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TRIAL CHAMBER II

Before: Judge Marc Perrin de Brichambaut, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Péter Kovács

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public Document

**Defence Submissions on the Evidence Admitted for the Determination of
Thomas Lubanga Dyilo's Liability for Reparations**

Source: Defence for Mr Thomas Lubanga

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

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BACKGROUND

1. On 13 July 2017, Trial Chamber II (“Chamber”) issued an order calling for submissions to be filed on the evidence admitted in these proceedings, and, in particular, for the Chamber to be provided with an estimate of the current monetary value of the harm alleged by the victims and with an estimate of the total number of direct and indirect victims, as well as any submissions on Mr Lubanga’s liability.¹
2. On 21 July 2017, the Chamber granted the parties an extension of time.²
3. On 8 September 2017, the V01³ and V02⁴ teams of Legal Representatives of Victims (“V01 and V02 LRVs”) and the Office of Public Counsel for Victims⁵ (“OPCV”) filed their written submissions.
4. The Defence for Mr Lubanga hereby files the present submissions pursuant to the Orders of 13 and 21 July 2017.

¹ “Order Instructing the Parties to File Submissions on the Evidence Admitted for the Determination of Thomas Lubanga Dyilo’s Liability for Reparations”, 13 July 2017, ICC-01/04-01/06-3339-tENG.

² “Decision on the Application of the Office of Public Counsel for Victims for an extension of the time limit set by the Order of 13 July 2017”, 21 July 2017, ICC-01/04-01/06-3345-tENG.

³ “*Observations sur les éléments de preuve admis dans la présente procédure en vue de fixer le montant des réparations auxquelles est tenu Thomas Lubanga Dyilo*”, 8 September 2017, ICC-01/04-01/06-3359.

⁴ “*Observations of the V02 Team in Compliance with Order No. ICC-01/04-01/06-3345*”, 8 September 2017, ICC-01/04-01/06-3363-tENG.

⁵ “*Observations sur les éléments admis dans la procédure en vue de fixer le montant des réparations auquel est tenu M. Thomas Lubanga Dyilo*”, 8 September 2017, ICC-01/04-01/06-3360.

SUBMISSIONS

1. Defining indirect victims

5. Under rule 85(a) of the Rules of Procedure and Evidence, “victims” means “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”.
6. Under the terms of the Order issued by the Appeals Chamber, only the parents of former child soldiers, or persons showing evidence of the same type of personal relationship to a direct victim, may be considered indirect victims. This rules out any expanded definition of the concept of family.⁶
7. In their submissions, the Legal Representatives and the OPCV attempt to expand the category of indirect victims to include extended family, institutions and communities.
8. Their analysis is contrary to rule 85(a) and to the criteria articulated by the Appeals Chamber.
 - *Family members*
9. The Appeals Chamber gave a clear definition of indirect victimhood specifically requiring proof of close personal ties to a direct victim, such as exist between a child and his or her parents.⁷
10. Therefore, while a parent may rightfully be considered eligible for reparations as an indirect victim by dint of his or her child’s enlistment, any other members of the direct victim’s family will be required to show a special connection to the direct victim to prove that they personally suffered harm.
11. The V01 Legal Representatives’ view – that indirect victim standing should be granted not only to a former child soldier’s close relatives but also to his or her

⁶ ICC-01/04-01/06-3129-AnxA, para. 63.

⁷ *Idem.*

entire family circle,⁸ without any requirement to show a close connection or personal harm – is contrary to the Order of the Appeals Chamber.

- *Institutions*

12. The V02 Legal Representatives call for institutions (schools, churches and other buildings destroyed as a result of the hostilities in Ituri) to receive reparations as indirect victims.⁹
13. Their designation as such is inadmissible, since the harm suffered is required to have been caused by the crimes of which the defendant stands convicted.¹⁰
14. In the present case, Mr Lubanga stands convicted of enlisting and conscripting children under the age of 15 into the UPC/FPLC and using them to participate actively in hostilities between early September 2002 and 13 August 2003.¹¹
15. As acknowledged by the V02 Legal Representatives, the destruction of public buildings such as schools and churches is not a result of the crime of using child soldiers. It is a consequence of other criminal or military activities in connection with the numerous conflicts that have affected the Ituri region.
16. Since there is nothing linking that harm to the crimes of which Mr Lubanga stands convicted, the institutions in question cannot be granted standing as indirect victims.

⁸ ICC-01/04-01/06-3359, para. 9.

⁹ ICC-01/04-01/06-3363-tENG, para. 21.

¹⁰ ICC-01/04-01/06-3129-AnxA, para. 60.

¹¹ "Judgment pursuant to Article 74 of the Statute", 14 March 2012, ICC-01/04-01/06-2842.

- *Communities*

17. The V01¹² and V02¹³ Legal Representatives, as well as the OPCV,¹⁴ submit that the crimes of which Mr Lubanga stands convicted caused harm to the former child soldiers' communities, and that those communities must therefore be regarded as indirect victims with a right to reparations.
18. This approach is at odds with the position adopted by the Appeals Chamber, which held that a community is to be understood as a group of victims each of whom satisfies the standard articulated in rule 85(a)¹⁵ of having suffered direct or indirect personal harm as a result of the crimes committed.
19. Following this interpretation, Trial Chamber VIII in *Al Mahdi* stated that reparations may be granted to direct and indirect individual victims provided that the harm they suffered was personal.¹⁶
20. Trial Chamber VIII thus found that the crimes of destroying protected buildings, of which Mr Al Mahdi stood convicted, had caused personal harm to the direct victims (the faithful and inhabitants of Timbuktu), but also to people throughout Mali and to the international community, as the buildings served a cultural purpose and most were on the UNESCO World Heritage List.¹⁷
21. In that case, an entire country and the international community suffered personal harm because of the type of crime committed and the nature of the buildings destroyed.
22. The instant case is different.

