

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/04-01/06 A7 A8

Date: 18 July 2019

THE APPEALS CHAMBER

Before:

**Judge Piotr Hofmański, Presiding
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public redacted

Judgment

**on the appeals against Trial Chamber II's 'Decision Setting the Size of the
Reparations Award for which Thomas Lubanga Dyilo is Liable'**

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

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REGISTRY

Registrar

Mr Peter Lewis

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The Appeals Chamber of the International Criminal Court,

In the appeals of the legal representatives of the V01 group of victims and of Mr Thomas Lubanga Dyilo against the decision of Trial Chamber II entitled ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’ of 15 December 2017, to which a corrigendum was issued on 21 December 2017 (ICC-01/04-01/06-3379-Red-Corr-tENG),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

- 1) The ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’ of 15 December 2017 (ICC-01/04-01/06-3379-Red-Corr-tENG) is confirmed, subject to sub-paragraph 2) to follow.
- 2) The ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’ of 15 December 2017 (ICC-01/04-01/06-3379-Red-Corr-tENG) is amended such that the victims whom Trial Chamber II found ineligible to receive reparations, and who consider that their failure to sufficiently substantiate their allegations, including by supporting documentation, resulted from insufficient notice of the requirements for eligibility, may seek a new assessment of their eligibility by the Trust Fund for Victims, together with other victims who may come forward in the course of the implementation stage and as envisaged by Trial Chamber II in paragraphs 292 – 297 and the disposition of the aforementioned decision; any recommendations as to eligibility made by the Trust Fund for Victims shall be subject to the approval of Trial Chamber II.
- 3) The ‘Defence Application for Suspension of the “Décision approuvant les propositions du Fonds au profit des victimes portant sur la procédure

visant à localiser et décider de l'admissibilité aux réparations des nouveaux demandeurs" Issued on 7 February 2019 by Trial Chamber II' (ICC-01/04-01/06-3447-Red-tENG) is dismissed *in limine*.

REASONS

I. KEY FINDINGS

1. The second sentence of article 75(1) of the Statute concerns, *inter alia*, the trigger for reparations proceedings: upon conviction of a person by the Court, the trial chamber will enter into the reparations phase of proceedings (i) if it has received requests for reparations by individuals identifying themselves as victims, or (ii) on its own motion, if exceptional circumstances exist.

2. It would be incorrect to assume that the number of victims may only be established based on individual requests for reparations received by the Court. It would be undesirable for the trial chamber to be restrained in that determination simply because not all victims had presented themselves to the Court by making a request under rule 94 of the Rules of Procedure and Evidence. In making that determination, the trial chamber should consider the scope of damage as it is in the current reality, based on the crimes for which the convicted person was found culpable.

3. In deciding what reparations are 'appropriate', a trial chamber must take into account the rights of the convicted person. The reparations order must not go beyond the crimes for which he or she was convicted. The convicted person must be given a sufficient opportunity to make submissions on the scope of reparations, the scope of victimhood to be repaired, the type of reparations, etc., so as to comply with the requirements of fairness. To that end, the trial chamber must give notice to the parties of the manner in which it intends to conduct the reparations proceedings before it, especially where it does not intend to make individual determinations with respect to each victim who has filed a request. In this regard, it must ensure that the convicted person is adequately on notice as to the information on which it will rely in making its order, so that he or she has a meaningful opportunity to make representations thereon, and it must give notice as to the manner in which it intends to assess that information

– e.g. does it intend to assess each request individually? The Trial Chamber must also ensure that the parties are on notice as to the standard of proof that will be applied in the proceedings so that they are aware of the manner in which the information will be assessed. [...] If the trial chamber resorts to estimates as to the number of victims, such estimates must be based on a sufficiently strong evidential basis; any uncertainties must be resolved in favour of the convicted person (for instance, by assuming a lower number of victims, or by discounting the amount of liability).

4. The amount of the convicted person's liability should be fixed taking into account the cost of reparations considered to be appropriate and that are intended to be put in place (which can include reparations programmes) and the different harms suffered by the different victims, both individual victims (direct and indirect) in addition to, in particular circumstances, the collective of victims. In setting the amount, the trial chamber must also ensure that it takes into account the convicted person's rights and interests.

5. It is important for trial chambers to provide a clear indication to victims who have already been authorised to participate in proceedings, and to other victims seeking reparations, as to the standard of proof that will apply to the assessment of their eligibility for reparations.

II. INTRODUCTION TO THE APPEALS

6. Mr Lubanga was convicted, on 14 March 2012, of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC¹ and using them to participate actively in hostilities. On 7 August 2012, Trial Chamber I issued a decision on reparations which was subsequently appealed. The Appeals Chamber, on 3 March 2015, rendered a judgment in relation to those appeals.² The Appeals Chamber amended Trial Chamber I's decision and also issued an amended reparations order. In its judgment, the Appeals Chamber found, among other things, that it was 'appropriate to exceptionally seek the Trust Fund's assistance in requesting that it provide [...] the anticipated monetary amount that it considers necessary to remedy

¹ For defined terms and abbreviations, as well as cited materials, see [Annex B](#) to this Judgment.

² [Lubanga Appeal Judgment on Reparations](#) and [Lubanga Amended Reparations Order](#).

the harms by the crimes for which Mr Lubanga was convicted'.³ The Appeals Chamber gave the parties the opportunity to then make submissions on the scope of Mr Lubanga's liability, in light of the information provided by the TFV, prior to the trial chamber setting the amount of the award.⁴ It stated that the trial chamber's decision on the amount of Mr Lubanga's liability for reparations would be appealable.⁵

7. It is the Trial Chamber's decision of 15 December 2017 – the Impugned Decision – which set the amount of Mr Lubanga's monetary liability, which has now been appealed. In that decision, the Trial Chamber held Mr Lubanga liable for reparations to the sum of USD 10,000,000 in respect of 425 victims it found eligible for reparations and 'any other victims who may be identified'.

8. On 15 January 2018, Victims V01 and Mr Lubanga filed notices of appeal against that decision. Mr Lubanga has raised six grounds of appeal against the Impugned Decision and Victims V01 have raised three. As certain grounds of appeal overlap, the Appeals Chamber has grouped them as follows.

9. **First group: system for the award of reparations** – Mr Lubanga's first and fourth grounds of appeal and Victims V01's first and second grounds of appeal. These grounds of appeal raise the question of the correctness of the Trial Chamber's approach/methodology in deciding on the monetary amount of reparations for which Mr Lubanga was held liable, in addition to its decision to decide on the eligibility for reparations of certain individual victims; together, they raise issues that concern the system in place for the award of (collective) reparations.

10. **Second group: assessment of individual requests and standard of proof** – Mr Lubanga's second and third grounds of appeal and Victims V01's third ground of appeal. These grounds of appeal relate to the actual assessment of the 473 individual requests for reparations and to the determination that the 425 victims are only a sample of the potentially eligible victims and that hundreds and possibly thousands

³ [Lubanga Appeal Judgment on Reparations](#), para. 240.

⁴ [Lubanga Amended Reparations Order](#), para. 80.

⁵ [Lubanga Amended Reparations Order](#), para. 81; [Lubanga Appeal Judgment on Reparations](#), para. 242.

more victims suffered harm as a consequence of the crimes of which Mr Lubanga was convicted.⁶

11. **The two remaining grounds of appeal are the following.** Mr Lubanga's fifth ground of appeal raises the issue of how to take into account, when calculating the monetary value of a person's liability for reparations, a convicted person's role in the commission of the crimes in question, also *vis-à-vis* other possible co-perpetrators, and how to take into account other issues that he or she may raise with a view to mitigating his or her liability. Mr Lubanga's sixth ground of appeal raises the issue of the application of the *non ultra petita* rule in reparations proceedings before the Court.

12. Prior to entering into the merits of the grounds of appeal, the Appeals Chamber will first address four preliminary issues that arose in this case. Also, further details of the procedural history of this case can be found in Annex A.⁷

III. PRELIMINARY ISSUES

A. OPCV's standing to participate in these appeals

13. The OPCV filed a response to the appeals in this case, stating that it is the 'legal representative of 392 applicants, of whom 379 have already been found eligible for collective reparations'.⁸ Victims V01, in their reply, challenge the 'OPCV's position in the proceedings' and seem to argue that the OPCV does not have standing to participate in these appeals.⁹ Victims V01 contend that the 392 'applicants' that the OPCV purports to represent 'have never filed an application for reparations within the meaning of rule 94; nor have they applied to participate in the proceedings; let alone have they ever been granted leave [...] to participate in the proceedings'.¹⁰ In Victims V01's view, '[s]ince Trial Chamber I rejected the applications for reparations put

⁶ The Appeals Chamber notes that the Impugned Decision consistently refers to the number of applicants as 473 (e.g., pp. 3, 21, 23, 30, 70, and 111, and paras 14, 27, 36, 44, 190, 239, and 279), and there are 473 applicants recorded in Table A of the confidential Annex II to the Impugned Decision. The Impugned Decision also refers to 425 as the number of applicants who established that they are victims for the purposes of reparations (e.g., para. 292). However, [Annex III to the Impugned Decision](#), footnotes 45 and 47, refers to 476 applicants and 427 found to be eligible. For the purposes of the present judgment, the Appeals Chamber will refer to the total number of applicants as 473 and the total number of applicants found to be eligible as 425.

⁷ [Annex A](#).

⁸ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 1.

⁹ [Victims V01's Reply](#), paras 8-13.

¹⁰ [Victims V01's Reply](#), para. 9.

before it and the Appeals Chamber has held that the collective reparations would not be based on applications, it would appear that [the] OPCV no longer represents individual applicants but rather the interests of those victims who may receive collective reparations'.¹¹ Victims V01 also find it 'particularly astonishing' that the OPCV, contrary to its mandate to assist victims, is opposing 'consideration of an appeal brought by and/or which has the support of all the victims authorised to participate in the proceedings'.¹²

14. In its Scheduling Order of 6 November 2018, the Appeals Chamber invited the parties to make submissions on, *inter alia*, the OPCV's standing to participate in these appeals.¹³ On 31 January 2019, the OPCV stated that its standing in this case derives from Trial Chamber I's decision of 6 April 2012, as followed by the Trial Chamber, and that the Appeals Chamber seems to acknowledge the OPCV's standing by having instructed it to make submissions on the questions in the Scheduling Order of 6 November 2018.¹⁴

15. On 5 April 2012, Trial Chamber I, which was at that time seized of the case, issued the 'Decision on the OPCV's request to participate in the reparations proceedings'; it considered the expertise of the OPCV to be useful in particular to 'safeguard the rights of these potential beneficiaries of an award for collective reparations'.¹⁵ In the circumstances, it allowed the OPCV to 'act as the legal representative of unrepresented applicants for reparations until their status is determined or until the Registrar arranges a legal representative to act on their behalf' and to 'represent the interests of victims who have not submitted applications but who may benefit from an award for collective reparations, pursuant to Rules 97 and 98 of the Rules'.¹⁶ Prior to Trial Chamber I's *Lubanga* Reparations Decision, the OPCV had acted as legal representative of several of the 85 victims who had made requests for reparations.¹⁷ In the *Lubanga* Appeal Decision on Admissibility, the Appeals

¹¹ [Victims V01's Reply](#), para. 11.

¹² [Victims V01's Reply](#), para. 12.

¹³ [Scheduling Order of 6 November 2018](#), pp. 3, 4, 9. *See also* [Order on Conduct of Proceedings](#), p. 3.

¹⁴ [OPCV's Submissions Following the Appeals Chamber's Questions](#), para. 7.

¹⁵ [Decision on OPCV's Participation in the Proceedings](#), para. 11.

¹⁶ [Decision on OPCV's Participation in the Proceedings](#), para. 12.

