpose of trial proceedings is the determination of the guilt or innocence of the accused person of the crimes charged*”.¹⁵⁵ The Legal Representatives submit that the Appeals Chamber was referring to the proceedings leading to the establishment of the criminal responsibility of the then accused, and consequently the findings relied upon by the Appellant are not applicable to the current phase of the proceedings. Therefore, the Appellant’s reliance on rulings of the Appeals Chamber applicable to different proceedings is misplaced.

85. As argued by the legal representatives of victims during the trial in their request to trigger regulation 55 of the Regulations of the Court, the active participation of children in hostilities is *per se* an “*inhuman practice*” and inhuman conditions prevailing during children’s military training are common practice.¹⁵⁶ Moreover, the recruitment of girls into armed forces is generally recognised as having as primarily aim their use as sex slaves. Accordingly, gender based crimes

¹⁵² See the Impugned Decision, *supra* note 1, paras. 207-209 and 240.

¹⁵³ See the Defence Document in Support of the Appeal, *supra* note 3, par. 128.

¹⁵⁴ See the “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, *supra* note 57, par. 61.

¹⁵⁵ *Idem*, par. 62.

¹⁵⁶ See the “Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court”, No. ICC-01/04-01/06-1891-tENG, 16 July 2009, paras. 21-23 and paras. 29-31.

and inhumane treatments being an inherent component of enlistment, recruitment and use of children in hostilities, victims having suffered harms as a result of said conducts must be able to take part in reparations proceedings in the present case.

86. Consequently, the Legal Representatives submit that applicants for reparations who suffered harm of a physical, psychological or sexual nature need only to prove that their harm resulted from the crimes for which the Appellant has been convicted. The Appellant need not be found guilty of cruel or inhumane treatment or sexual crimes for applicants who experienced harm of such a nature to be granted reparations. The Legal Representatives contend that the key consideration for adjudicating a reparations claim before the Court is not the nature of the crimes for which the Appellant has been convicted, but the harm produced as a result thereof.

87. Although neither the definition of the crimes for which the Appellant has been found guilty nor international criminal tribunals dealing with the same crimes, namely recruitment, enlistment or use of child soldiers, provide for a link between said crimes and the crimes of sexual violence,¹⁵⁷ this is explained by the fact that those texts are aimed at adjudicating the criminal responsibility arising from the commission of the crimes, and not at specifying types of harm which might be produced as a result thereof. In this regard, the Special Court for Sierra Leone does not have a mandate to grant reparations for the damage arising from the crimes it deals with. By contrast, the Court has a mandate to grant reparations and it is duly empowered to fulfil such mandate.

88. The Legal Representatives submit that the Chamber's evaluation of the causal link between the harms suffered by the applicants for reparations and the crimes for which the Appellant has been convicted is correctly set out in the present case. The Legal Representatives oppose the Appellant's contention that the "*proximate cause*"

¹⁵⁷ See the Defence Document in Support of the Appeal, *supra* note 3, par. 135.

test relied upon by the Chamber to adjudicate on applications for reparations is vague and imprecise, and contrary to an “*incontestable tendency of international jurisdictions and other international entities converging towards a restrictive evaluation of the causality link*”.¹⁵⁸ The Appellant’s allegation that “*all the international jurisdictions and entities with jurisdiction on reparation matters apply the direct and immediate causality test*” is equally unfounded.¹⁵⁹ Based on this wrong assumption, the Appellant constantly implies the need for a direct link between the harm suffered by the applicants for reparations and the crimes for which he has been convicted.¹⁶⁰

89. As submitted *supra* regarding the standard of proof, the jurisprudence of other international courts or bodies is not directly transposable to proceedings in the current case, given its different factual and legal environment.¹⁶¹ At most, it may be of guidance when interpreting the legal instruments of the Court. However, such guidance can only be of assistance if the Court is provided with all relevant information. The Legal Representatives contend that the Appellant fails to refer to specific jurisprudence disclosing that the causal test used at international law is not as univocal as the Appellant argues it to be.