¹² ICC-01/04-01/06-3359, para. 13.

¹³ ICC-01/04-01/06-3363-tENG, para. 25.

¹⁴ ICC-01/04-01/06-3360, para. 49.

¹⁵ ICC-01/04-01/06-3129, paras. 210-215.

¹⁶ "Reparations Order", 17 August 2017, ICC-01/12-01/15-236, para. 40.

¹⁷ *Ibid.*, para. 53.

23. The crimes of which Mr Lubanga stands convicted affected specific individuals and did not, as such, cause direct and personal harm to all of the inhabitants of a city, town or community identified as such.
24. Even if any crime is a breach of the public order and thereby disruptive to society, this is not indicative of a compensable harm to every member of the affected society.
25. It follows, in the present case, that no identified community passes the test under rule 85(a) for eligibility to receive reparations in these proceedings.

2. Estimating the number of victims

26. The Chamber asked the parties to make submissions on the various items of evidence germane to a determination of the number of potential reparations beneficiaries.¹⁸
27. For the purposes of reparations, the Chamber instructed the Trust Fund for Victims (“Trust Fund”),¹⁹ and then the OPCV,²⁰ to prepare and send it applications for each potential victim. Those applications were subsequently redacted and disclosed to the Defence.²¹
28. Two lists of minors having participated in programmes for the disarmament, demobilization and rehabilitation/reinsertion/reintegration of Congolese armed groups were produced by the Democratic Republic of the Congo²² at the request of the Trust Fund²³ and the Chamber.²⁴

¹⁸ ICC-01/04-01/06-3339-tENG.

¹⁹ “Order instructing the Trust Fund for Victims to supplement the draft implementation plan”, 9 February 2016, ICC-01/04-01/06-3198-tENG.

²⁰ ICC-01/04-01/06-3252-tENG.

²¹ ICC-01/04-01/06-3275-tENG; ICC-01/04-01/06-3290-tENG.

²² ICC-01/04-01/06-3272-Conf-AnxIII; ICC-01/04-01/06-3274-Conf-Anx1.

²³ ICC-01/04-01/06-3272.

²⁴ “Order inviting the Government of the Democratic Republic of the Congo to submit observations on the participation of child soldiers in programmes for the disarmament, demobilisation and reintegration of armed groups in Ituri”, ICC-01/04-01/06-3260-tENG, paras. 4-6.

29. By an order dated 20 July 2017, the Chamber instructed the Registry to file in the case record 26 additional documents²⁵ consisting of reports by NGOs, international organizations and MONUC.

30. The Defence will offer submissions on each of those items.

a. Reports by NGOs and international organizations

31. A document is admissible into evidence only if it is “relevant to the trial”.²⁶ Furthermore, its probative value must be weighed against its potential prejudicial effect.²⁷

32. Trial Chamber I has ruled, accordingly, that reports are considered reliable when they provide sufficient guarantees of impartiality and include “sufficient information on their sources and the methodology used to compile and analyze the evidence”.²⁸

33. Visibly, the 26 documents tendered do not satisfy those standards of relevance and reliability.

34. Annexes 3-5, 7, 9-24 and 26²⁹ are immaterial in that they refer either to events before or after the time frame of the charges or to facts concerning the Democratic Republic of the Congo as a whole and not the UPC/FPLC in Ituri.

35. Annexes 1, 2, 6, 8 and 25 relate to matters concerning the UPC/FPLC during the time frame of the charges but cannot be relied upon in their current form. Some of these reports do not specify the ages of the children³⁰ classified as former child soldiers. Others provide an estimate of the number of minors

²⁵ ICC-01/04-01/06-3344-tENG, para. 3.

²⁶ ICC-01/04-01/06-1398-Conf, paras. 27-32.

²⁷ ICC-01/04-01/06-2135, para. 34.

²⁸ ICC-01/04-01/06-2842, paras. 738-740; ICC-01-04-01-07-2635, paras. 29-30, pp. 21-22.

²⁹ ICC-01/04-01/06-3344-tENG, para. 3.

³⁰ ICC-01/04-01/06-3344-Anx6, p. 13.

under the age of 18 allegedly enlisted into the UPC/FPLC, but fail to measure specifically the recruitment of children under the age of 15.³¹

36. Such is the case of the estimate produced by the organization Child Soldiers, which refers to children allegedly aged between 8 and 17 at the time of their enlistment into the UPC/FPLC³² but fails to specify the proportion of children younger than 15.
37. Furthermore, the information in these reports is to be regarded with utmost circumspection given its low level of reliability.
38. Testimony before Trial Chamber I showed that NGO and MONUC reports could not be equated with investigative findings³³ and that their legal relevance had to be put into perspective.³⁴ Witness W-0582, an investigation team leader in the Office of the Prosecutor of the International Criminal Court ("Court"), stated as follows: "[TRANSLATION] [O]ne has to concede that the process of investigation by humanitarian groups generally corresponds more, as I see it, to a sort of a general journalism than to something akin to the activities of legal investigators".³⁵
39. It was established that the working methods of those organizations do not guarantee the veracity of the information contained in their reports.³⁶

³¹ ICC-01/04-01/06-3344-Anx2, p. 53; ICC-01/04-01/06-3344-Anx8, p. 15; ICC-01/04-01/06-3344-Conf-Anx25, p. 2.