¹⁷ [Lubanga Appeal Decision on Admissibility](#), para. 72; *The Prosecutor v. Thomas Lubanga Dyilo*, 'Observations on issues concerning the admissibility of appeals lodged by the Defence, the OPCV and

Chamber determined, in the circumstances, that ‘the OPCV is entitled to bring an appeal with regard to those individuals in respect of whom it was appointed as a legal representative’.¹⁸

16. After the 2015 *Lubanga* Appeal Judgment on Reparations, the Trial Chamber, on 13 January 2016, disposed of a request by the OPCV for access to a report filed in the proceedings; in finding the OPCV’s request moot, as the information had already been disclosed, it nevertheless referred to, without disputing, the OPCV’s submissions as to the manner of its participation before Trial Chamber I.¹⁹ The Trial Chamber also fixed a deadline for, *inter alia*, the OPCV to file observations on the TFV’s draft implementation plan.²⁰ On 21 October 2016, the Trial Chamber dealt with another such request. Recalling the role of the OPCV in the reparations proceedings,²¹ the Trial Chamber authorised the OPCV to assist victims in completing further reparations requests, and in transmitting them, through the Registry, to the Trial Chamber.²² Commencing in December 2016, the OPCV, through the Registry, transmitted seven batches of requests for reparations.²³ On 13 July 2017, the Trial Chamber disposed of a request by the OPCV for it to reconsider its decision of 6 April 2017, in which it rejected the OPCV’s request for an extension of time for the preparation and submission of dossiers of potentially eligible victims.²⁴ The Trial Chamber recalled that it had found, in its decision of 6 April 2017, that the victims’ files submitted to the Registry ‘constituted a sufficient number of representative files’ and that ‘the mandate conferred on the OPCV by way of the Order of 21 October 2016 – to continue the process of locating and identifying Potentially Eligible Victims, to prepare their files and to transmit them to the Chamber [...] [was] at an

[the V01 and V02 teams against Trial Chamber I’s Decision establishing the principles and procedures to be applied to reparations, rendered on 7 August 2012](#)’, 1 October 2012, ICC-01/04-01/06-2928-tENG, para. 9.

¹⁸ [Lubanga Appeal Decision on Admissibility](#), para. 72.

¹⁹ [Decision on OPCV’s and Victims V02’s Requests](#), paras 10-11.

²⁰ [Decision on OPCV’s and Victims V02’s Requests](#), p. 6.

²¹ [Order of 21 October 2016](#), para. 16.

²² [Order of 21 October 2016](#), paras 18-21.

²³ See [Registry’s First Transmission of Dossiers](#) (23 requests); [Registry’s Second Transmission of Dossiers](#) (96 requests); [Registry’s Third Transmission of Dossiers](#) (92 requests); [Registry’s Fourth Transmission of Dossiers](#) (60 requests); [Registry’s Fifth Transmission of Dossiers](#) (60 requests); [Registry’s Sixth Transmission of Dossiers](#) (60 requests); [Registry’s Seventh Transmission of Dossiers](#) (53 requests).

²⁴ [Decision of 13 July 2017](#), p. 6.

end’.²⁵ It went on to state that ‘[t]he OPCV [would], however, continue to represent the Potentially Eligible Victims whose files it prepared’.²⁶

17. The Appeals Chamber notes that, as argued, the OPCV represents a number of the individuals who requested reparations in this case. No valid reasons have been presented by Victims V01 to find that the OPCV does not have standing in these proceedings while the Trial Chamber has, in this case, clearly accepted the OPCV’s standing to represent the victims referred to above. Victims V01’s argument is rejected.

B. Admissibility of the OPCV’s Consolidated Response to the Appeal Briefs in respect of Mr Lubanga’s Appeal Brief

18. The OPCV filed a consolidated response to the two appeal briefs filed respectively by Mr Lubanga and Victims V01. The two appeal briefs were filed on different dates thereby, *prima facie*, triggering different dates for the filing of responses; responses to Mr Lubanga’s Appeal Brief were due by 15 May 2018 and responses to Victims V01’s Appeal Brief were due by 21 May 2018. The OPCV filed the OPCV’s Consolidated Response to the Appeal Briefs on 18 May 2018, which on the face of it is outside the time limit in respect of Mr Lubanga’s appeal.

19. In the introduction to its response, the OPCV submits:

Pursuant to rule 150(1) of the Rules of Procedure and Evidence and regulation 63(4) of the Regulations of the Court applied to these proceedings, the Legal Representative hereby files a consolidated response to the appeal briefs of the Defence and of the LRVs; the latter was notified to her on 19 March 2018.²⁷

20. The OPCV assumed that the time limit for its response began to run from 19 March 2018, thereby rendering its filing timely and did not make any submissions as to why these provisions, which do not relate to the filing of consolidated responses in reparations appeals, should apply to its filing. Indeed, regulation 63 of the Regulations of the Court, as referred to, expressly relates only to consolidated filings by the Prosecutor. Nevertheless, despite this fact, the Appeals Chamber notes that the title of that regulation relates to appeals generally under rule 150 (which include reparations

²⁵ [Decision of 13 July 2017](#), para. 10.

²⁶ [Decision of 13 July 2017](#), para. 10.

²⁷ [OPCV’s Consolidated Response to the Appeal Briefs](#), para. 4.

appeals) and there seems to be no reason why it could not apply, by analogy, to filings in reparations appeals, noting that its spirit seems aimed generally at ensuring judicial economy.²⁸ The Appeals Chamber also recalls that the OPCV represents victims affected by the Impugned Decision and so has an interest in responding to Mr Lubanga. In the future, however, the Appeals Chamber would expect the OPCV to make clear submissions as to why, in its view, the Appeals Chamber should accept a course of action that is not clear on the face of provisions relied upon.

C. OPCV’s request for rejection of the appeals ‘outright’

21. In the OPCV’s Consolidated Response to the Appeal Briefs, the OPCV argues that neither of the two appellants ‘has stated clearly, let alone proved, that the criteria applicable under article 82(4) of the Rome Statute have been met’ and that therefore ‘neither appeal is admissible and they must be rejected outright’.²⁹ Having referred to the explanation of the standard of review in the *Lubanga* Appeal Judgment on Reparations, the OPCV submits that ‘the appellants do not clearly identify the nature or the basis of the errors allegedly committed by the Trial Chamber or show how the impugned decision was affected by the alleged errors’.³⁰ It submits in addition ‘that, as “the clear misappreciation of the facts” does not fall within the purview of the Appeals Chamber, in conformity with its previous decisions, these appeals must be rejected outright by the Appeals Chamber’.³¹

22. In his reply, Mr Lubanga submits that the Appeals Chamber should deny the OPCV’s motion to dismiss as unfounded and argues that each of his six grounds of appeal sets out their legal basis, alleged errors and how those errors affected the Impugned Decision, as well as the relief sought.³² He avers that ‘clear misappreciation of the facts and error in the exercise of discretion fall within the jurisdiction of the

²⁸ It may be noted that, in the instant case, in the course of the reparations proceedings leading to the [Lubanga Appeal Judgment on Reparations](#), the Appeals Chamber referred to regulation 63 of the Regulations of the Court when fixing a page limit for Mr Lubanga. It ordered him to ‘file a consolidated response to the two documents in support of the appeals filed on behalf of the participating victims, which, by analogy to regulation 63 of the Regulations of the Court, must not be longer than 140 pages’, [Lubanga Appeal Decision on Admissibility](#), para. 74.

²⁹ [OPCV’s Consolidated Response to the Appeal Briefs](#), para. 10.

³⁰ [OPCV’s Consolidated Response to the Appeal Briefs](#), para. 12.

³¹ [OPCV’s Consolidated Response to the Appeal Briefs](#), para. 12 (footnote omitted).

³² [Mr Lubanga’s Reply](#), paras 30-31.

Appeals Chamber'.³³ In their reply, Victims V01 argue, *inter alia*, that the OPCV has advanced no reason for its purported interpretation of article 82(4) of the Statute,³⁴ that their appeal brief shows a number of alleged errors of law and, alternatively, abuse of discretion; and that these errors necessarily materially affected the Impugned Decision.³⁵

23. The Appeals Chamber rejects the OPCV's request. Leaving aside whether they are fully substantiated or argued, both appeal briefs set out arguments on each of the grounds of appeal raised and identify, at least in general terms, the main alleged errors and their effect on the Impugned Decision. There is no reason to reject the appeals 'outright', as suggested by the OPCV.³⁶ It is also not the case, as seems to be alleged,³⁷ that errors of fact do not fall within the scope of a reparations appeal, as will be discussed in more detail later in this judgment.³⁸ The Appeals Chamber also referred to such errors in the *Katanga* Judgment on Reparations.³⁹

D. Mr Lubanga's request for suspension of the Decision of 7 February 2019

24. Following issuance of the Impugned Decision, proceedings continued before the Trial Chamber. In particular, on 7 February 2019, the Trial Chamber issued a decision regarding implementation of the Impugned Decision.⁴⁰ In that decision, the Trial Chamber approved proposals by the TFV 'on the process for locating new applicants and determining their eligibility for reparations'.⁴¹ On 20 March 2019, Mr Lubanga filed a request⁴² for suspension of this decision, which was followed by responses by Victims V01,⁴³ the OPCV⁴⁴ and Victims V02⁴⁵, each of them submitting that it should be dismissed.

³³ [Mr Lubanga's Reply](#), para. 32.

³⁴ [Victims V01's Reply](#), paras 19-20.

³⁵ [Victims V01's Reply](#), para. 21.

³⁶ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 12.

³⁷ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 12.

³⁸ *See infra*, para. 30.

³⁹ [Katanga Judgment on Reparations](#), paras 41, 62, 77, 235.

⁴⁰ [Decision of 7 February 2019](#).

⁴¹ [Decision of 7 February 2019](#), p. 17.

⁴² [Request to Suspend the Decision of 7 February 2019](#).

⁴³ [Response of the Legal Representatives of V01 Victims to the Defence Application for Suspension of the "Décision approuvant les propositions du Fonds au profit des victimes portant sur la procédure visant à localiser et décider de l'admissibilité aux réparations des nouveaux demandeurs" Issued on 7](#)

25. Relying on rules 134(3) and 149 of the Rules,⁴⁶ Mr Lubanga argues that the Decision of 7 February 2019 should be suspended pending the appeals in order to ensure the proper administration of justice and the right to an impartial and independent hearing.⁴⁷ He submits that, by directing the TFV [REDACTED] and [REDACTED], the Trial Chamber ‘predetermined the Appeals Chamber’s position’⁴⁸ with regard to his argument under the first ground of his appeal that ‘the Chamber should not have taken into consideration the existence of hundreds and possibly thousands more unidentified victims who did not apply to the Chamber’.⁴⁹ Mr Lubanga submits that the Appeals Chamber is also seized of the issue as to whether there is a date by which the requests for reparations from potentially eligible victims must be filed.⁵⁰

26. The Appeals Chamber notes that Mr Lubanga did not seek suspensive effect of the Impugned Decision when filing his appeal. On 13 February 2019, he sought leave to appeal the Decision of 7 February 2019,⁵¹ which was subsequently denied by the Trial Chamber.⁵² The Appeals Chamber is, therefore, not seized of an appeal in relation to the Decision of 7 February 2019 and is consequently not in a position to suspend its application. The Request to Suspend the Decision of 7 February 2019 is therefore dismissed *in limine*.

[February 2019](#)’, 25 March 2019, ICC-01/04-01/06-3448-Red-tENG. A public redacted version was registered on 1 July 2019.

⁴⁴ [‘OPCV Response to the “Requête de la Défense aux fins de suspension de la « Décision approuvant les propositions du Fonds au profit des victimes portant sur la procédure visant à localiser et décider de l’admissibilité aux réparations des nouveaux demandeurs » rendue le 7 février 2019 par la Chambre de première instance II”](#)’, 26 March 2019, ICC-01/04-01/06-3449-Red. A public redacted version was registered on 1 July 2019.

⁴⁵ [‘Corrected version of Response of the Legal Representatives of the V02 Group of Victims to the Defence Application for Suspension of the “Décision approuvant les propositions du Fonds au profit des victimes portant sur la procédure visant à localiser et décider de l’admissibilité aux réparations des nouveaux demandeurs” Issued on 7 February 2019 by Trial Chamber II \(ICC-01/04-01/06-3447-Conf.\) \(ICC-01/04-01/06-3450-Conf\)’](#), ICC-01/04-01/06-3450-Corr-tENG, reclassified as public on 12 July 2019.

⁴⁶ [Request to Suspend the Decision of 7 February 2019](#), para. 13.

⁴⁷ [Request to Suspend the Decision of 7 February 2019](#), para. 22.

⁴⁸ [Request to Suspend the Decision of 7 February 2019](#), paras 19, 21.

⁴⁹ [Request to Suspend the Decision of 7 February 2019](#), para. 18.

⁵⁰ [Request to Suspend the Decision of 7 February 2019](#), para. 20.

⁵¹ [‘Requête de la Défense aux fins d’autorisation d’interjeter appel de la Décision rendue le 7 février 2019’](#), 13 February 2019, ICC-01/04-01/06-3441-Red.

⁵² [‘Decision on the Application by the Defence Team for Thomas Lubanga Dyilo for Leave to Appeal Against the Decision of 7 February 2019’](#), 4 March 2019, ICC-01/04-01/06-3445-tENG.