90. For instance, the causal test before the ECCC is not settled law yet. The Appellant refers to case 001 but fails to mention case 002, where the test identified by the Pre-Trial Chamber was found to be more flexible:

“the Pre-Trial Chamber, for those applicants alleging psychological injury who are not in a position to substantiate a close relationship with the immediate victim, shall, where appropriate, apply a presumption of collective injury in its assessment of civil party applications in case 002. The presumption of collective injury derives from the very nature of the source of such injury, these being crimes like genocide or crimes against humanity which, as mentioned above, are, by definition, crimes directed against groups or the population.

¹⁵⁸ *Idem*, par. 174.

¹⁵⁹ *Ibid.*, par. 179.

¹⁶⁰ *Ibid.*, paras. 34, 109 and 171.

¹⁶¹ See *supra* paras. 53, 61 and 76.

[...] *By presumption of collective injury, the Pre-Trial Chamber means that as long as a civil party applicant submits that he/she was a member of the same targeted group or community as the direct victims and such is more likely than not to be true, psychological harm suffered by the indirect victim arises out of the harm suffered by the direct victim, brought about by the commission of crimes which represent grave violations of international humanitarian law as alleged in the Closing Order”*.¹⁶²

91. Judge Marchi-Uhel went even further in her dissenting opinion to the ECCC decision quoted *supra*, deeming it appropriate

“to adopt a broader approach than that adopted by the Co-Investigating Judges and the Trial Chamber in Case 001 and accept that there is a presumption that where crimes charged in the Indictment have been committed against members of the applicant’s family – direct or extended – defined as including parents, children, siblings, grand-parents, in-laws, uncles and aunts and cousins, such crimes have caused a psychological harm to the applicant. I will also apply a presumption of psychological harm in those instances where the applicants allege to be part of a community with close ties and allege to have suffered harm as a result of a crime committed against a member of his or her community”.¹⁶³

92. In a similar manner, the Appellant only refers to one case before the IACHR to conclude that only the “*immediate effects*” of the unlawful act in question call for reparations.¹⁶⁴ However, the IACHR implicitly and expressly relied upon a more extensive approach to the causal link between a violation and the resulting harm to determine the scope of reparations.

93. In particular, in the very case mentioned by the Appellant, the IACHR found that

¹⁶² See ECCC, Case File 002/10-09-2007-ECCC/OCIJ (Ieng Sary et al.), “Decision on Appeals against Orders of the Co-Investigating Judges on the admissibility of civil party applications” (Pre-Trial Chamber), 24 June 2011, par. 93 (emphasis added).

¹⁶³ *Idem*, Separate and Partially Dissenting Opinion of Judge Marchi-Uhel, par. 68 (emphasis added).

¹⁶⁴ See the Defence Document in Support of the Appeal, *supra* note 3, par. 177.

*“[t]he obligation to make reparation for damages caused is sometimes, and within the limits imposed by the legal system, extended to cover persons who, though not successors of the victims, have suffered some consequence of the unlawful act”.*¹⁶⁵

In other cases, the IACHR has considered an even broader causal link:

*“Regarding the argument of the State about the non-existence of a causal link between the disappearance of Mr. Anzualdo Castro and the cancer development in his mother, in fact, no evidence has been furnished in order to consider this proven. However, in several cases serious human rights violations brought to this Tribunal’s attention, the Court has verified physical damage suffered by the victims’ next-of-kin as a consequence of the emotional or psychological damage caused by such violation. In this way, the Court deems reasonable to consider that the health of Mrs. Castro Cachay de Anzualdo has considerable deteriorated as a result of intense emotional distress inflicted due to her son’s disappearance”.*¹⁶⁶

94. Regarding the Governing Council of the United Nations Compensation Commission (the “UNCC”), the Legal Representatives submit that the UNCC has expressly taken into account the concept of “proximate cause” in order to take its decisions. In fact, the Panel of Commissioners found that

“in the determination of whether a particular loss falls within the classification of a “direct” loss for which Iraq is liable [...] considerations of logic, fairness and equity must enter”, and concluded that “one authority has summarized relevant jurisprudence with the statement that “in the majority of cases, in which the epithets ‘direct’ and ‘indirect’ are applied to describe the consequences of an unlawful act, they are in fact being used synonymously with ‘proximate’ and ‘remote.’ Accordingly, the most commonly used test in damage claims is whether the act of a State was

¹⁶⁵ See IACHR, *Aloeboetoe et al. v Suriname*, Reparations and Costs, Judgment of 10 September 1993, Series C No. 15 (1993), par. 67 (emphasis added).