³² ICC-01/04-01/06-3344-Anx2, p. 53.

³³ T-208-FRA WT, p. 29, line 14, to p. 30, line 19; Rule68Deposition-CONF-FRA ET, 17 November 2010, p. 49, lines 16-17, and p. 50, lines 13-23.

³⁴ Rule68Deposition-CONF-FRA ET, 16 November 2010, p. 22, lines 15-28.

³⁵ Rule68Deposition-CONF-FRA ET, 17 November 2010, p. 48, lines 26-28.

³⁶ T-157-ENG ET, p. 21, line 17, to p. 22, line 2: "In the case of MONUC reports, there can be choices that are made. One chooses to say at this point in time it would be counter-productive to say one thing rather than another. And in an attempt to prove the situations, to calm things down, in an attempt to make progress, well, MONUC has a role to play, they have to intervene in the situation, improve the situation. Truth is not always beneficial, it shouldn't always be expressed, especially when one is in a situation where matters are uncertain. If you think that a certain interpretation is more positive, more useful, more productive, and could reduce the possibility of conflict, well, in such a situation if matters are uncertain one will choose the most positive solution, the most positive option".

40. Indeed, too often, their reports merely reproduce statements that have been taken from third parties³⁷ without any effort to verify or corroborate them or even to check the identities of their sources.
41. The Court, moreover, has stated regularly that the probative value of indirect or “hearsay” information is less than that of other evidentiary material.³⁸
42. The insufficiency or lack of verification of sources³⁹ by the authors of these reports prohibits assigning them any probative value in a court of law.⁴⁰
43. In his expert testimony before Trial Chamber I, Mr Prunier acknowledged that some of the findings in the UN reports were based on inference rather than facts: “[TRANSLATION] the identity of the killers is inferred from the identity of the victims, on the principle that such group kills such other group”.⁴¹
44. Lastly, the approximations contained in these organizations’ reports also feed doubt as to the value of their estimates of the number of child soldiers.⁴²
45. Witness W-0582, for example, stressed that many NGO reports included “[TRANSLATION] generalizations”⁴³ and that some NGOs tended to “[TRANSLATION] overestimate” the number of victims.⁴⁴
46. He also said it was not uncommon for information in one report to be repeated and relayed by other NGOs without any verification whatsoever.⁴⁵ That being the case, the repetition of the same estimate in several reports does not amount to corroboration.

³⁷ T-38-FR, p. 102, lines 20-24; T-157-ENG-CT, p. 15, lines 9-10.

³⁸ ICC-01/04-01/07-2635, para. 29; ICC-02/11-01/11-432, para. 28.

³⁹ T-208-FRA WT, p. 30, line 20 and p. 31, lines 12-13; T-39-FRA, p. 80, lines 13-21; T-38-FR, p. 84, lines 20-22; ICC-01/04-01/07-2635, para. 29; T-156-FRA-CT, p. 30, lines 2-23.

⁴⁰ Rule68Deposition-CONF-FRA ET, 17 November 2010, p. 45, lines 26-27; T-157-ENG-CT, p. 20, lines 4-10.

⁴¹ T-157-FRA ET, p. 13, lines 22-23.

⁴² Rule68Deposition-CONF-FRA ET, 17 November 2010, p. 46, lines 16-17, and p. 49, lines 1-11; T-157-ENG-CT, p. 12, lines 10-11.

⁴³ Rule68Deposition-CONF-FRA ET, 17 November 2010, p. 45, lines 4-6.

⁴⁴ Rule68Deposition-CONF-FRA ET, 18 November 2010, p. 16, lines 1-5.

⁴⁵ Rule68Deposition-CONF-FRA ET, 17 November 2010, p. 45, lines 8-20.

47. In sum, these reports fail to provide enough detail on their sources and methods of estimation to allow the Defence to fact-check their content.
48. It follows that the reports enclosed in annexes 1-26 fall short of the standards of reliability and relevance established by the Court.
49. Consequently, in view of their potential prejudicial effect on an assessment of Mr Lubanga's liability, these reports should not be taken into account in the Chamber's estimate of the number of victims.

b. Potential victims' applications transmitted to the Defence

50. The Defence has repeatedly pointed out that Mr Lubanga must be afforded the opportunity to engage adversarially with all of the evidence tendered in these proceedings on reparations. As the assessment of his liability will essentially hinge on the extent of the harm caused, Mr Lubanga must have full access to the materials submitted by potential victims as evidence of that harm.
51. However, although the Chamber instructed the Registry to disclose all of the potential victims' applications to the Defence,⁴⁶ the numerous redactions in those applications (concerning identities, ages, accounts of alleged events and descriptions of alleged harm) deprived the Defence of the information needed to assess the substance of the claims submitted to the Chamber.
52. Accordingly, the purpose of the Defence's observations on those applications was not to demonstrate that they were illegitimate or that the accounts were inaccurate or false. Such a demonstration would have entailed in-depth investigations, which the Defence was prevented from conducting.