IV. STANDARD OF REVIEW

27. The present appeals raise questions of law, fact and procedure in addition to the exercise of the Trial Chamber's discretion. Such errors were also raised in the case of *Germain Katanga* and, in the *Katanga* Judgment on Reparations, the Appeals Chamber recalled the following standard of review.⁵³

28. With respect to alleged legal errors:

[T]he Appeals Chamber will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.

[An Impugned Decision] is "materially affected by an error of law" if the Trial Chamber "would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error".⁵⁴
[Footnotes omitted.]

29. With respect to alleged procedural errors:

such errors may occur in the proceedings leading up to an impugned decision. [...] However, as with errors of law, the Appeals Chamber will only reverse [the Impugned Decision] if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the [Impugned Decision] would have substantially differed from the one rendered.⁵⁵

30. With respect to alleged errors of fact:

[The Appeals Chamber] will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the "misappreciation of facts", the Appeals Chamber has also stated that it "will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot

⁵³ [Katanga Judgment on Reparations](#), paras 38-45.

⁵⁴ [Katanga Judgment on Reparations](#), para. 39, quoting [Lubanga Appeal Judgment on Conviction](#), paras 18-19.

⁵⁵ [Katanga Judgment on Reparations](#), para. 40, quoting [Lubanga Appeal Judgment on Conviction](#), para. 20.

discern how the Chamber's conclusion could have reasonably been reached from the evidence before it".⁵⁶

31. And finally, with respect to alleged errors in discretionary decisions, the Appeals Chamber recalled what it had held in the case of *the Prosecutor v. Uhuru Muigai Kenyatta*:

The Appeals Chamber recalls that it will not interfere with a Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.⁵⁷

32. In respect of the abuse of discretion, the Appeals Chamber stated:

[T]he Appeals Chamber may interfere with a discretionary decision [when it] amounts to an abuse of discretion. Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to "force the conclusion that the Chamber failed to exercise its discretion judiciously". The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question.⁵⁸

33. As in that case,⁵⁹ the Appeals Chamber will be guided by the above standards of review, bearing in mind the following. The Trial Chamber, in making its findings as to the victims' eligibility for reparations, stated that it applied the standard of the balance of probabilities.⁶⁰ This standard has not been challenged on appeal (see Mr Lubanga's second ground of appeal below). Therefore, in considering the errors

⁵⁶ [Katanga Judgment on Reparations](#), para. 41, quoting [Lubanga Appeal Judgment on Conviction](#), para. 21.

⁵⁷ [Katanga Judgment on Reparations](#), para. 43, quoting [Kenyatta OA 5 Judgment](#), para. 22, referring to [Kony et al. OA 3 Judgment](#), paras 79-80; [Banda OA 5 Judgment](#), para. 30; [Ongwen OA 3 Judgment](#), para. 35.

⁵⁸ [Katanga Judgment on Reparations](#), para. 44, quoting [Kenyatta OA 5 Judgment](#), para. 25.

⁵⁹ [Katanga Judgment on Reparations](#), para. 45.

⁶⁰ [Impugned Decision](#), para. 43.

alleged on appeal with respect to the Trial Chamber's assessments of eligibility, the Appeals Chamber's standard of review, as set out above, will be applied with the standard of balance of probabilities in mind.

V. MERITS

34. Before entering into the merits of these appeals, the Appeals Chamber finds it appropriate, in the circumstances of this case, to make the following observations.

35. The Appeals Chamber is aware that this case is in the implementation phase and that the TFV is finalising proposed reparations programmes related to the victims whom the Trial Chamber has already found to be eligible. Noting that the Trial Chamber must still approve the final programmes to be put in place for the benefit of eligible victims, the Appeals Chamber finds it opportune to stress a number of issues; in doing so and, in particular, in recalling certain issues that were also dealt with in its judgment in 2015, the Appeals Chamber does not intend to reduce the significance of the other issues that were also addressed in that judgment and that remain equally valid.

36. The Appeals Chamber recalls that the reparations ordered in this case include restitution, compensation and rehabilitation.⁶¹ The Appeals Chamber would particularly note the principle of *restitutio in integrum* and the fact that the Appeals Chamber stated that '[r]estitution should, as far as possible, restore the victim to his or her circumstances before the crime was committed'.⁶² The TFV and the Trial Chamber, in the implementation process, and in formulating particular reparations programmes, should be guided by the principle of *restitutio in integrum* bearing in mind the particular circumstances of the case and the type of reparations ordered.

37. The Appeals Chamber recalls that the reparations proceedings in this case concern harm caused to children under the age of fifteen years who were conscripted or enlisted into the FPLC, or used to participate actively in hostilities, as well as to indirect victims – including family members of those children. The situation of such children is particular and requires measures to be taken which properly address those

⁶¹ [Lubanga Amended Reparations Order](#), para. 67.

⁶² [Lubanga Amended Reparations Order](#), para. 67 (footnote omitted).

particularities. The Appeals Chamber recognised the situation of such children in its amended reparations order in 2015. It stated, *inter alia*, that

[r]eparation orders and programmes in favour of child soldiers, should guarantee the development of the victims' personalities, talents and abilities to the fullest possible extent and, more broadly, they should ensure the development of respect for human rights and fundamental freedoms. For each child, the measures should aim at developing respect for their parents, cultural identity and language. Former child soldiers should be helped to live responsibly in a free society, recognising the need for a spirit of understanding, peace and tolerance, showing respect for equality between the sexes and valuing friendship between all peoples and groups.⁶³ [Footnote omitted.]

38. Also, and as pointed to by the OPCV,⁶⁴ the Appeals Chamber stresses the need to recognise and address, as one type of harm, in the projects being implemented, the damage to a life plan/the project of life, which these children may have suffered. Again, the Appeals Chamber recalled this concept in the *Lubanga* Amended Reparations Order, noting that 'the concept of "damage to a life plan", adopted in the context of State responsibility at the IACtHR, may be relevant to reparations at the Court'.⁶⁵ In identifying the harm to direct victims of, specifically, Mr Lubanga's crimes, the Appeals Chamber included '[i]nterruption and loss of schooling' and '[t]he non-development of "civilian life skills" resulting in the victim being at a disadvantage, particularly as regards employment'.⁶⁶ The Appeals Chamber emphasises that it is crucial, in the reparations provided, that the specific situation of the children at issue in this case is recognised and that their harm is appropriately remedied through the particular reparations provided.

39. Similarly, the situation of indirect victims in this case must be addressed in an appropriate manner, again appreciating the difference in needs that such victims have, as they most likely require reparations that differ from those required for direct victims. It is also important that, in any eligibility assessment for reparations programmes, appropriate questions are posed enabling indirect victims to be fairly assessed for participation in those programmes, and not requiring them to have knowledge of events or information that they could not reasonably be expected to

⁶³ [Lubanga Amended Reparations Order](#), para. 26.

⁶⁴ [OPCV's Submissions Following the Appeals Chamber's Questions](#), paras 21-25.

⁶⁵ [Lubanga Amended Reparations Order](#), para. 40, n. 24.

⁶⁶ [Lubanga Amended Reparations Order](#), para. 58(a).

have; at the same time, the questions posed must be sufficiently probing to enable a finding that they are, in fact, indirect victims in this case.

40. Although the reparations ordered in this case are collective in nature, the Appeals Chamber finds it important to recall that, as it has previously stated, ‘[i]ndividual and collective reparations are not mutually exclusive, and they may be awarded concurrently’.⁶⁷ Future chambers should have this in mind when reaching determinations as to the appropriateness of particular reparations in the cases before them. Also, although it would not attempt to set out, in an exhaustive manner, how the concept of ‘collective’ reparations should be understood – bearing in mind the many permutations possible, which will also be dependent on the facts of particular cases – the Appeals Chamber would, nevertheless, also stress now that, in awarding collective reparations to victims, this can include reparations which are individualised; in this respect, collective reparations can include the payment of sums of money to individuals to repair harm suffered and the possibility for individuals to participate in particular programmes that address the specific harm that those individuals have suffered. The Appeals Chamber recalls that it has held that, ‘[w]hen collective reparations are awarded, these should address the harm the victims suffered on an individual and collective basis’.⁶⁸ Finally, it would also recall that ‘[r]eparations are entirely voluntary and the informed consent of the recipient is necessary prior to any award of reparations, including participation in any reparations programme’.⁶⁹

41. As stated above, the Appeals Chamber has grouped the grounds of appeal as follows: first group, system for the award of reparations; second group, assessment of individual requests and standard of proof; and third group, the two remaining grounds of appeal. These will now be addressed in sequence.

⁶⁷ [Lubanga Amended Reparations Order](#), para. 33.

⁶⁸ [Lubanga Amended Reparations Order](#), para. 33.

⁶⁹ [Lubanga Amended Reparations Order](#), para. 30.

A. System for the award of reparations

1. Procedural background and relevant parts of the Impugned Decision

42. To avoid duplication, the common elements of the procedural background and the Impugned Decision, as related to these four grounds of appeal, are presented together, and not within the sections devoted to the individual grounds of appeal.

(a) The 2012 Lubanga Reparations Decision and subsequent Appeals Chamber judgment

43. The reparations phase in this case began in 2012, at which time Trial Chamber I issued the *Lubanga* Reparations Decision. In that decision, Trial Chamber I held that ‘[g]iven the uncertainty as to the number of victims of the crimes in this case [...] and the limited number of individuals who have applied for reparations, the Court should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified’.⁷⁰ It found that, in the circumstances of the case, the identification of victims and beneficiaries should be carried out by the TFV, and it directed that all requests received up to that point should be transmitted to the TFV.⁷¹

44. Having considered appeals against Trial Chamber I’s decision, the Appeals Chamber amended that decision⁷² and issued an amended order for reparations.⁷³ It also gave instructions regarding implementation of its amended order.⁷⁴ The Appeals Chamber held that ‘the Trial Chamber must clearly *define* the harms that result from the crimes for which the person was convicted, the extent of which may then be *assessed* by the Trust Fund for purposes of determining the size and nature of reparation awards’.⁷⁵ The Appeals Chamber found that Trial Chamber I had erred in delegating to the TFV the task of defining the harms caused to victims.⁷⁶ However, it noted that, following its judgment, ‘the Trust Fund [would] be seized of the amended reparation order for purposes of implementation and a newly constituted Chamber

⁷⁰ [Lubanga Reparations Decision](#), para. 219.

⁷¹ [Lubanga Reparations Decision](#), paras 283, 289(b).

⁷² [Lubanga Appeal Judgment on Reparations](#).

⁷³ [Lubanga Amended Reparations Order](#).

⁷⁴ [Lubanga Appeal Judgment on Reparations](#), paras 240-243.

⁷⁵ [Lubanga Appeal Judgment on Reparations](#), para. 184 (emphasis in the original).

⁷⁶ [Lubanga Appeal Judgment on Reparations](#), para. 184.

[would] have the authority to approve the draft implementation plan submitted by the Trust Fund'.⁷⁷ The Appeals Chamber considered that

it [was] appropriate to exceptionally seek the Trust Fund's assistance in requesting that it provide, in the draft implementation plan, the anticipated monetary amount that it consider[ed] necessary to remedy the harms caused by the crimes for which Mr Lubanga was convicted, based on information gathered during the consultation period leading up to the submission of the draft implementation plan.⁷⁸

45. The Appeals Chamber did not amend Trial Chamber I's instruction that the Registrar transmit all requests to the TFV. It only instructed the Registrar to seek the victims' consent to disclosure of confidential information and instructed the TFV to refrain from reviewing the requests until such consent was received.⁷⁹

46. In the *Lubanga* Amended Reparations Order, the Appeals Chamber directed the newly composed Trial Chamber to 'monitor and oversee the implementation stage of the [amended] order, including having the authority to approve the draft implementation plan submitted by the Trust Fund'.⁸⁰ The Appeals Chamber also directed the Trial Chamber to set the amount of Mr Lubanga's liability, after giving the parties the opportunity to appear or make submissions, in light of the information provided by the TFV in its draft implementation plan.⁸¹

(b) Proceedings before the Trial Chamber and the Impugned Decision

47. Having been assigned with the case, the Trial Chamber, in its first decision on the matter, stated that

in accordance with the Appeals Chamber's instructions, the Draft [implementation plan] must (i) identify the victims eligible to benefit from the reparations; (ii) evaluate the extent of the harm caused to the victims; and (iii) determine the appropriate modalities and forms of reparations [...].⁸²

⁷⁷ [Lubanga Appeal Judgment on Reparations](#), para. 240.

⁷⁸ [Lubanga Appeal Judgment on Reparations](#), para. 240.

⁷⁹ [Lubanga Appeal Judgment on Reparations](#), para. 162.

⁸⁰ [Lubanga Amended Reparations Order](#), para. 76.

⁸¹ [Lubanga Amended Reparations Order](#), para. 80.