¹⁶⁶ See IACHR, *Anzualdo-Castro v. Peru*, Preliminary Objection, Merits, Reparations and costs, Judgment of 22 September 2009, Series C No. 202 (2009), par. 112 (emphasis added).

the “proximate cause” of the loss suffered, or whether that act was too remote to create liability”.¹⁶⁷

95. Other international bodies have also expressly relied upon the “proximate cause” criterion when dealing with mass claims for reparations, such as the Eritrea-Ethiopia Claims Commission.¹⁶⁸

96. Against this background, the Legal Representatives submit that the “proximate cause” test identified by the Chamber is neither inconsistent with the legal framework of the Court and the international jurisprudence nor inappropriate with regard to the circumstances of the present case.

97. Indeed, most victims represented by the Legal Representatives are former child soldiers who were forcibly recruited into the *Union des Patriotes Congolais* (“UPC”)/FPLC when they were under the age of 15 years and were subsequently sent to training camps where they underwent military training. During that training, all of these victims suffered physical harm, moral and material damage, and lost opportunities. Furthermore, the young girls suffered regularly sexual harm. All this harms results from the crimes for which the Appellant has been convicted.

98. The Legal Representatives submit that the very act of forcibly recruiting child soldiers under the age of 15 years into the UPC/FPLC to make them undergo military training and/or using them to participate actively in hostilities resulted in harms for the victims. In fact, the statements of numerous witnesses who testified in the proceedings regarding the establishment of guilt or innocence of the accused, or related to the eventual determination of the sentence in the current case, demonstrate that after they were forcibly recruited into the UPC/FPLC, followed by military

¹⁶⁷ See UNCC, “Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individual Claims for Damages up to US\$100,000 (Category “C” Claims)”, UN Doc. S/AC.26/1994/3, 21 December 1994, pp. 21-22 (emphasis added).

¹⁶⁸ See Eritrea-Ethiopia Claims Commission, “Decision Number 7: Guidance Regarding Jus ad Bellum Liability”, 27 July 2007, paras. 13-14; and the “Final Award, Eritrea’s Damages Claims”, 17 August 2009, par. 39.

training in training camps and active participation in hostilities, they all experienced physical and/or psychological suffering of varying levels of severity. A number of witnesses also testified that children under the age of 15 years were, in any case, too young to undergo military training.¹⁶⁹

99. Moreover, the inhumane conditions prevailing during the children's military training following their recruitment are clearly detailed in the report of the Secretary-General on the events in Ituri, which states that:

*"By all accounts, training conditions were generally physically gruelling and extremely hard, in terms of food rations and punishment regimes."*¹⁷⁰

100. The Legal Representatives submit that child soldiers under the age of 15 years and forcibly recruited into the UPC/FPLC were subjected to or witnessed the whipping of recruits, cruelly beating and sometimes even killing during their military training for disobeying orders, lack of diligence during training and particularly for attempting to flee the camp or for losing weapons.¹⁷¹ The statements of some witnesses who testified in the trial proceedings regarding the current case corroborate this physical and moral harm, *inter alia*, Witnesses OTP 0038,¹⁷² OTP 0213,¹⁷³ and OTP 0294.¹⁷⁴ The practice of forcing recruits, including children under the age of 15 years, to drink alcohol and smoke hemp was confirmed by, *inter*

¹⁶⁹ See the "Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court", *supra* note 156, paras. 32-33.

¹⁷⁰ See the Special report on the events in Ituri, January 2002 – December 2003, UN Doc. S/2004/573, 16 July 2004, para. 147.

¹⁷¹ See the "Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court", *supra* note 156, paras. 32-33.