⁴⁶ ICC-01/04-01/06-3275-tENG; ICC-01/04-01/06-3290-tENG.

53. The sole purpose of the observations to which the Defence hereby refers⁴⁷ was to enlighten the Chamber about the relevance and reliability of the information it was presented with, within the means it was afforded.
54. Contrary to the claims of the V01 Legal Representatives, the Defence was never in a position to verify statements made by applicants for victim status.
55. Disclosure of an applicant's first and last names is obviously insufficient to enable verification. The Defence cannot effectively verify the allegations made by a potential victim unless it is in a position to conduct on-site investigations and check those statements against its findings, which would require it to be privy to the whereabouts of the persons concerned.
56. The Chamber expressly instructed the Registry to redact any information that could be used to locate potential victims or their relatives,⁴⁸ even in cases where the applicants had reported no security concerns and had consented to the disclosure of their identities to the Defence.
57. The Defence submits that preventing Mr Lubanga from confirming or disconfirming the allegations of potential victims amounts to a denial of his right to an adversarial hearing.

*c. Lists from programmes for disarmament, demobilization and rehabilitation
/ reinsertion / reintegration*

58. The two lists submitted by the Democratic Republic of the Congo show the number of child soldiers who, having been enlisted into the UPC/FPLC between September 2002 and August 2003, took part in DDR programmes.

⁴⁷ ICC-01/04-01/06-3291-tENG and annexes; ICC-01/04-01/06-3299-tENG and annex; ICC-01/04-01/06-3311-tENG and annexes; ICC-01/04-01/06-3315-tENG and annexes; ICC-01/04-01/06-3320-tENG and annex; ICC-01/04-01/06-3322-tENG and annex; ICC-01/04-01/06-3335 and annex; ICC-01/04-01/06-3336 and annex; ICC-01/04-01/06-3319 and annexes.

⁴⁸ ICC-01/04-01/06-3275-tENG, paras. 14-19.

59. The lists present the names of 202 minors⁴⁹ and 282 minors⁵⁰ aged 9-15, respectively, making a total of 484 victims.
60. The Chamber should note, however, that all 202 names on the first list are repeated on the second list. The actual number of children under the age of 15 accounted for on these lists is therefore 282.
61. It is additionally noteworthy that the overwhelming majority of the children concerned apparently indicated 27 July 2003 as their date of recruitment. A dubious coincidence, especially given the proximity of that date to the launch of Operation Artemis in June 2003.
62. Furthermore, Trial Chamber I ruled that it could not rely on the contents of the logbooks used to compile the lists of child participants in DDR programmes “because of the potential unreliability of the information when it was originally provided and the apparent lack of sufficient (or any) verification”.⁵¹
63. As no probative value was assigned to these reports at trial, they should not be called upon to inform an assessment of Mr Lubanga’s civil liability.
64. Nevertheless, the Defence notes that the figure of 282 children, which is close to the Prosecution’s estimate of 200 potential victims,⁵² seems more realistic than the figure of 3,000 victims advanced by the Trust Fund.

d. LRV, OPCV and Trust Fund assessments of the number of victims

65. The disparity in estimates of the number of victims is proof that no reliable assessment can be made, even roughly, of how many former child soldiers were in the UPC/FPLC during the time frame of the charges.

⁴⁹ ICC-01/04-01/06-3274-Conf-Anx1.

⁵⁰ ICC-01/04-01/06-3272-Conf-Anx3.

⁵¹ ICC-01/04-01/06-2842, para. 740.

⁵² ICC-01/04-01/06-2950, para. 43; ICC-01/04-01/06-2968-Red, para. 35.

66. In its draft plan, the Trust Fund estimated a total of 3,000⁵³ potential beneficiaries but acknowledged that it was not in a position to provide a definite number of victims potentially eligible for reparations.⁵⁴
67. Its assessment, in any event, rests on mere approximations. It appears to have relied essentially on two reports: one by Human Rights Watch and another by Child Soldiers. As already shown,⁵⁵ however, those reports – enclosed in annexes 1⁵⁶ and 2⁵⁷ to the order instructing the Registry to file additional documents in the case record – do not pass the Court’s admissibility test.
68. The legal representatives, too, fail to arrive at a shared estimate and acknowledge the difficulty of precisely estimating the total number of victims.⁵⁸
69. The V02 Legal Representatives call the estimate given by the Trust Fund “excessive”. They assess the total number of victims at 1,000.⁵⁹ The OPCV posits a figure of 1,500 potential beneficiaries.⁶⁰ The estimate provided by the V01 Legal Representatives includes extended family, making a total of some 20,000-25,000 direct and indirect victims.⁶¹
70. These estimates are contradicted by the Office of the Prosecutor’s assessment, which puts the likely number of children under the age of 15 recruited during the time frame of the charges – under Mr Lubanga’s responsibility – at about 200.⁶²

⁵³ ICC-01/04-01/06-3177, para. 253.

⁵⁴ *Ibid.*, para. 241.

⁵⁵ See above, paras. 35-36.