⁸² [Decision on the "Request for extension of time to submit the draft implementation plan on reparations"](#), 14 August 2015, ICC-01/04-01/06-3161-tENG, para. 6.

48. On 3 November 2015, the TFV submitted the Draft Implementation Plan.⁸³ That filing did not include the calculation of Mr Lubanga's monetary liability, as the TFV found it 'highly challenging' to set the amount of such liability and submitted that such determination was 'within the discretion of the Court'.⁸⁴ In its Order of 9 February 2016, the Trial Chamber reiterated its request for the inclusion of the anticipated monetary amount of Mr Lubanga's liability in the draft implementation plan.⁸⁵ The Trial Chamber required the TFV and, subsequently, the OPCV, Victims V01 and Victims V02 to locate and identify victims, to compile their dossiers and to impart the results of this process to the Trial Chamber.⁸⁶ Having noted the 'difficulties associated with identifying victims potentially eligible to benefit from the reparations', the Trial Chamber stated that it would

not be able to rule on the monetary amount of Mr Lubanga's liability until the potential victims have been identified and it has examined both their status as victims eligible to benefit from the reparations and the extent of the harm they have suffered. In this context, the Chamber recalls that it is responsible for deciding on the status of eligible victims once the Defence has had the opportunity to submit its observations on the eligibility of each victim.⁸⁷ [Footnote omitted.]

49. The TFV sought leave to appeal this order. Noting that the Appeals Chamber decided that only collective reparations should be considered in this case and that it addressed the differences between individual and collective awards, the TFV submitted that, instead of acknowledging this difference, 'the Chamber adopted an individualised approach, resulting in a judicial person-by-person determination of eligibility of individual victims as a precondition for adoption of the implementation plan'; it argued that this was 'in conflict' with both what the Appeals Chamber had stated and the relevant law⁸⁸ and that it would be 'operationally impractical' for it to compile a list of potentially eligible victims prior to beginning actual implementation of any collective awards.⁸⁹ The TFV also argued that it was 'inappropriate that the Chamber adopted an approach to calculate the total monetary liability of Mr. Lubanga

⁸³ [Draft Implementation Plan](#).

⁸⁴ [Draft Implementation Plan](#), para. 214.

⁸⁵ [Order of 9 February 2016](#), para. 9.

⁸⁶ [Order of 9 February 2016](#), para. 15; [Order of 15 July 2016](#).

⁸⁷ [Order of 9 February 2016](#), para. 14.

⁸⁸ [TFV's Request for Leave to Appeal](#), para. 14.

⁸⁹ [TFV's Request for Leave to Appeal](#), para. 17.

for reparations in the present case by suggesting that such a calculation should only be based on the cumulative sum of individual harm, without taking into consideration the Appeals Chamber determination that there should be collective reparations in the case', arguing, *inter alia*, that the Trial Chamber's method of calculation was 'incompatible with costing methods applied in programmatic design befitting collective awards'.⁹⁰ It also submitted that not all victims may come forward; also, not all may tell their full story which 'may directly implicate the calculation of the amount of Mr Lubanga's liability, if a narrow approach is taken'.⁹¹ The Trial Chamber did not grant the requested leave to appeal.⁹²

50. In the course of the proceedings the TFV submitted filings containing, *inter alia*, its estimate of the number of potential victims.⁹³

51. In those filings, the TFV further questioned the procedure for eligibility screening set out by the Trial Chamber:

15. [T]he Trial Chamber [...] decided to approach victim eligibility as a legal procedure prior to programme approval or implementation, with eligibility determinations to be made by the Trial Chamber, requiring the compilation of individual victim dossiers, including both detailed victimization information and a harm assessment at the individual level, as well as informed consent by each victim to agree to have his or her identity revealed and challenged by the convicted person.

17. As the Trust Fund has previously argued, the Trial Chamber's procedural approach to victims' eligibility and harm will result in a significantly lower number of victims being able to benefit from reparations than it had estimated at the time of proposing the Draft Implementation Plan. Moreover, this approach of the Trial Chamber may exclude in particular vulnerable victims such as female victims or victims who are still stigmatized today because of the harm they suffered. [...]

25. Moreover, the eventual scope of reparations has become much less clear. It is not possible to assess whether the eligibility process instituted by the Trial Chamber will allow for tens, hundreds, or a thousand and more victims to be eligible for reparations.⁹⁴

⁹⁰ [TFV's Request for Leave to Appeal](#), para. 16.

⁹¹ [TFV's Request for Leave to Appeal](#), para. 30.

⁹² [Decision on TFV's Request for Leave to Appeal](#), p. 9.

⁹³ [Additional Programme Information Filing](#), para. 13.

⁹⁴ [Additional Programme Information Filing](#), paras 15, 17, 25 (footnotes omitted).

52. On 15 July 2016, the Trial Chamber instructed the Registry to provide assistance to the legal representatives of victims and to the TFV for the purpose of locating and identifying victims potentially eligible for reparations,⁹⁵ having considered that the search for such persons should continue and noting that it would be able ‘to supplement the sample already available and to better assess to what extent the list of victims identified [was] representative of all potential victims’.⁹⁶

53. On 22 December 2016, the TFV submitted filings containing, *inter alia*, the anticipated cost of running some of the possible reparations programmes.⁹⁷

54. On 6 April 2017, the Trial Chamber approved ‘the first stage of the programmatic framework for collective service-based reparations as proposed by the TFV’.⁹⁸

55. Between 31 May 2016 and 31 March 2017, the Trial Chamber received dossiers of possible victims. In its Decision of 13 July 2017, the Trial Chamber stated that it would subsequently be for the TFV to consider whether the persons who were not in a position to submit a dossier on time qualify for a collective award at the implementation stage of reparations.⁹⁹ It also noted that these dossiers ‘reflect only a sample of the Potentially Eligible Victims’, and it therefore instructed the parties ‘to provide it with an estimate of the current monetary value of the harms alleged by the direct and indirect victims, and to explain the methodology behind that estimate’¹⁰⁰ and ‘to provide it with an estimate of the total number of direct and indirect victims, along with an explanation of the methodology behind that estimate’.¹⁰¹ Submissions on this issue were received on 8, 11 and 29 September 2017.¹⁰²

⁹⁵ [Order of 15 July 2016](#), p. 7.

⁹⁶ [Order of 15 July 2016](#), para. 8 (footnote omitted).

⁹⁷ [Third Submission of Victim Dossiers](#), paras 60-61.

⁹⁸ ‘[Order approving the proposed programmatic framework for collective service-based reparations submitted by the Trust Fund for Victims](#)’, 6 April 2017, ICC-01/04-01/06-3289, p. 9.

⁹⁹ [Decision of 13 July 2017](#), para. 11.

¹⁰⁰ [Order on Submissions on Evidence](#), paras 10, 11 (footnote omitted).

¹⁰¹ [Order on Submissions on Evidence](#), para. 11.

¹⁰² [OPCV’s Submissions on Evidence](#); [Victims V01’s Submissions on Evidence](#); [Victims V02’s Submissions on Evidence](#); [Mr Lubanga’s Submissions on Evidence](#).

56. In the Impugned Decision, the Trial Chamber indicated that it examined the dossiers which it had received in order to, *inter alia*, set the size of the reparations award.¹⁰³ The Trial Chamber also underscored that

another aim of the assessment of the dossiers is to devise a method for the screening of the victims for eligibility to be undertaken by the Trust Fund during the victim selection process upon which it will embark as it starts to implement the reparations.¹⁰⁴ [Footnote omitted.]

The Trial Chamber made it clear that its rejection of some of the requests before it meant that the persons concerned would not be eligible to participate in the collective programmes.¹⁰⁵ However, the Trial Chamber recalled that the Appeals Chamber had invited the TFV to contemplate, in the exercise of its mandate under regulation 50(a) of the Regulations of the TFV, the possibility of including in the assistance programmes the persons who do not qualify for the award of reparations in the case.¹⁰⁶ The Trial Chamber assessed the individual dossiers it had received, against the criteria which it set out, and concluded that 425 had shown that they were victims and were entitled to reparations.¹⁰⁷

57. The Trial Chamber determined that the number of victims who suffered harm as a consequence of the crimes for which Mr Lubanga was convicted exceeds the 425 persons who had established that they were victims for the purposes of reparations.¹⁰⁸ The Trial Chamber estimated that the number of victims, depending on the calculation method, might return a figure between 2,451 and 5,938 victims.¹⁰⁹ It conceded that it was ‘unable to arrive at a precise number of victims of the crimes of which Mr Lubanga was convicted’.¹¹⁰

58. The Trial Chamber decided not to carry out ‘an “exhaustive” identification process’, which ‘would not have been fully representative of the true extent of the harm caused by Mr Lubanga’, as ‘the number of victims who might have come

¹⁰³ [Impugned Decision](#), para. 35.

¹⁰⁴ [Impugned Decision](#), para. 38.

¹⁰⁵ [Impugned Decision](#), paras 155, 169, 190.

¹⁰⁶ [Impugned Decision](#), para. 301.

¹⁰⁷ [Impugned Decision](#), para. 190.

¹⁰⁸ [Impugned Decision](#), para. 212.

¹⁰⁹ [Impugned Decision](#), paras 223-230.

¹¹⁰ [Impugned Decision](#), para. 233.

forward through a screening process would have remained well below the actual number of victims affected by the crimes of which Mr Lubanga was convicted'.¹¹¹

59. The Trial Chamber then identified factors which, in its view, may have affected the victims' inclination to make themselves known and seek reparations:

[T]he time elapsed since the crimes were committed and the very protracted course of the proceedings since the time they were instituted against Mr Lubanga; the scattering of victims across large geographical areas; the fact that victims may have been displaced or may have settled elsewhere, say, to seek employment, or the fact that unrest, stigmatization and discrimination may have prompted their departure; a loss of interest in reparations on the part of some potential victims; social and cultural factors deterring a significant number of victims from disclosing their child-soldier past on account of the attendant stigmatization and social pressure; the fact that young girls and women wish to be inconspicuous, in particular because they seldom participated in the DDR [disarmament, demobilisation and reintegration] programmes as former child soldiers and the fact that some potential victims belong to at-risk groups, for instance, persons with disabilities or severe mental trauma. The Chamber also has in mind the political factors at play in some regions, especially in those where communities continue to support Mr Lubanga. The Legal Representatives of V01 and V02 Victims and the OPCV cannot readily reach such communities. And so, it would appear a complex and nigh on impossible undertaking for them to identify all of the potentially eligible victims in those areas. Lastly, the Chamber notices that some of the children under the age of 15 years recruited by the UPC were orphans and, since they died while or after serving in the UPC, there are no surviving relatives in a position to claim reparations.¹¹²

60. The Trial Chamber ultimately considered it 'established to the requisite standard of proof that, along with the 425 victims in the sample, hundreds and possibly thousands more victims were affected by the crimes of which Mr Lubanga was convicted'.¹¹³

61. The Trial Chamber then addressed the 'monetary value of the harm suffered' by the persons who it had established were victims.¹¹⁴ It indicated that it had not 'scrutinized the specific harm alleged by each potentially eligible victim'.¹¹⁵ Instead, it noted that 'it has applied a presumption of average harm to each direct and indirect victim once a direct victim's child-soldier status in the UPC/FPLC during the time

¹¹¹ [Impugned Decision](#), para. 235.

¹¹² [Impugned Decision](#), para. 236 (footnotes omitted).

¹¹³ [Impugned Decision](#), para. 244.

¹¹⁴ [Impugned Decision](#), paras 245-259.

¹¹⁵ [Impugned Decision](#), para. 247.

frame of the charges and an indirect victim's close personal relationship with a child soldier have been established on a balance of probabilities'.¹¹⁶ The Trial Chamber then 'turn[ed] to the assessment of the average harm suffered by each victim'.¹¹⁷ It stated:

Having regard to the submissions of [Victims V01, Victims V02] and the OPCV (which arrive at an average of USD 6,000 per victim), the Congolese decisions (which suggest comparable values), the Chamber's findings in *Katanga* and in the instant case, and the results of the sample, the Chamber reckons *ex æquo et bono* the harm suffered by each victim, direct or indirect, at USD 8,000.¹¹⁸

62. Turning to the size of the reparations award, the Trial Chamber stated:

279. Having found that 425 of the 473 victims in the sample qualify for reparations awarded in the case, and having assessed *ex æquo et bono* the value of the harm per capita, taking into account the above considerations and factors pertaining to Mr Lubanga's individual responsibility, the Chamber reckons *ex æquo et bono* Mr Lubanga's liability in respect of the 425 victims in the sample at USD 3,400,000.