¹⁷² See the transcript of the hearing of 30 January 2009, No. ICC-01/04-01/06-T-113-CONF-ENG ET, p. 69, line 3 to p. 70, line 11. See also the transcript of the hearing of 3 February 2009, No. ICC-01/04-01/06-T-114-CONF-ENG ET, p. 4, line 6 to p. 5 line 9; and p. 82, line 19 to p. 83, line 3.

¹⁷³ See the transcript of the hearing of 20 February 2009, No. ICC-01/04-01/06-T-132-CONF-ENG CT, p. 12, lines 3 to 6. See also the transcript of the hearing of 23 February 2009, No. ICC-01/04-01/06-T-133-CONF-ENG ET, p. 3, lines 6 to 10.

¹⁷⁴ See the transcript of the hearing of 18 March 2009, No. ICC-01/04-01/06-T-150-CONF-FRA CT, p. 75, line 15 to p. 76, line 17.

alia, Witnesses OTP 0293,¹⁷⁵ OTP 0017¹⁷⁶ and OTP 0294.¹⁷⁷ The harms resulting from the inhumane detention conditions of recruits, including children under the age of 15 years, in the various camp prisons was described by, *inter alia*, Witness OTP 0213¹⁷⁸.

101. Furthermore, girls recruited into armed militias played multiple roles and were often used for sexual purposes.¹⁷⁹ This is consistent with several international reports and principles which support the contention that harm of a sexual nature normally results from the crimes for which the Appellant has been convicted.¹⁸⁰

102. The Legal Representatives submit that girls recruited or enlisted within the UPC/FPLC suffered harm of a sexual nature because they were used, including those under the age of 15 years, against their will for sexual purposes by the commanders

¹⁷⁵ See the transcript of the hearing of 24 March 2009, No. ICC-01/04-01/06-T-153-CONF-ENG ET, p. 48, line 24 to p. 49, line 1.

¹⁷⁶ See the transcript of the hearing of 31 March 2009, No. ICC-01/04-01/06-T-158-CONF-ENG ET, p. 31, line 24 to p. 32, line 1.

¹⁷⁷ See the transcript of the hearing of 18 March 2009, No. ICC-01/04-01/06-T-150-CONF-ENG ET, p. 77, line 17 to p. 78, line 24.

¹⁷⁸ See the transcript of the hearing of 20 February 2009, No. ICC-01/04-01/06-T-132-CONF-ENG ET, p. 40, line 6 to p. 42, line 12.

¹⁷⁹ See the "Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court", *supra* note 156, paras. 26-31.

¹⁸⁰ See MACHEL (G.), *Promotion and Protection of the Rights of Children: Impact of armed conflict on children*, UN doc. A/51/306, 26 August 1996, par. 34; the *Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa*, 30 April 1997, definition of 'child soldier'. This document is available at: [http://www.unicef.org/emerg/files/Cape_Town_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf); Committee on the Rights of the Child, Colombia, third periodic report on the Convention on the Rights of the Child, UN doc. CRC/C/COL/CO/3, 8 June 2006, par. 80(a). This document is available at: <http://www.unhcr.org/refworld/docid/45377ee30.html>; the *Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, February 2007, principle 8.5. This document is available at: <http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>; and Committee on the Rights of the Child, Uganda, initial report on the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, UN doc. CRC/C/OPAC/UGA/CO/1, 3 October 2008, par. 24. This document is available at: <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.OPAC.UGA.CO.1.pdf>.

of the armed group,¹⁸¹ as was confirmed by former child soldiers forcibly recruited, *inter alia*, Witnesses OTP 0038¹⁸² and OTP 0294.¹⁸³

103. Lastly, the adoption of the “*proximate cause*” test by the Chamber is not likely to be detrimental to the Appellant’s rights. Indeed, should the Chamber decide to examine applications for reparations, the Appellant may be given the opportunity, pursuant to article 75(3) of the Rome Statute, to make representations on, *inter alia*, whether sexual or other types of harm suffered by the victims was “*as a result of*” the crimes found proven against him.

104. Therefore, the Legal Representatives request the Appeals Chamber to dismiss the Appellants’ arguments in this regard.