⁵⁶ “Ituri: ‘Covered in Blood’ – Ethnically Targeted Violence in Northern DRC”, *Human Rights Watch*, Vol. 15, No. 11 (A), July 2003.

⁵⁷ *Child Soldiers Global Report 2004*, Child Soldiers International.

⁵⁸ ICC-01/04-01/06-3360, para. 45; ICC-01/04-01/06-3357, para. 62; ICC-01/04-01/06-3177, para. 252.

⁵⁹ ICC-01/04-01/06-3363-tENG, para. 29.

⁶⁰ ICC-01/04-01/06-3360, para. 42.

⁶¹ ICC-01/04-01/06-3357, para. 89.

⁶² ICC-01/04-01/06-2950, para. 43; ICC-01/04-01/06-2968-Red, para. 35.

71. That assessment, as the Defence has already pointed out, is the culmination of a decade-long investigation.⁶³ The Prosecution backs up its assessment in detail and cites its sources.⁶⁴

72. For these reasons, the Defence submits that the assessment proposed by the Office of the Prosecutor may reasonably be regarded as the highest estimate that may be taken into account for reparations purposes.⁶⁵

3. Estimating the current monetary value of the harm alleged by victims

a. Compensable harm

73. The Defence hereby refers to its observations on the potential victims' applications transmitted to it,⁶⁶ and on the harm alleged, for a discussion of the existence of that harm and its causal link to the crimes concerned.

74. Having taken due note of the submissions filed on 8 September 2017 by the Legal Representatives and the OPCV, the Defence tenders the following additional observations:

- Sexual harm

75. The Chamber in *Katanga* recalled that a victim must show that he or she suffered harm ensuing from one of the crimes of which the convicted person was found guilty.⁶⁷ It consequently factored out any harm arising from sexual crimes, as Mr Katanga had been found not guilty as an accessory to the crimes of rape and sexual slavery.⁶⁸

⁶³ ICC-01/04-01/06-3196, para. 33.

⁶⁴ ICC-01/04-01/06-2950, para. 43.

⁶⁵ ICC-01/04-01/06-3196, para. 34.

⁶⁶ ICC-01/04-01/06-3291-tENG and annexes; ICC-01/04-01/06-3299-tENG and annex; ICC-01/04-01/06-3311-tENG and annexes; ICC-01/04-01/06-3315-tENG and annexes; ICC-01/04-01/06-3320-tENG and annex; ICC-01/04-01/06-3322-tENG and annex; ICC-01/04-01/06-3335 and annex; ICC-01/04-01/06-3336 and annex.

⁶⁷ ICC-01/04-01/07-3728-tENG, para. 147.

⁶⁸ ICC-01/04-01/07-3728-tENG, paras. 147-150.

76. In the present case, Trial Chamber I correctly determined that Mr Lubanga could not be convicted of sexual crimes because no such crimes were included in the charges against him.⁶⁹
77. Accordingly, the Appeals Chamber was right not to include any sexual offences among the types of harm attributable to Mr Thomas Lubanga.⁷⁰
78. The V01 Legal Representatives are therefore barred from moving the Chamber to take the sexual harm alleged by potential victims into account in its determination of Mr Lubanga's civil liability.⁷¹
79. The Trust Fund, however, is at liberty to establish programmes embracing a gender-focused approach and to expand its operations to victims of sexual crimes under its assistance mandate.

- *Physical harm*

80. The Appeals Chamber has held that the concept of harm denotes "hurt, injury and damage". Harm may be material, physical or psychological.⁷²
81. The burden is on the applicant to show that the alleged harm is real and that it resulted from the crimes of which the convicted person was found guilty.
82. The Chamber in *Katanga* found that many of the medical records tendered by the applicants did not show clearly whether the wounds alleged had been sustained in the attack on Bogoro. It therefore determined that the causal nexus was not established to the requisite standard of proof.⁷³

⁶⁹ ICC-01/04-01/06-2842, para. 630.

⁷⁰ ICC-01/04-01/06-3129-AnxA, para. 58.

⁷¹ ICC-01/04-01/06-3359, paras. 7, 18 and 62.

⁷² ICC-01/04-01/06-3129-AnxA, para. 10.

⁷³ ICC-01/04-01/07-3728-tENG, para. 111.

83. The only two applicants who obtained a finding of physical harm had tendered a hospital record – dated very close to the time of the attack on Bogoro – and a forensic report.⁷⁴
84. In the instant case, although the vast majority of victims allege physical harm, none have tendered medical records establishing a causal link with the crimes of which Mr Lubanga stands convicted.
85. Many also fail to establish the existence of the alleged harm.
86. In view of the above, the standard of proof required for a finding of physical harm has not been met in these proceedings.

- *Transgenerational harm*

87. The V01 Legal Representatives⁷⁵ and the OPCV⁷⁶ allege transgenerational harm to the children of former child soldiers.
88. They submit that this harm should be factored into the determination of Mr Lubanga's liability because the upbringing of these children is affected by their parents' experiences and because they suffer as a result of their parents' psychological problems.
89. The Chamber in *Katanga* ventured that certain applicants were probably suffering from transgenerational psychological harm, but found that no evidence had been laid before it to establish, on a balance of probabilities, the causal nexus between the trauma suffered and the attack on Bogoro.⁷⁷
90. That Chamber therefore chose not to rely on the existence of any transgenerational harm in its determination of Mr Katanga's liability,

⁷⁴ ICC-01/04-01/07-3728-tENG, footnote 184.