280. Recalling that hundreds and possibly thousands more victims suffered harm as a consequence of the crimes of which Mr Lubanga was convicted, and having regard to the above considerations and factors, the Chamber reckons *ex æquo et bono* Mr Lubanga's liability with respect to those other victims who may be identified during the implementation of reparations at USD 6,600,000.

281. Accordingly, the Chamber sets the total reparations award for which Mr Lubanga is liable at USD 10,000,000.¹¹⁹

2. *Mr Lubanga's first ground of appeal*

(a) **Submissions on appeal**

(i) *Mr Lubanga's submissions*

63. Mr Lubanga submits that article 75(1) of the Statute and rule 95 of the Rules provide that only in 'exceptional circumstances' may a Chamber, *proprio motu*, make decisions on reparations with respect to victims who have not made any such claims for that purpose.¹²⁰ He argues that the collective nature of reparations does not necessarily authorise the trial chamber to examine the situation of unidentified,

¹¹⁶ [Impugned Decision](#), para. 247.

¹¹⁷ [Impugned Decision](#), para. 251.

¹¹⁸ [Impugned Decision](#), para. 259.

¹¹⁹ [Impugned Decision](#), paras 279-281.

¹²⁰ [Mr Lubanga's Appeal Brief](#), paras 11-16.

potentially eligible victims who have not submitted any requests to the Court.¹²¹ Mr Lubanga argues that he has been denied the rights provided for under rule 95 of the Rules and, specifically, the right to file submissions proving the lack of ‘exceptional circumstances’ to show that the Court was ruling ‘on its own motion’ on harm not put before it for consideration.¹²²

(ii) *Victims V01’s response*

64. Victims V01 argue that Trial Chamber I had already decided that the reparations proceedings would not be based on applications for reparations, and that this decision was confirmed by the Appeals Chamber in the *Lubanga Appeal Judgment on Reparations*.¹²³ Victims V01 further submit that the Appeals Chamber’s ‘determination that it was inappropriate to award individual reparations and the decision to opt for collective reparations only were [...] implicitly considered by the Appeals Chamber to constitute an exceptional circumstance [...] justifying the [Trial] Chamber’s decision to act “on its own motion”’.¹²⁴

(iii) *Victims V02’s response*

65. Victims V02 submit that the Trial Chamber did not, in fact, proceed *proprio motu* to determine the harm suffered by ‘other potentially eligible victims’.¹²⁵ Victims V02 point out that the Trial Chamber recalled that the ‘OPCV and the Legal Representatives of V02 Victims had stated, in their respective submissions, that they were in contact with tens and possibly hundreds of such victims’.¹²⁶ Victims V02 argue that the Trial Chamber was correct in recognising the need to rule in respect of unidentified victims given the potential undue delay in attempting to individually identify victims to set the size of the reparations award.¹²⁷

(iv) *OPCV’s response*

66. The OPCV submits that the Trial Chamber did not rule *proprio motu*, as it was ‘duly informed [...] of the existence of hundreds of additional victims identified for

¹²¹ [Mr Lubanga’s Appeal Brief](#), para. 20.

¹²² [Mr Lubanga’s Appeal Brief](#), paras 44-48.

¹²³ [Victims V01’s Response to Mr Lubanga’s Appeal](#), para. 9.

¹²⁴ [Victims V01’s Response to Mr Lubanga’s Appeal](#), para. 15.

¹²⁵ [Victims V02’s Consolidated Response to the Appeal Briefs](#), para. 13.

¹²⁶ [Victims V02’s Consolidated Response to the Appeal Briefs](#), paras 13-14. *See also* paras 42-43, 52-54.

¹²⁷ [Victims V02’s Consolidated Response to the Appeal Briefs](#), paras 26-28, 31-32.

the purpose of reparations in the instant case’ and ‘[i]n that sense, the victims’ applications were put before the Chamber’.¹²⁸

(v) *Mr Lubanga’s reply*

67. Mr Lubanga submits that, contrary to the averment of Victims V01, Trial Chamber I and the Appeals Chamber did not decide to proceed on their own motion, within the meaning of article 75(1) of the Statute. He contends that they only decided to proceed to award collective, rather than individual, reparations.¹²⁹

(vi) *TFV’s submissions*

68. The TFV submits that setting the amount of liability of a convicted person occurs at the time the reparations order is issued, and that the trial chamber ‘must take into account the findings made in the conviction and sentencing decisions’.¹³⁰ With regard to identification of unknown victims, the TFV submits, based on the Court’s case law, that it is not ‘necessary to have previously identified the number of victims eligible in order to have a valid reparations order, for the purposes of determining the amount of the convicted person’s liability’.¹³¹

(vii) *Submissions of the parties on questions posed by the Appeals Chamber*

69. Mr Lubanga submits that in collective reparations, the trial chamber must first identify ‘the victims and the nature and extent of the harm’,¹³² and that ‘a potential victim cannot seek post facto to qualify as a victim for the purpose of the reparations awarded by order of the Court’.¹³³ Mr Lubanga argues that an award cannot make a convicted person liable for potential victims if this person had not had the opportunity to make submissions on the applications of the potential victims.¹³⁴ This was required by ‘the rules of a fair trial and the right to notice and the opportunity to be heard.’¹³⁵

70. Victims V01 submit that the services should not be different depending on whether the victims were identified during the proceedings or the implementation

¹²⁸ [OPCV’s Consolidated Response to the Appeal Briefs](#), para. 31.

¹²⁹ [Mr Lubanga’s Reply](#), paras 5-9.

¹³⁰ [TFV’s Submissions](#), para. 41.

¹³¹ [TFV’s Submissions](#), paras 46-47.

¹³² [Mr Lubanga’s Submissions Following the Appeals Chamber’s Questions](#), para. 17.

¹³³ [Mr Lubanga’s Submissions Following the Appeals Chamber’s Questions](#), para. 18.

¹³⁴ [Mr Lubanga’s Submissions Following the Appeals Chamber’s Questions](#), para. 21.

¹³⁵ [Mr Lubanga’s Submissions Following the Appeals Chamber’s Questions](#), para. 79.

stage¹³⁶ and that the award needs to be determined on the basis of an estimate ‘of what is necessary and reasonable’.¹³⁷ Victims V01 submit that collective reparations should address the harm suffered on an individual and collective basis, and should benefit the community as a group sharing a characteristic.¹³⁸

71. Victims V02 submit that they travelled twice to the field and identified a number of other victims,¹³⁹ and that all victims identified and contacted should receive collective reparations.¹⁴⁰ Victims V02 further submit that, contrary to the position of the TFV, the Court may order that Mr Lubanga make submissions during the implementation stage pursuant to rule 103(2) of the Rules.¹⁴¹

72. The OPCV submits that collective reparations may be awarded during the TFV’s administrative screening process, when the convicted person should have no right to be on notice of or make submissions regarding the victims’ requests for reparations.¹⁴² The OPCV considers that there should be no difference between identified and unidentified victims during the implementation stage of reparations.¹⁴³

(b) Determination by the Appeals Chamber

73. Article 75(1) of the Statute reads in relevant part:

[...] in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

74. Rule 94 of the Rules regulates the procedure when victims file requests for reparations, regulating the content of requests, notification thereof and the filing of representations¹⁴⁴ and rule 95 regulates the procedure on the motion of the Court.

Rule 95 reads as follows:

¹³⁶ [Victims V01’s Submissions Following the Appeals Chamber’s Questions](#), para. 6.

¹³⁷ [Victims V01’s Submissions Following the Appeals Chamber’s Questions](#), para. 6.

¹³⁸ [Victims V01’s Submissions Following the Appeals Chamber’s Questions](#), para. 6.

¹³⁹ [Victims V02’s Submissions Following the Appeals Chamber’s Questions](#), para. 32.

¹⁴⁰ [Victims V02’s Submissions Following the Appeals Chamber’s Questions](#), para. 33.

¹⁴¹ [Victims V02’s Submissions Following the Appeals Chamber’s Questions](#), para. 34.

¹⁴² [OPCV’s Submissions Following the Appeals Chamber’s Questions](#), para. 10.

¹⁴³ [OPCV’s Submissions Following the Appeals Chamber’s Questions](#), para. 11.

¹⁴⁴ 1. A victim’s request for reparations under article 75 shall be made in writing and filed with the Registrar. It shall contain the following particulars:

Procedure on the motion of the Court

1. In cases where the Court intends to proceed on its own motion pursuant to article 75, paragraph 1, it shall ask the Registrar to provide notification of its intention to the person or persons against whom the Court is considering making a determination, and, to the extent possible, to victims, interested persons and interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3.

2. If, as a result of notification under sub-rule 1:

(a) A victim makes a request for reparations, that request will be determined as if it had been brought under rule 94;

(b) A victim requests that the Court does not make an order for reparations, the Court shall not proceed to make an individual order in respect of that victim.

75. Rule 98(3) of the Rules reads as follows:

The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.

76. Mr Lubanga argues on appeal that the Trial Chamber erred by making an award for reparations ‘on its own motion’ to, or in respect of, the unidentified victims who had not made a request for reparations, without having established that there were ‘exceptional circumstances’ and without following the procedure set out in rule 95 of the Rules. Mr Lubanga also makes a more general argument that, although in collective reparations the trial chamber does not need to rule on the quantum of the individual harm to the victims who have applied for reparations, it may not ‘consider the situation of unidentified possible victims who have made no application to the

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- (a) The identity and address of the claimant;
 - (b) A description of the injury, loss or harm;
 - (c) 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;
 - (d) Where restitution of assets, property or other tangible items is sought, a description of them;
 - (e) Claims for compensation;
 - (f) Claims for rehabilitation and other forms of remedy;
 - (g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.

2. At commencement of the trial and subject to any protective measures, the Court shall ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges and, to the extent possible, to any interested persons or any interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3.

Court'.¹⁴⁵ The Appeals Chamber is not persuaded by Mr Lubanga's arguments for the reasons that follow.

77. The central provision regulating reparations before the Court is article 75 of the Statute, which stipulates in the first sentence of its paragraph 1 that the Court 'shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'. The second sentence of article 75(1) concerns, *inter alia*, the trigger for reparations proceedings: upon conviction of a person by the Court, the trial chamber will enter into the reparations phase of proceedings (i) if it has received requests for reparations by individuals identifying themselves as victims, or (ii) on its own motion, if exceptional circumstances exist. In the interpretation proposed by Mr Lubanga, the manner in which reparations proceedings are initiated (either upon request or on the Court's own motion) also limits the scope of the ultimate award for reparations. The Appeals Chamber, however, notes that the applicable provisions of the law do not provide for such limitation.

78. Article 75(2) of the Statute provides that the Court may make an order for 'appropriate reparations' directly against the convicted person, or through the TFV. A trial chamber's role is, therefore, to determine what reparations are 'appropriate'. In making this determination, a trial chamber must consider, *inter alia*, the 'scope and extent of any damage, loss and injury to, or in respect of victims' (article 75(1), second sentence). As to what this means, the Appeals Chamber recalls that it has found that

article 75 (1) of the Statute requires a trial chamber to "determine the scope and extent of any damage, loss and injury to, or in respect of victims". The Appeals Chamber considers that, in doing so, a trial chamber should, generally speaking, establish the types or categories of harm caused by the crimes for which the convicted person was convicted, *based on all relevant information before it*, including the decision on conviction, sentencing decision, submissions by the parties or *amici curiae*, expert reports and the applications by the victims for reparations.¹⁴⁶

¹⁴⁵ [Mr Lubanga's Appeal Brief](#), para. 20.

¹⁴⁶ [Katanga Judgment on Reparations](#), para. 70 (footnotes omitted, emphasis added). *See also*, in the context of civil party applications before the ECCC: [Kaing Guek Eav Appeal Judgment](#), para. 512.

79. It is, for example, conceivable that the conviction decision contains findings as to the number of victims of the crimes for which the conviction was entered, the type of harm they suffered, etc. Such findings are likely to be relevant for determining the appropriateness of reparations and there is no reason why a trial chamber should be forced to ignore them only because not all of the victims have filed a request for reparations with the Court. If the trial chamber were limited to determining the scope of the harm based only on the requests for reparations it had received – as Mr Lubanga contends – the resulting finding would almost inevitably be incomplete and reflect only part of the harm actually caused by the crimes for which the person was convicted.