9. On the provision of reparations to the victims’ families and communities

105. The Legal Representatives oppose the Appellant’s contention according to which a “community” cannot be awarded with reparations.¹⁸⁴ Similarly, the Appellant’s argument according to which the beneficiaries of a collective award must be precisely identified and previously recognized as victims is meritless.¹⁸⁵ Both contentions would render nugatory the power conferred to the relevant Chamber to award reparations “*on an individualized basis*”, “*on a collective basis*” or both, pursuant to the express terms of rule 97(1) of the Rules of Procedure and Evidence. Following the Appellant’s approach, there would be no actual difference between individual and collective reparations, since in both instances the beneficiaries would have to be identified and assessed *individually*.

¹⁸¹ See the “Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court”, *supra* note 156, par. 34.

¹⁸² See the transcript of the hearing of 3 February 2009, No. ICC-01/04-01/06-T-114-CONF-ENG ET, p. 22, line 12 to p. 24, line 14; and p. 25, line 16 to p. 26, line 8.

¹⁸³ See the transcript of the hearing of 19 March 2009, No. ICC-01/04-01/06-T-151-CONF-ENG ET, p. 5, line 14 to p. 6, line 3.

¹⁸⁴ See the Defence Document in Support of the Appeal, *supra* note 3, par. 141.

¹⁸⁵ *Idem*, paras. 144-145.

106. The Legal Representatives submit that the Chamber made no error when finding that “*when collective reparations are awarded, these should address the harm the victims suffered on an individual and collective basis*”,¹⁸⁶ and when concluding, in this particular case, that “*a community-based approach, using the TFV’s voluntary contributions, would be more beneficial and have greater utility than individual awards, given the limited funds available and the fact that this approach does not require costly and resource-intensive verification procedures*”.¹⁸⁷

107. In order to oppose the correct approach adopted by the Chamber, the Appellant relies once again on a decision by the Appeals Chamber on victims’ participation in proceedings leading to the establishment of the Appellant’s criminal responsibility.¹⁸⁸ As submitted *supra*,¹⁸⁹ the decision referred to by the Appellant does not address the current reparations proceedings and *a fortiori* cannot be relevant when deciding on the scope of beneficiaries of collective reparations.

108. Furthermore, the Legal Representatives observe that the Appellant seems to misinterpret the term “communities” referred to by the Chamber.¹⁹⁰ In this regard, the Legal Representatives submit that, contrary to the Appellant’s contention, the Chamber did not refer to “communities” in the sense of “*legal entities*” to which reparations may be granted pursuant to rule 85(b) of the Rules of Procedure and Evidence.¹⁹¹ However, the fact that communities have not requested reparations to date does not necessarily mean that they cannot, in addition to receiving assistance from the TFV, as admitted by the Appellant himself,¹⁹² benefit from collective reparations awards.

¹⁸⁶ See the Impugned Decision, *supra* note 1, par. 221.

¹⁸⁷ *Idem*, par. 274.

¹⁸⁸ See the Defence Document in Support of the Appeal, *supra* note 3, paras. 142-143.

¹⁸⁹ See *supra* par. 83.

¹⁹⁰ See the Defence Document in Support of the Appeal, *supra* note 3, par. 146.

¹⁹¹ See the Impugned Decision, *supra* note 1, par. 197.

¹⁹² See the Defence Document in Support of the Appeal, *supra* note 3, par. 148.

109. Regarding the interpretation of the term “communities” referred to by the Chamber, the Legal Representatives submit that said term has been used in international jurisprudence for the purpose of awarding collective reparations, where there is a high number of victims forming potentially large groups based in particular localities and/or with common interests. The IACHR, in particular, adopted this approach.¹⁹³ For instance, in the *Aloeboetoe et al.* case referred to by the Appellant, the IACHR found that “as part of the compensation due, Suriname is under the obligation to reopen the school at Gujaba” and that “the necessary steps shall be taken for the medical dispensary already in place there to be made operational and reopen that same year” because “[m]ost of the children of the victims live in Gujaba, where the school and the medical dispensary have both been shut down”.¹⁹⁴ Pursuant to this approach, the IACHR has issued collective reparations awards of a similar nature in subsequent cases.