⁷⁵ ICC-01/04-01/06-3359, para. 10.

⁷⁶ ICC-01/04-01/06-3360, paras. 19 and 49.

⁷⁷ ICC-01/04-01/06-3728-tENG, para. 134.

although it did recommend that the Trust Fund monitor the children and that it accord them special attention under its assistance mandate.⁷⁸

91. In the instant case, unlike in *Katanga*, none of the 474 applications transmitted contain claims from former child soldiers' descendants seeking reparations for transgenerational harm.
92. Therefore, since there are no applicants, and, accordingly, no evidence to support a causal link with the crimes of which Mr Lubanga stands convicted, transgenerational harm is immaterial to an assessment of his liability.
93. Furthermore, transgenerational harm is not among the types of harm enumerated by the Appeals Chamber in its amended order of 3 March 2015.⁷⁹

b. Monetary assessment and reparations programmes approved

94. At the Chamber's behest, the V01 and V02 Legal Representatives and the OPCV conducted monetary assessments of the harm alleged by victims.
95. The aggregate values they deem necessary to repair all harm to victims differ, but after consultation the Legal Representatives and the OPCV estimate the final amount of the harm to be \$6 million.
96. The Defence notes that it does not have the information it needs to make an informed response to the various victim teams' assessments.
97. For example, the OPCV refers to a survey conducted among populations in Ituri, in which forms were used. Those questionnaires, which apparently served as a basis for assessing programme costs, have not been made available to the parties or to the Chamber. This precludes any critical analysis of the estimates.

⁷⁸ ICC-01/04-01/06-3728-tENG, footnote 217.

⁷⁹ ICC-01/04-01/06-3129-AnxA, para. 58.

98. The OPCV further submits that the cited aggregate estimate of \$6 million does not appear to match the actual costs of implementing the projects⁸⁰ and is therefore a low-end figure.
99. The Defence recalls that Mr Lubanga's liability must be determined in proportion to the amount of harm suffered – not in terms of the cost of implementing the reparations programmes.
100. Accordingly, Trial Chamber VIII determined that the amount of Mr Al Mahdi's liability was exclusive of any internal administration costs incurred by the Trust Fund during the implementation phase, for which he was not liable.⁸¹
101. The V01 Legal Representatives also request the establishment of a financial assistance programme for in-need ascendants of children killed in combat.⁸²
102. The Defence recalls that the Appeals Chamber has confirmed the collective nature of reparations in this case and that any such programme must not, therefore, take the form of a lump-sum or structured payment.
103. Lastly, the cited amount is inclusive of several types of harm that fail to satisfy the standards enshrined in rule 85(a) and the case law of the Court.⁸³
104. The Defence therefore defers to the Chamber's equitable judgement for an estimate of the current monetary value of the harm alleged by victims.

4. Assessing Mr Lubanga's liability

105. In its Judgment of 3 March 2015, the Appeals Chamber held that a convicted person's liability for reparations must be proportionate to the harm caused

⁸⁰ ICC-01/04-01/06-3360, para. 42.

⁸¹ ICC-01/12-01/15-236, para. 134.

⁸² ICC-01/04-01/06-3359, para. 76.

⁸³ See above, paras. 75-93.

and, *inter alia*, to his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case.

106. In the present case, the Chamber will consider the following:

a. Co-perpetration

107. In its order in *Katanga*, the Chamber underscored that the doctrine of joint and several liability for all harm suffered by victims “cannot be imported into the particular context of cases before this Court”.⁸⁴ It follows that, in circumstances of co-perpetration, liability for reparations must be shared and distributed among the co-perpetrators according to their respective contributions to the commission of the crimes.

108. In its Judgment of 14 March 2012 in the instant case, Trial Chamber I referred expressly to the existence of co-perpetrators responsible alongside Mr Lubanga for the commission of the crimes of which he was convicted. The Chamber cited Floribert Kisembo, Bosco Ntaganda, Commander Tchaligonza, Commander Kasangaki and Chief Kahwa by name.⁸⁵ In addition to those leaders, the Judgment made reference to a multitude of other co-perpetrators acting in subordinate roles.

109. It follows that Mr Lubanga cannot be held liable for the full amount of any reparations ultimately awarded by this Chamber.

b. Degree of participation in the commission of the crimes

110. In its Judgment of 10 July 2012, Trial Chamber I recalled that it had:

determined that Mr Lu[b]anga agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. The Chamber did not conclude that Mr Lubanga meant to conscript and enlist boys and girls under the age of 15 into the UPC/FPLC and to use them to participate actively in hostilities. Instead, the Chamber decided Mr Lubanga was aware that, in the ordinary course

⁸⁴ ICC-01/04-01/07-3728-tENG, para. 263.