80. Furthermore, the Appeals Chamber notes rule 98(2) of the Rules and regulations 60-65 of the Regulations of the TFV. These provisions specifically provide for verification by the TFV, in the case of individual awards, of whether persons are members of the beneficiary group in cases where the trial chamber has not identified the beneficiaries in its reparations order. As stipulated in rule 98(2) of the Rules, this may occur where ‘it is impossible or impracticable to make individual awards directly to each victim’.¹⁴⁷ This possibility presupposes that the reparations order is, at least in part, based on information other than that contained in requests for reparations filed before the Chamber. It would run contrary to this logic if, at the same time, the scope of the convicted person’s liability for reparations could be determined only in respect of victims who have filed requests for reparations.

81. Requiring that, barring exceptional circumstances, the reparations order may only be based on requests for reparations already received would also have a negative impact on the efficiency of the reparations process. This would mean that, for example in cases where there are large numbers of victims, in order to avoid prejudice to those victims, and in order to provide them with a sufficient opportunity to submit requests for reparations, the trial chamber would need to set generous time limits for their submissions. The implementation process, however, could not begin until the reparations order was actually issued and the trial chamber had determined the status of all of those who had at that point applied for reparations. The result would be that

¹⁴⁷ The French version of this part of rule 98(2) of the Rules reads: ‘il lui est impossible d’accorder un montant à chaque victime prise individuellement’.

valuable time would be lost during which victims would have to wait for reparations – even though they may have already submitted their requests for reparations early on during the trial proceedings.

82. The Appeals Chamber also notes that collective reparations, referred to in rule 98(3) of the Rules, may take forms that do not necessarily require identifying individual victims at any stage of the reparations process – for instance in cases where memorials are erected as reparations measures or other symbolic reparations imposed.¹⁴⁸ Limiting the reparations process in such circumstances to those who have applied for reparations would serve no apparent purpose.

83. Finally, the Appeals Chamber recalls its finding, made previously in this case, that a requirement that collective reparations may only be awarded on the basis of individual requests for reparations would contravene the principle that reparations ‘oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Chamber to ensure that offenders account for their acts’.¹⁴⁹

84. It is for these reasons that the Appeals Chamber is unable to accept the argument that the requirement set out in article 75(1) of the Statute, that the Court proceed ‘upon request or on its own motion’, limits the trial chamber’s determination of the scope of damage to the information contained in requests for reparations, save for exceptional circumstances where it acts on its own motion. As indicated earlier and in view of the foregoing, this part of the provision only regulates how the reparations proceedings are triggered.

¹⁴⁸ The preparatory work for the rules regarding reparations awards shows that at least three different views were expressed: (i) that reparations are ‘a method for victims to enforce their civil claims through the Court’; (ii) that reparations were ‘another form of sanction imposed by the Court, specifically tailored to the needs of victims, and were not a means of satisfying civil debts’ (symbolic gestures, such as building a hospital, school or memorial were considered); and (iii) that the Court should have the flexibility to make individual or collective awards to address the needs of victims and that victims should have a say in how any resources were used. Eventually rule 97(1) ‘emphasises that reparations should normally be on an individualised basis unless the Court considers it appropriate to make the award on a collective basis or both’, referring to P. Lewis and H. Friman, ‘Reparations to Victims’ in R. S. Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 483.

¹⁴⁹ [Lubanga Appeal Judgment on Reparations](#), para. 151.

85. Mr Lubanga grounds his argument to the contrary on rules 94 and 95 of the Rules. However, neither of these provisions stipulates that the scope of the reparations order must be limited to individuals who have filed a request for reparations. Rule 94(1) stipulates the form and content that a request for reparations before the Court should have, while rule 94(2) requires the Registrar to notify requests that have been received at the commencement of a trial to certain individuals. Rule 95 is concerned with the procedure that is to be followed if no requests for reparations have been received and the trial chamber nevertheless decides to proceed to consider the question of reparations, on its own motion. However, as noted above, as long as the trial chamber has received requests for reparations (as was the case in the case at hand), it is obliged to enter into the reparations phase of the proceedings, and rule 95 is without relevance.

86. The Appeals Chamber notes that a trial chamber may find it appropriate to award individual reparations based on an individual assessment of the specific harm suffered by each victim who filed a request (for instance, because the number of victims of the crimes for which the person was convicted was very low and it is apparent that a large majority (or all) of these victims has filed requests) and a determination of what reparation measures may be appropriate to address this specific harm may require the trial chamber to conduct a review of the requests and make findings thereon. In such cases, rule 94 of the Rules will be of significance in that it sets out the particulars which a request shall contain and it provides for notification of the request to, *inter alia*, the convicted person. The Appeals Chamber referred to this type of procedure previously as ‘primarily application (“request”) based’.¹⁵⁰

87. By contrast, there may be cases where the trial chamber contemplates an award for reparations that is not based on an individual assessment of the harm alleged in the requests filed. This may be, for instance, due to the number of victims. In such cases, the trial chamber ‘is not required to rule on the merits of the individual requests for reparations’.¹⁵¹ In its judgment rendered previously in the present case, the Appeals Chamber gave an example of collective reparations, where the trial

¹⁵⁰ [Lubanga Appeal Judgment on Reparations](#), para. 149.

¹⁵¹ [Lubanga Appeal Judgment on Reparations](#), para. 152.

chamber may typically follow such a procedure.¹⁵² In this regard, once it has become clear that the trial chamber does not intend to make individual determinations with respect to each victim who has filed a request, elements of rule 94 may be of less relevance, as the requests which have been filed will not be individually considered.

88. The Appeals Chamber is of the view that, in cases with more than a few victims, proceeding in this manner may prove to be more efficient than awarding, or deciding on the eligibility for, reparations on an individual basis, precisely because it is not necessary for the trial chamber to consider individual requests for reparations. If Mr Lubanga's argument as to the limitation of awards for reparations to those who have filed a request under rule 94 of the Rules were correct, a potentially large group of victims could be excluded from the reparations process.

89. This is not to say that, if collective reparations are ordered, the number of victims is not relevant to the determination of the scope of a convicted person's liability for reparations; to the contrary, the number of victims will be an important parameter for determining what reparations are appropriate. Clearly, it makes a difference whether the crimes for which the conviction was entered resulted in the victimisation of one hundred, one thousand or one hundred thousand individuals. Nevertheless, it would be incorrect to assume that the number of victims may only be established based on individual requests for reparations received by the Court. It would be undesirable for the trial chamber to be restrained in that determination simply because not all victims had presented themselves to the Court by making a request under rule 94 of the Rules. In making that determination, the trial chamber should consider the scope of damage as it is in the current reality, based on the crimes for which the convicted person was found culpable. The number of victims at the time of the crimes may be a starting point for this consideration. However, other parameters for determining what reparations are appropriate include considerations of what reparations measures are envisaged and how many victims are likely to come forward and benefit from them – a number that is likely to be smaller in the current reality than the overall number of victims of the crimes at the time they were

¹⁵² [Lubanga Appeal Judgment on Reparations](#), para. 149.

committed. These determinations can be made based on, *inter alia*, submissions received from the parties and reports of experts.¹⁵³

90. In deciding what reparations are ‘appropriate’, a trial chamber must take into account the rights of the convicted person. The reparations order must not go beyond the crimes for which he or she was convicted. The convicted person must be given a sufficient opportunity to make submissions on the scope of reparations, the scope of victimhood to be repaired, the type of reparations, etc., so as to comply with the requirements of fairness. To that end, the trial chamber must give notice to the parties of the manner in which it intends to conduct the reparations proceedings before it, especially where it does not intend to make individual determinations with respect to each victim who has filed a request. In this regard, it must ensure that the convicted person is adequately on notice as to the information on which it will rely in making its order, so that he or she has a meaningful opportunity to make representations thereon, and it must give notice as to the manner in which it intends to assess that information – e.g. does it intend to assess each request individually? The Trial Chamber must also ensure that the parties are on notice as to the standard of proof that will be applied in the proceedings so that they are aware of the manner in which the information will be assessed. As will be seen below, some of these issues are addressed further in Victims V01’s first ground of appeal and Mr Lubanga’s second and third grounds of appeal. If the trial chamber resorts to estimates as to the number of victims, such estimates must be based on a sufficiently strong evidential basis; any uncertainties must be resolved in favour of the convicted person (for instance, by assuming a lower number of victims, or by discounting the amount of liability). Furthermore, awarding reparations

¹⁵³ In the course of preparatory work on the Rules of Procedure and Evidence, the Preparatory Commission for the International Criminal Court suggested the following:

Rule E: Assessment of reparations

1. The Court shall award reparations, where possible on an individualized basis, taking into account the scope and extent of any damage, loss and injury and the gravity of the harmful act.
2. Where the large number of claimants precludes individualized determination of damage, loss and injury, and of reparations, the Court may appoint a representative to recommend to the Court the appropriate reparations based on a representative sample of the victims and the damage, loss and injuries they have suffered, utilizing accepted scientific methodology. [UN, Preparatory Commission for the ICC, ‘[Report on the international seminar on victims’ access to the International Criminal Court](#)’, 6 July 1999, PCNICC/1999/WGRPE/INF/2, p. 7]

beyond those who have filed a request under rule 94 of the Rules may not be appropriate in all cases.

91. In view of the foregoing, the Appeals Chamber considers that Mr Lubanga cannot rely on the part of article 75(1) of the Statute concerning the initiation of reparations proceedings to argue that the Trial Chamber erred in making an award for reparations ‘on its own motion’ without having established that there were ‘exceptional circumstances’ and without following the procedure set out in rule 95 of the Rules.

92. In the present case, Trial Chamber I found that, ‘[g]iven the uncertainty as to the number of victims of the crimes in this case – save that a considerable number of people were affected – and the limited number of individuals who have applied for reparations, the Court should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified’.¹⁵⁴ This finding was not overturned by the Appeals Chamber. The Trial Chamber, on receipt of the case, and having attempted to identify the victims of Mr Lubanga’s crimes, through receipt of dossiers from the TFV and the victims’ legal representatives, then estimated the total number of victims of his crimes. In this regard, the Appeals Chamber considers that the Trial Chamber’s approach aimed at ensuring, to the extent possible, and based on the information before it, that all interested victims of Mr Lubanga’s crimes received reparations. In light of the Appeals Chamber’s findings above, there was no need for the Trial Chamber to establish that there were ‘exceptional circumstances’ in this case, nor to follow the procedure set out in rule 95 of the Rules; the reparations phase of the proceedings was commenced based on requests for reparations received and the Trial Chamber, contrary to Mr Lubanga’s argument, did not err in law by determining the scope of Mr Lubanga’s liability not exclusively based on those requests; whether the Trial Chamber correctly assessed evidence concerning victims who had not yet been identified, is a matter that will be addressed further in the second half of Mr Lubanga’s second ground of appeal.

¹⁵⁴ [Lubanga Reparations Decision](#), para. 219. See also [Lubanga Appeal Judgment on Reparations](#), para. 143. None of the parties alleged errors with respect to that decision in their appeals against Trial Chamber I’s decision ([Lubanga Appeal Judgment on Reparations](#), para. 153).

93. The Appeals Chamber therefore rejects Mr Lubanga's first ground of appeal.

3. *Mr Lubanga's fourth ground of appeal*

(a) **Submissions on appeal**

(i) *Mr Lubanga's submissions*

94. Mr Lubanga submits that the award against a convicted person can be assessed only on the basis of the actual cost of the collective award.¹⁵⁵ He argues that the Trial Chamber, nevertheless, held that the award should be equal to the aggregate individual harm and made the reparations award without regard to its cost, nature and size.¹⁵⁶ Mr Lubanga contends that a collective award could 'only be lower than the aggregate individual harm' and that, by having awarded an amount exceeding the cost of collective reparations, the Trial Chamber issued an order for reparations of a punitive character and committed an error of law.¹⁵⁷

(ii) *Victims V01's response*

95. Victims V01 argue that, for a collective reparations programme, 'the only criterion to be taken into account is the cost of implementing the programme'.¹⁵⁸ They submit that it was 'only at the explicit behest of the Chamber that the Legal Representatives of the victims put forward amounts which they considered reasonable for a hypothetical assessment per capita and per head of harm'.¹⁵⁹

(iii) *Victims V02's response*

96. Victims V02 argue that the Trial Chamber 'applied a presumption of average harm to each direct and indirect victim'.¹⁶⁰ Victims V02 refer to the 2005 Basic Principles and Guidelines on the Right to Reparation and note that 'compensation should be provided for economically assessable damage resulting from gross violations of international human rights law, as appropriate and proportional to the gravity of the violation and the circumstances of each case'.¹⁶¹

¹⁵⁵ [Mr Lubanga's Appeal Brief](#), paras 208-213.

¹⁵⁶ [Mr Lubanga's Appeal Brief](#), paras 214-217.

¹⁵⁷ [Mr Lubanga's Appeal Brief](#), paras 222-225.

¹⁵⁸ [Victims V01's Response to Mr Lubanga's Appeal](#), para. 52.