110. In the *Plan de Sánchez Massacre* case, the IACHR stated “the possibility to determine, in the corresponding section, other forms of reparation in favor of all the members of the communities affected by the facts of the case”, and eventually found that “[g]iven that the victims in this case are members of the Mayan people, this Court considers that an important component of the individual reparation is the reparation that the Court will now grant to the members of the community as a whole”.¹⁹⁵ Similarly, in the case of the *Mapiripán Massacre*, the IACHR ordered the State to “carry out such actions as may be necessary to ensure security conditions for the next of kin of the victims, as well as other former inhabitants of Mapiripán, who have been displaced, to be able to return to Mapiripán, if they wish to do so”.¹⁹⁶ Consistent with this approach, the former President of the IACHR and currently judge of the International Court of Justice explained in his

¹⁹³ See IACHR, *Ituango Massacres v. Colombia*, *supra* note 98, par. 397; ‘Juvenile Reeducation Institute’ *v. Paraguay*, Preliminary Objections, Merits, Reparations and Costs, 2 September 2004, Series C No. 112 (2004); and *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, 5 July 2006, Series C No. 150 (2006).

¹⁹⁴ See IACHR, *Aloeboetoe et al. v. Suriname*, *supra* note 165, par. 96.

¹⁹⁵ See IACHR, *Plan de Sánchez Massacre v. Guatemala*, Reparations, Judgment of 19 November 2004, Series C No. 116, paras. 62 and 86.

¹⁹⁶ See IACHR, *Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of 15 September 2005, Series C No. 134, operative par. 11.

concurring opinion to the interpretation of the judgement in the case of *La Cantuta* that “in the recent cycle of the cases of massacres, the Court has considered as “victims” or “injured parties” the people that have a relationship with the facts described in the application, as well as the evidence presented or produced before it”.¹⁹⁷

111. The ECCC Supreme Court Chamber relied on IACHR jurisprudence to determine the meaning of the term “collective award”.¹⁹⁸

112. Moreover, the Legal Representatives submit that contrary to the Appellant’s contention,¹⁹⁹ nothing in the legal framework of the Court prevents a relevant Chamber from granting a “community based” award without a previous request for reparations submitted by members of the affected community. In fact, article 75(1) of the Rome Statute foresees the possibility for the Court to do so “in exceptional circumstances”. Moreover, rule 95(2) of the Rules of Procedure and Evidence reserves the possibility for the Chamber to issue individual awards for the benefit of victims of an affected community who might have requested individual reparations. This approach is consistent with the practice of other international jurisdictions dealing with mass victimization. In particular, the ECCC reliance on the Guatemalan Report of the Historical Clarification Commission is relevant in this regard:

“[C]ollective reparatory measures for survivors of collective human rights violations and acts of violence, and their relatives, should be carried out within a framework of territorially based projects to promote reconciliation, so that in addition to addressing reparation, their other actions and benefits also favour the entire population without distinction between victims and perpetrators.”²⁰⁰

¹⁹⁷ See IACHR, *La Cantuta v. Peru*, Interpretation of the Judgment on Merits, Reparations and Costs, Judgment of 30 November 2007, Series C No. 173, Concurring Opinion of the Judge A.A. Cançado Trindade, par. 66.

¹⁹⁸ See ECCC, *Case File No. 001, “Appeal Judgment”*, *supra* note 109, par. 1323, referring to IACHR, *Villagrán-Morales et al. v. Guatemala (“Street Children” case)*, Reparations and Costs, Judgment of 26 May 2001, Series C No. 77(2001).

¹⁹⁹ See the Defence Document in Support of the Appeal, *supra* note 3, par. 147.

²⁰⁰ See ECCC, *Case File No. 001, “Appeal Judgment”*, *supra* note 109, par. 660, referring to Guatemalan Historical Clarification Commission, “Guatemala: Memory of Silence”, s. III(10).