⁸⁵ ICC-01/04-01/06-2842, paras. 1128 and 1131.

of events, this would occur. It was in this context that Mr Lubanga was convicted as a co-perpetrator who made an essential contribution to the common plan.⁸⁶

111. In Trial Chamber I's view, the phrase "ordinary course of events" involves concepts of "possibility" and "probability" inherent to the notions of "risk" and "danger".⁸⁷ Departing from Pre-Trial Chamber II's strict construction based on the concept of the "virtually certain consequence",⁸⁸ the Chamber accepts the concept of *dolus eventualis* presented by Pre-Trial Chamber I as the most indirect form of criminal intent.⁸⁹
112. The indirect and third-degree form of criminal intent thus ascribed to Mr Lubanga should accordingly be taken into account by the Chamber in its assessment of his share of liability for reparations.
113. Furthermore, notwithstanding Trial Chamber I's view, with regard to the evidence as a whole, that the letters, memos, minutes, reports and orders referring to measures in support of demobilizing minors were insufficient to establish a lack of criminal intent, those items of evidence remain material to its determination of Mr Lubanga's degree of participation in the commission of the crimes.
114. For example, the authenticity and truthfulness of the minutes dated 25 February 2003 – documenting discussions at that day's meeting between delegates of the self-defence committees and Mr Lubanga – have never been challenged. Those minutes clearly show that, in the face of the self-defence committees' keen misgivings, Mr Lubanga was adamant about disarming children and about the necessity of not exposing them to combat.⁹⁰ The statements made at that meeting by Mr Lubanga, and the minutes documenting them, cannot in any way be interpreted as a ploy to mislead the

⁸⁶ ICC-01/04-01/06-2901, para. 52. [Emphasis added].

⁸⁷ ICC-01/04-01/06-2842, para. 1012.

⁸⁸ ICC-01/04-01/06-2773-Conf-tENG, footnote 72.

⁸⁹ ICC-01/04-01/06-803-tEN, para. 352.

⁹⁰ EVD-D01-01095; witness D-0007: T-348-FRA-ET, p. 25, lines 4-24; see also ICC-01/04-01/06-2773, paras. 922-933.

international community. There is no reason to doubt that they reflect the attitudes and true intentions of Mr Lubanga himself with regard to the children involved in hostilities at the time.

115. Likewise, the authenticity and truthfulness of the minutes of the “[TRANSLATION] meeting between the Chief of Staff and commanders of major units” of 16 June 2003⁹¹ have never been challenged.⁹² This document – which is evidence of the priority placed on child demobilization at the time – shows that Mr Lubanga clearly indicated to the military authorities that he wanted any and all armed minors demobilized. The sentence “[TRANSLATION] This is the argument presented by the President, which we have adopted” confirms beyond any doubt the nature of the intentions personally conveyed by Mr Lubanga to leaders in the military. This document, which remained confidential until it was presented at trial, cannot under any circumstances be suspected of having been used for disinformation purposes. Whatever came of that meeting, there is no doubt that its minutes unequivocally reveal the exact nature of Mr Lubanga’s intentions with regard to the enlisted minors.
116. The same is true of the other documents relating to measures in favour of demobilization, most of which remained confidential until their presentation at trial. In particular, the report of 16 February 2003,⁹³ whose probative value the Chamber acknowledged,⁹⁴ confirms Mr Lubanga’s intention to demobilize the children from the self-defence forces.
117. Accordingly, in addition to the indirect character of the criminal intent ascribed to Mr Lubanga, the evidence presented at trial demonstrates – at the very least – that he was far from indifferent to the plight of the children involved in the hostilities and that he concerned himself with the situation on numerous occasions in an attempt to remedy it.

⁹¹ EVD-D01-01098.

⁹² See ICC-01/04-01/06-2842, paras. 1166, 1331 and 727.

⁹³ EVD-D01-01097.

⁹⁴ ICC-01/04-01/06-2842, para. 906.

c. Mr Lubanga's actions in favour of peace

118. For the sake of fairness, Mr Lubanga's actions in favour of peace and reconciliation during the time frame of the charges must be factored into the determination of his liability for reparations.
119. There is substantial evidence to show that Mr Lubanga, by a variety of initiatives, exerted himself in a genuine bid to restore peace to Ituri.⁹⁵ In the course of his peace and reconciliation activities, he occasionally came up against the opposing views of some FPLC leaders, and consistently strove – sometimes in vain – to secure the triumph of peaceful over bellicose means.⁹⁶
120. In particular, it has been established that, from the assumption of his duties in September 2002 until his arrest by the Congolese authorities, Mr Lubanga filled the political and administrative institutions of Ituri with a combination of representatives from all of its communities and regions so as to bring the various communities together and put a lasting end to the hostilities.⁹⁷

⁹⁵ See, for example: video footage showing that a UPC/RP delegation was sent by Thomas Lubanga to meet representatives of the Lendu community in the Lipri region to discuss peace-building (T-128-CONF-FRA-CT, p. 59, line 1 to p. 60, line 13; EVD-OTP-00572, 00:00:00 to 00:19:00); Minutes of the meeting of 25 February 2003 between representatives of the self-defence committees, including D01-0007, and Thomas Lubanga, during which the latter reported his efforts at promoting Hema-Lendu reconciliation to achieve calm throughout the region (EVD-D01-01095); Presidential Decree of 3 September 2002 appointing the members of the executive of the UPC/RP, in which John Tinanzabo is named National Secretary for Pacification and Reconciliation (EVD-OTP-00721); Mr Tinanzabo's appointment to this position was renewed by the decree of 11 December 2002, which reorganized the executive of the UPC/RP (EVD-OTP-00740); Address by the National Secretary for Pacification and Reunification on the occasion of the official instatement of the Truth, Peace and Reconciliation Committee (EVD-OTP-00713); Address on the formal opening of the activities of the Truth, Peace and Reconciliation Committee by Thomas Lubanga (EVD-OTP-00121); Mission order of 24 December 2002 to send a delegation of different ethnic communities to Arua, Uganda, as part of the Ituri peace process (EVD-D01-01090); Order of 13 January 2003 appointing the members of the Truth, Peace and Reconciliation Committee (EVD-D01-01091).