¹⁵⁹ [Victims V01's Response to Mr Lubanga's Appeal](#), para. 53.

¹⁶⁰ [Victims V02's Consolidated Response to the Appeal Briefs](#), para. 129 (emphasis removed).

¹⁶¹ [Victims V02's Consolidated Response to the Appeal Briefs](#), para. 130.

(iv) OPCV's response

97. The OPCV argues that the Trial Chamber 'did take the actual cost of the intended collective reparations into account' in the Impugned Decision.¹⁶² The OPCV submits that the Trial Chamber 'appears to have used per capita assessments of each type of harm, along with estimates of the associated services, in order to make an informed, realistic and fair decision on Mr Lubanga's liability'.¹⁶³ The OPCV points out that the Trial Chamber had before it information about the estimated cost of many types of programmes and services that could be implemented in Ituri.¹⁶⁴

(v) Mr Lubanga's reply

98. In reply to the OPCV, Mr Lubanga argues that the Trial Chamber based its reasoning 'solely on the assessment of the harm suffered by each victim', with no regard to the cost of the implementation of the reparations.¹⁶⁵ Mr Lubanga submits that the Trial Chamber noted that the TFV was not able to put forward an estimate of its cost.¹⁶⁶

(vi) TFV's submissions

99. Referring to the Appeals Chamber's judgments in the cases of *Katanga* and *Al Mahdi*, the TFV submits that when determining the reparations award, the Court should also take into account the service cost to repair. The TFV submits that there is a difference between the service cost to repair and the actual cost of reparations to be implemented since the latter does not strictly address the harms as determined by the Court and it is established after the award of reparations.¹⁶⁷

(vii) Submissions of the parties on questions posed by the Appeals Chamber

100. Mr Lubanga submits that assessing the cost of reparations programmes requires that 'all eligible victims be identified and the harm to them be established before an order for reparations' is issued.¹⁶⁸ He asserts that in the instant case the TFV failed to comply with the Trial Chamber's directions to list eligible victims or to

¹⁶² [OPCV's Consolidated Response to the Appeal Briefs](#), para. 42.

¹⁶³ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 42.

¹⁶⁴ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 42.

¹⁶⁵ [Mr Lubanga's Reply](#), para. 45.

¹⁶⁶ [Mr Lubanga's Reply](#), para. 46.

¹⁶⁷ [TFV's Submissions](#), paras 43-45.

¹⁶⁸ [Mr Lubanga's Submissions Following the Appeals Chamber's Questions](#), para. 51.

assess the monetary amount necessary to implement collective reparations appropriate to the harm done to the victims.¹⁶⁹ He submits that the TFV's proposals on the 'modalities and forms of the reparations' were 'too unspecific and general to establish the cost of the programmes and [...] the size of the award for which Mr Lubanga should be liable'.¹⁷⁰

101. Victims V01 submit that in cases of service-based programmes of reparations, the only criterion for setting an award is the cost of the programme.¹⁷¹ In their view, '[i]f the size of a collective reparations award is equal to the cost of implementing the reparations', the number of victims is 'of little consequence'.¹⁷² They further argue that the value of reparations not only depends on the cost but also on their meaning and relevance to the victims.¹⁷³

102. Victims V02 submit that the reparations award should be calculated not on the basis of the number of victims, but 'according to the scope and extent of any damage, loss or injury to, or in respect of, the victims'¹⁷⁴. They argue that the Trial Chamber should have used experts, under rule 97(2) of the Rules, to determine such scope and extent and to suggest options of appropriate types and modalities of reparations.¹⁷⁵

103. The OPCV submits that the TFV still needs to provide information on details as to the available remedies and their costs, and that the anticipated costs may vary depending on the available infrastructure in Ituri for the implementation stage of reparations.¹⁷⁶ The OPCV argues that there is a relationship between the cost to repair the harm and the value of the harm.¹⁷⁷ Furthermore, the OPCV submits that collective awards can be calculated on the basis of an aggregation of individual harm of victims or on the basis of the cost to repair harm.¹⁷⁸ The OPCV, referring to jurisprudence of

¹⁶⁹ [Mr Lubanga's Submissions Following the Appeals Chamber's Questions](#), para. 57.

¹⁷⁰ [Mr Lubanga's Submissions Following the Appeals Chamber's Questions](#), para. 58.

¹⁷¹ [Victims V01's Submissions Following the Appeals Chamber's Questions](#), para. 7.

¹⁷² [Victims V01's Submissions Following the Appeals Chamber's Questions](#), para. 8.

¹⁷³ [Victims V01's Submissions Following the Appeals Chamber's Questions](#), para. 9.

¹⁷⁴ [Victims V02's Submissions Following the Appeals Chamber's Questions](#), para. 18.

¹⁷⁵ [Victims V02's Submissions Following the Appeals Chamber's Questions](#), para. 19.

¹⁷⁶ [OPCV's Submissions Following the Appeals Chamber's Questions](#), para. 14.

¹⁷⁷ [OPCV's Submissions Following the Appeals Chamber's Questions](#), para. 17, referring to [Al Mahdi Reparations Order](#), paras 116-118.

¹⁷⁸ [OPCV's Submissions Following the Appeals Chamber's Questions](#), para. 18.

the IACtHR¹⁷⁹ and the ECtHR¹⁸⁰, requests that the concept of a ‘project of life’ be acknowledged by the Appeals Chamber and that this notion be ‘incorporated in the assessment of the liability of Mr Lubanga for reparations’.¹⁸¹

(b) Determination by the Appeals Chamber

104. Mr Lubanga argues that the Trial Chamber set the reparations award against him on the basis of the aggregate individual harm, without assessing the actual cost of the reparations ordered.¹⁸²

105. Article 75(1) of the Statute provides that the Court may ‘determine the scope and extent of any damage, loss and injury to, or in respect of, victims’. Article 75(2) of the Statute stipulates that ‘[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation’.

106. In the *Katanga* Judgment on Reparations, the Appeals Chamber noted that

rather than attempting to determine the “sum-total” of the monetary value of the harm caused, trial chambers should seek to define the harms and to determine the appropriate modalities for repairing the harm caused with a view to, ultimately, assessing the costs of the identified remedy. The Appeals Chamber considers that focusing on the cost to repair is appropriate, in light of the overall purpose of reparations, which is indeed to repair.¹⁸³

107. The Appeals Chamber points out that this ruling only indicates that it is *appropriate* for the trial chamber to *focus* on the cost to repair. How much the trial chamber is able to focus on the cost of repair will depend on the circumstances of a given case. Importantly, a trial chamber’s failure to do so does not necessarily constitute an error. The Appeals Chamber is of the view that, when setting the amount of the convicted person’s liability, the trial chamber must bear in mind the overall

¹⁷⁹ [OPCV’s Submissions Following the Appeals Chamber’s Questions](#), paras 21-25, referring to [Loayza-Tamayo v. Peru](#), paras 147, 150; [Cantoral Benavides v. Peru](#), para. 99(6); [Tibi v. Ecuador](#), paras 245-246.

¹⁸⁰ [OPCV’s Submissions Following the Appeals Chamber’s Questions](#), para. 23, referring to [Thlimmenos v. Greece](#), para. 70.

¹⁸¹ [OPCV’s Submissions Following the Appeals Chamber’s Questions](#), paras 21-25.

¹⁸² [Mr Lubanga’s Appeal Brief](#), paras 208-220.

¹⁸³ [Katanga Judgment on Reparations](#), paras 2, 72.

purpose of reparations, which is to repair the harm caused and to achieve, to the extent possible, *restitutio in integrum*.¹⁸⁴

108. The amount of the convicted person's liability should be fixed taking into account the cost of reparations considered to be appropriate and that are intended to be put in place (which can include reparations programmes) and the different harms suffered by the different victims, both individual victims (direct and indirect) in addition to, in particular circumstances, the collective of victims. In setting the amount, the trial chamber must also ensure that it takes into account the convicted person's rights and interests. The goal is to set an amount that is fair and properly reflects the rights of the victims, bearing in mind the rights of the convicted person. If the information and evidence upon which the trial chamber relies does not enable it to set the amount of liability with precision, for example, because it cannot obtain precise information as to the costing of specific reparations programmes, then it may, with caution, consider whether to rely on estimates. In this regard, depending on the type of reparations contemplated, and the information it has managed to obtain, the trial chamber may have to rely on estimates as to the cost of reparations programmes. In doing so, it should, however, make every effort to obtain estimates that are as accurate as possible in the circumstances of the case. It is also important, and in the interests of both the victims and the convicted person, that the trial chamber conducts the reparations proceedings as expeditiously as possible. It may, therefore, need to weigh the need for accuracy of estimates against the goal of awarding reparations without delay.

109. As indicated above, the key figures relevant to the amount of Mr Lubanga's liability are: the sum of USD 8,000 per victim (and the related sum of USD 3,400,000) and the sum of USD 6,600,000 in respect of any other victims who may be identified. The Appeals Chamber will examine the manner in which the Trial Chamber reached these figures, bearing in mind the factors set out above.

110. Regarding the sum of USD 8,000 per victim, the Trial Chamber did not set out in detail the factors and considerations on which it focused. It referred to, *inter alia*, the assessment of harm with respect to the sample of 425 victims, the submissions of

¹⁸⁴ See *supra*, para. 36.

the parties, decisions of Congolese military tribunals referred to by the OPCV,¹⁸⁵ and the trial chamber's findings in the *Katanga* case.¹⁸⁶ Based on these submissions and findings, the Trial Chamber reckoned *ex aequo et bono* the harm suffered by each victim at USD 8,000.¹⁸⁷ Subsequently, having assessed Mr Lubanga's criminal responsibility, in a section entitled '[d]etermination of the size of the reparations award for which Mr Lubanga is liable',¹⁸⁸ it referred to this assessment of harm, the considerations it set out as to his individual responsibility, and reckoned, *ex aequo et bono* his liability in respect of the 425 victims in the sample at USD 3,400,000.¹⁸⁹ However, apart from referring to these submissions and findings, the Trial Chamber did not indicate the factors it took into account.

111. It must be noted that the Trial Chamber had instructed the TFV to provide 'the anticipated monetary amount that it consider[ed] necessary to remedy the harms caused by the crimes for which Mr Lubanga was convicted, based on information gathered during the consultation period leading up to the submission of the draft implementation plan'.¹⁹⁰ However, the TFV did not provide this monetary amount, noting that it would be 'highly challenging'¹⁹¹ and that 'setting the amount of liability [was] a task properly within the judicial discretion of the Chambers'.¹⁹² The TFV also commented on the feasibility of evaluation of the cost of programmes:

53. A "precise evaluation" of the cost of each project cannot be made in the abstract and, sequentially, cannot be given prior to the procurement process taking place. Similarly, the Trust Fund cannot begin selecting projects and implementing partners until a Draft Implementation Plan is approved.

54. Furthermore, the Trust Fund respectfully submits that any kind of rehabilitation activity, including those proposed in the Draft Implementation Plan as collective reparations awards, involve economies of scale. For example, medical interventions involve certain baseline costs. No matter whether surgery is provided to small or large numbers of patients, an operating theatre must be established and equipped and it may be necessary to relocate highly specialized surgeons and medical expertise. Consequently, the average cost of the same

¹⁸⁵ [Impugned Decision](#), para. 256.

¹⁸⁶ [Impugned Decision](#), para. 257.

¹⁸⁷ [Impugned Decision](#), para. 259.

¹⁸⁸ [Impugned Decision](#), p. 99.

¹⁸⁹ [Impugned Decision](#), para. 279.

¹⁹⁰ [Lubanga Appeal Judgment on Reparations](#), para. 240.

¹⁹¹ [Draft Implementation Plan](#), para. 214.