113. Therefore, the Legal Representatives request the Appeals Chamber to dismiss the Appellant's arguments in this regard.

10. On the provision of reparations to victims in different parts of the Ituri region

114. The Legal Representatives argue that there is no error in the Impugned Decision not to limit the geographical scope of reparations to the places referred to in the Judgement.²⁰¹ Contrary to the Appellant's contentions,²⁰² said finding by the Chamber is not inconsistent with the jurisprudence or the legal framework of the Court.

115. The Appellant bases his contentions, once again, on a decision regarding the scope of the judgements eventually issued by Chambers of the Court pursuant to article 74 of the Rome Statute.²⁰³ As submitted *supra*,²⁰⁴ reparations proceedings only deal with the harms caused as a result of the commission of crimes already adjudicated upon. Accordingly, the Appellant's alleged unfairness arising from the possibility to grant reparations to persons who suffered harms in locations not mentioned in the Judgment, but whose harms resulted from the crimes found therein, is groundless. As further submitted *supra*,²⁰⁵ the Chamber did not limit in any way the possibility for the Appellant to challenge applications for reparations during the reparations proceedings.

116. Moreover, the approach adopted by the Chamber in this regard is consistent with, although obviously not bound by, the practice of the ECCC Pre-Trial Chambers on the scope of potential reparations for mass victimization:

²⁰¹ See the Impugned Decision, *supra* note 1, par. 282.

²⁰² See the Defence Document in Support of the Appeal, *supra* note 3, par. 182.

²⁰³ *Idem*, par. 181.

²⁰⁴ See *supra* par. 78.

²⁰⁵ See *supra* paras. 65 *et seq.*

*“the Civil Party Applicants do not necessarily have to relate their injury to only one crime site or even to only those crime sites identified in the part of the Closing order titled ‘factual findings’, as the crimes and the underlying CPK policies forming the basis of the indictments were allegedly implemented throughout Cambodia [...]. In the Closing Order where the Co-Investigating Judges qualify the facts as crimes, on all occasions, they state that the Accused made an implemented policies for the whole of Cambodia. The Pre-Trial Chamber finds that where Civil Party Appellants state that they have suffered from the implementation of policies but in areas other than those chosen to be investigated, they shall be considered for admission as Civil Parties”.*²⁰⁶

117. Similarly, the Chamber in the present case found the Appellant responsible for having *“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. This resulted, in the ordinary course of events, in the conscription and enlistment of boys and girls under the age of 15, and their use to participate actively in hostilities”*.²⁰⁷ Consequently, the harms resulting from the crimes for which the Appellant was convicted might not be limited to the locations precisely mentioned by the Chamber in the Judgment. Indeed, the locations precisely mentioned in the Judgment were relied upon only to elucidate the Appellant’s criminal responsibility. In this regard, the Legal Representatives submit that, given the distinction between the proceedings leading to the establishment of the criminal responsibility and the reparations proceedings, victims should be entitled to submit applications for reparation concerning the harms they suffered from in any locality in the Ituri region as a result of the crimes committed by the Appellant.

118. Therefore, the Legal Representatives request the Appeals Chamber to dismiss the Appellant’s arguments in this regard.

²⁰⁶ See ECCC, Case File 002, “Decision on Appeals against Orders of the Co-Investigating Judges on the admissibility of civil party applications”, *supra* note 162, paras. 72 and 77.

²⁰⁷ See the Judgment, *supra* note 15, par. 1351 (emphasis added).

FOR THE FOREGOING REASONS, the Legal Representatives respectfully request the Appeals Chamber:

- **to GRANT** the Defence appeal only in relation to the Trial Chamber's findings regarding (i) delegating certain judicial functions to the TFV, a team of experts and the Registry; (ii) ordering the constitution of a new Trial Chamber to supervise the reparations proceedings; and (iii) deciding not to examine itself the individual application forms for reparations submitted by victims; and
- **to DISMISS** the remaining arguments submitted by the Defence.



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for Legal Representatives of Victims V02

Dated this 8th day of April 2013

At The Hague (The Netherlands) and Kinshasa (Democratic Republic of the Congo)