⁹⁶ See, for example, T-169-ENG-RT, p. 49, line 15, to p. 50, line 3 (P-0012); T-114-CONF-FRA-CT, p. 71, line 24, to p. 73, line 12 (P-0038).

⁹⁷ See, for example: the list of members of the executive of the UPC/RP dated 26 January 2003, showing ethnic and territorial representation in UPC/RP national secretariats (EVD-D01-01093); Order of 13 January 2003 appointing the members of the Truth, Peace and Reconciliation Committee (EVD-D01-01091); P-0041: T-126-CONF-FRA-CT, p. 25, line 4, to p. 31, line 10; p. 37, line 20, to p. 38, line 2; EVD-OTP-00721; P-0055: T-178-CONF-FRA-CT, pp. 48-62.

121. Mr Lubanga's many statements adduced at trial corroborate his preoccupation with easing tensions and building peace.⁹⁸ At no time did he call for hate or violence or make discriminatory remarks about any community in Ituri.
122. Mr Lubanga's involvement in efforts to end the conflict and protect all of the populations in Ituri from its destructive consequences should also enter into the Chamber's assessment of the amount of his liability for reparations.

d. "Specific circumstances of the case"

123. Mr Lubanga's factual circumstances during the time frame of the charges were such that it is reasonable to take the context surrounding the crimes of which he was convicted into account in assessing his liability for reparations.
124. In the first place, considerable evidence shows that the "common plan" for the establishment of an armed force and the voluntary enlistment of a large number of young people during the years 2002-2003 were born of the need to contend against systematic and widespread mass killings.⁹⁹ The creation of the armed force organized under the name FPLC as of September 2002 appears in that light as fulfilling a vital necessity for the survival of the populations targeted in those mass killings. Mr Lubanga's actions at the time fall squarely within the context of that necessity.
125. In the second place, considerable evidence shows that the populations subject to those mass killings could hope for no protection from state authorities. Worse yet, the Congolese state authorities appear to have been involved

⁹⁸ See, for example: Thomas Lubanga's speech at the Rwampara training camp, where he stressed that the FPLC was not an ethnic army and that all communities in Ituri were to be protected (EVD-OTP-00570; T-128-CONF-FRA, p. 38, line 14, to p. 39, line 17); television interview with Mr Lubanga where he emphasizes that he is working on behalf of all ethnicities (EVD-OTP-00584; T-130-CONF-FRA-CT, p. 56, lines 17-25).

⁹⁹ On the reality of systematic and widespread mass killings, see: expert witness P-0360: T-156-CONF-FRA-CT, p. 41, line 8, to p. 44, line 15; D-0004: T-243-CONF-FRA-CT3, p. 30, line 20, to p. 33, line 18, and p. 38, line 10, to p. 40, line 11; D-0037: T-349-FRA-ET, p. 6, lines 18-20; D-0006: T-254-CONF-FRA-CT, p. 76, line 21, to p. 77, line 4; P-0017: T-160-CONF-FRA-CT, p. 35, line 20, to p. 38, line 10; D-0011: T-346-FRA-ET, p. 62, lines 2-8; D-0007: T-348-FRA-ET, p. 48, line 28, to p. 49, line 7, and p. 51, line 27, to p. 52, line 1.

directly in organizing and conducting certain mass killings and/or in actively assisting the direct perpetrators.¹⁰⁰

126. In the third place, considerable evidence shows that, although they were present in Ituri before and during the time frame of the charges and well aware of the mass killings under way, the United Nations forces took no appropriate measures to protect the civilian population.¹⁰¹

127. Under these circumstances – and in view of the conduct of the national and international authorities responsible for protecting civilian populations – fairness requires an equitable division of the liability for reparations in the matter of the crimes of which Mr Lubanga stands convicted.

e. Mr Lubanga's indigence

128. Given Mr Lubanga's indigence, any order to pay amounts incommensurate with his current or future ability to contribute would be of a punitive nature contrary to internationally recognized principles of reparations and would be regarded as manifestly unfair.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER II TO:

TAKE FORMAL NOTE of the present submissions.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 29 September 2017

At The Hague

¹⁰⁰ For Kinshasa's involvement in mass killings, see P-0360: T-156-FRA-CT, p. 61, lines 12-16 and p. 65, lines 9-24. Witnesses W-0360, W-0055 and W-0017 confirmed the significant involvement of Uganda as an occupying force: T-156-FRA-CT, p. 40, lines 16-25 (P-0360); T-174-CONF-FRA-CT, p. 25, lines 11-12 (P-0055); T-154-CONF-FRA-CT, p. 66, lines 7-20 (P-0017).

¹⁰¹ P-0046: T-207-FRA-ET, p. 55, line 9, to p. 58, line 6, and T-208-FRA WT, p. 7, lines 4-21 and p. 2, line 19, to p. 5, line 10; P-0360: T-156-FRA, p. 44, line 24, to p. 45, line 24.