¹⁹² [Third Submission of Victim Dossiers](#), para. 62.

standard medical intervention per victim will greatly vary depending on the number of patients attending and their respective locations. Similarly, the price per pupil to partake in an accelerated literacy program will vary significantly depending on whether five or 50 students participate in the project.¹⁹³

112. The only indication that the TFV provided was that it was of the view that Mr Lubanga's liability should be set at an amount that was 'substantially higher than the 1 Million Euros that the Trust Fund ha[d] indicated it m[ight] complement at th[at] stage'.¹⁹⁴

113. Aside from the TFV, the Appeals Chamber notes that, in its discussion of the value of the harm in the Impugned Decision, the Trial Chamber referred to the submissions of the parties. The Trial Chamber referred to the submissions of Victims V01, who estimated the harm 'at a minimum of EUR 10,000 per direct victim'.¹⁹⁵ Although not referred to by the Trial Chamber specifically, in those submissions, Victims V01 also submitted that they were 'in agreement that the amount to be earmarked for reparation can be evaluated at EUR 6,000,000', which included, among other sums, the estimated costs of 'a significant collective reparations programme that comprises a set of services to be offered to direct victims (training programmes, (para-)medical and psychological assistance, coaching, help with job creation, microcredit programmes and other support for starting up self-employment, etc.) and a financial assistance programme for those ascendants of children killed in the fighting who are in need'.¹⁹⁶

114. The Trial Chamber also referred to the submissions of Victims V02, who had advanced an estimate of 1,000 victims and considered that 'a total amount of USD 6,000,000 [would] be sufficient to repair all the harm'.¹⁹⁷ The Trial Chamber concluded that, '[o]n the basis of these submissions, the average harm would come to USD 6,000'.¹⁹⁸

115. The Trial Chamber quoted from the submissions of the OPCV, who relied 'on the estimate of 3,000 direct and indirect victims made by the Trust Fund for planning

¹⁹³ [Additional Programme Information Filing](#), paras 53-54.

¹⁹⁴ [Third Submission of Victim Dossiers](#), para. 64.

¹⁹⁵ [Impugned Decision](#), para. 252, referring to [Victims V01's Submissions on Evidence](#), para. 63.

¹⁹⁶ [Victims V01's Submissions on Evidence](#), para. 76.

¹⁹⁷ [Impugned Decision](#), para. 253, referring to [Victims V02's Submissions on Evidence](#), para. 29.

¹⁹⁸ [Impugned Decision](#), para. 253.

purposes'.¹⁹⁹ It concluded that, according to the OPCV's submissions, 'the average value of the harm suffered by each victim would be USD 2,000'.²⁰⁰ The Appeals Chamber notes that, in its submissions, the OPCV provided information about, *inter alia*, the average annual school fees, annual university tuition, literacy course and language training.²⁰¹ The OPCV also set out the costs of vocational training for direct victims,²⁰² costs of access to psychological care,²⁰³ costs of medical care²⁰⁴ and costs of detoxification programmes.²⁰⁵ The OPCV thus estimated USD 6,000,000 as the 'minimum sum for reparations'.²⁰⁶

116. The Appeals Chamber notes that the above-quoted submissions from the parties in these proceedings provide examples of specific collective reparations programmes and their costs. In these submissions, Victims V01, Victims V02 and the OPCV rely, *inter alia*, on the estimated costs of repair and the estimated number of victims.

117. As indicated earlier, the Trial Chamber also relied on decisions by the Congolese military tribunals referred to by the OPCV, where the amounts of USD 2,000, USD 5,000 and USD 3,000 had been awarded in respect of inhuman treatment, outrages upon personal dignity and deprivation of liberty, respectively.²⁰⁷ Furthermore, the Trial Chamber referred to its findings in the *Katanga* case, where on average USD 12,635 per victim was awarded.²⁰⁸

118. The Appeals Chamber considers that it would have been preferable for the Trial Chamber to set out clearly how the factors on which it relied impacted on its conclusion. However, as the amount of USD 8,000, at which the Trial Chamber arrived, remains in the range of the estimates and the amounts referred to by the Trial Chamber, the Appeals Chamber is satisfied that the Trial Chamber duly considered them.

¹⁹⁹ [Impugned Decision](#), para. 254, quoting [OPCV's Submissions on Evidence](#), para. 50.

²⁰⁰ [Impugned Decision](#), para. 255.

²⁰¹ [OPCV's Submissions on Evidence](#), para. 35.

²⁰² [OPCV's Submissions on Evidence](#), para. 38.

²⁰³ [OPCV's Submissions on Evidence](#), para. 39.

²⁰⁴ [OPCV's Submissions on Evidence](#), para. 40.

²⁰⁵ [OPCV's Submissions on Evidence](#), para. 41.

²⁰⁶ [OPCV's Submissions on Evidence](#), paras 42, 50.

²⁰⁷ [Impugned Decision](#), para. 256.

²⁰⁸ [Impugned Decision](#), para. 258.

119. As indicated above, the Trial Chamber also set an amount of Mr Lubanga's liability – USD 6,600,000 – in respect of 'other victims who may be identified during the implementation of reparations'.²⁰⁹ The Appeals Chamber notes that the above-mentioned amount of USD 8,000 per victim is not specifically listed among the submissions and findings which the Trial Chamber considered to arrive at the total amount of USD 6,600,000. Similarly, the total number of victims, although discussed in the Impugned Decision, with the Trial Chamber noting 'a consensus within the range of 1,000-1,500 victims (...) whom (...) the Legal Representatives of V02 Victims and the OPCV expect to represent'²¹⁰ and pointing to an estimate of 2,451-5,938 children who had served in the UPC's ranks in the relevant time frame,²¹¹ was not expressly considered in the context of the amount to be awarded in respect of unidentified victims.

120. Again, the Appeals Chamber finds that, consistent with its findings above, the Trial Chamber should have more clearly set out the basis on which it reached this sum of money. In the circumstances, however, the Appeals Chamber notes that it has found no error in the Trial Chamber's finding that the amount of USD 8,000 was taken into account as the average sum for each identified victim found to be eligible. The Appeals Chamber recalls that, based on this amount, the Trial Chamber set the total amount of USD 3,400,000 with respect to the sample of 425 victims. The Appeals Chamber notes that the amount of USD 6,600,000 is less than twice as high

²⁰⁹ [Impugned Decision](#), para. 280.

²¹⁰ [Impugned Decision](#), para. 242; *see also* paras 201-212. Victims V01 estimated the number of direct and indirect victims to be as high as 20,000 to 25,000. However, having noted that 'it would not be reasonable to hold the convicted person liable for all the harm, when, in accordance with the decisions of the Court and the Trust Fund, this harm will not be remedied in its entirety, given that reparation will be limited to a service-based programme – from which only the former child soldiers can benefit – and to a symbolic reparations programme', Victims V01 proposed a total amount of EUR 6,000,000, without indicating the estimated number of victims, who, in their calculation, would be beneficiaries ([Victims V01's Submissions on Evidence](#), paras 74-76). Victims V02 provided an estimate of 1,000 victims ([Victims V02's Submissions on Evidence](#), para. 29), which the Trial Chamber found to 'be loosely based' on, *inter alia*, 'the 400 clients with whom the Legal Representatives of V02 Victims [said] they [were] in contact' ([Impugned Decision](#), para. 208). The OPCV relied on the estimate of 1,500 victims ([OPCV's Submissions on Evidence](#), para. 42), which 'includes the direct and indirect victims who are potential beneficiaries represented by the OPCV, estimated potential beneficiaries not yet interviewed and victims represented by other LRV teams' ([OPCV's Submissions on Evidence](#), para. 42, n. 58). The OPCV then noted that the aggregate amount of the lump sums would be approximately USD 3,000,000. The OPCV increased this amount to USD 6,000,000, which, it submitted, took into account the figure of 3,000 potential beneficiaries estimated by the TFV ([OPCV's Submissions on Evidence](#), para. 42).

²¹¹ [Impugned Decision](#), para. 243; [Annex III to Impugned Decision](#).

as the amount set with respect to the 425 victims from the sample. The Appeals Chamber finds that this indicates that the Trial Chamber took a cautious approach, bearing in mind the rights of the defence and the fact that it had concluded that there were ‘hundreds and possibly thousands more victims’²¹² who had suffered harm, but it had not managed to reach a final figure. This amount appears to take into account a number of victims significantly lower than the Trial Chamber’s estimate, in Annex III, of 2,451-5,938 children having served in the UPC at the relevant time. The Appeals Chamber considers that it was appropriate, in making the actual award against Mr Lubanga, and given that precise figures of the number of victims were not available, that the Trial Chamber reached this sum based on a conservative estimate, thereby protecting the rights of Mr Lubanga.

121. Therefore, as with the above-mentioned estimates related to the victims from the sample, the Appeals Chamber finds that, although the Trial Chamber’s calculation of the amount is not entirely clear, the considerations upon which it appears to have relied are relevant. The Trial Chamber made efforts to obtain estimates as to the costs of repair that were as accurate as possible in the circumstances.

122. In view of the foregoing, the Appeals Chamber finds that Mr Lubanga has not demonstrated an error in the Trial Chamber’s findings and rejects the fourth ground of Mr Lubanga’s appeal.

4. *Victims V01’s first ground of appeal*

(a) **Submissions on appeal**

(i) *Victims V01’s submissions*

123. Victims V01 argue that the Trial Chamber erred by individually assessing the eligibility of identified victims, in breach of rules 97(1) and 98(3) of the Rules, and by exceeding the mandate entrusted to it by the Appeals Chamber.²¹³ They argue that the Trial Chamber acted beyond the Appeals Chamber’s instruction to monitor and oversee the implementation of the *Lubanga* Amended Reparations Order under the

²¹² [Impugned Decision](#), para. 212.

²¹³ [Victims V01’s Appeal Brief](#), paras 14-32.

framework for collective reparations.²¹⁴ They submit that, ‘within the framework of an exclusively collective reparations programme implemented by the Trust Fund, it is not the Chamber but the [TFV] that determines the beneficiaries’.²¹⁵ They point to the negative consequences of the Trial Chamber’s approach and, having outlined the procedure followed by the TFV and the Trial Chamber, they argue that the Trial Chamber erroneously considered the reparations forms designed by the TFV as requests for reparations within the meaning of rule 94 of the Rules.²¹⁶ They argue that the Trial Chamber ‘ignored the fundamental difference between a procedure based on individual applications for reparations, as provided for by rule 94(3) [*sic*], and a collective reparations procedure, as provided for by rule 98’.²¹⁷

124. Victims V01 also argue that, despite having indicated that it would use the dossiers to determine the amount of collective reparations for which Mr Lubanga was liable, the Trial Chamber ruled on their eligibility.²¹⁸ They argue that the Trial Chamber failed to separately examine the different types of harm that the victims described in their dossiers²¹⁹ and that it made ‘an *ex aequo et bono* estimation that bore no relation either to the cost of the reparations programme or to the losses actually sustained by the individual victims’, which ‘implies that the whole process of assessing the individual dossiers mattered little for the determination of the amount awarded against Mr Lubanga’.²²⁰ They also take issue with the Trial Chamber’s rulings on the eligibility of some victims over others despite the fact that the TFV, which in their view has ‘extensive experience in this area’, had already made its own assessment.²²¹

(ii) *Mr Lubanga’s response*

125. Mr Lubanga submits that the argument that the Trial Chamber should not have determined the victim status of the applicants who had filed dossiers contradicts article 75 of the Statute, rules 94(1) and 95 of the Rules, as well as the Regulations of

²¹⁴ [Victims V01’s Appeal Brief](#), pp. 7-9, paras 14-15, referring to [Lubanga Appeal Judgment on Reparations](#), para. 234, and [Lubanga Amended Reparations Order](#), para. 76.

²¹⁵ [Victims V01’s Appeal Brief](#), para. 14.

²¹⁶ [Victims V01’s Appeal Brief](#), paras 17-21.

²¹⁷ [Victims V01’s Appeal Brief](#), para. 22.

²¹⁸ [Victims V01’s Appeal Brief](#), para. 28.

²¹⁹ [Victims V01’s Appeal Brief](#), para. 29.

²²⁰ [Victims V01’s Appeal Brief](#), para. 30.

²²¹ [Victims V01’s Appeal Brief](#), para. 31.

the TFV.²²² In his view, the Trial Chamber's assessment had to be limited to the applications before it and it could only rule *proprio motu* in relation to other victims if 'exceptional circumstances' were established.²²³ He therefore argues that the Trial Chamber erred in this case by ruling on the unidentified victims.²²⁴ Mr Lubanga considers that, even if the Trial Chamber decided on collective reparations, it still had to rule on the admissibility and merits of the requests before it.²²⁵ In his view, the Trial Chamber was correct to consider the reparations forms to be requests for reparations, arguing that any submission to a trial chamber seeking reparations in a case is a request for reparations under rule 94(1) of the Rules.²²⁶ He also argues that the Trial Chamber did not exceed its mandate as the Appeals Chamber had required it to determine whether the applicants who had filed requests were victims.²²⁷ And, he argues that there is no provision in the Regulations of the TFV that allows for the TFV to identify victims in collective reparations.²²⁸ Finally, Mr Lubanga raises arguments as to how the Trial Chamber assessed the value of his liability, asserting that the amount should be assessed only on the basis of the actual cost of the collective reparations ordered,²²⁹ that the collective nature of reparations does not preclude the Trial Chamber from its task of identifying victims but only from ruling on the amount of the individual harm²³⁰ and incorporating, by reference, his arguments in his fourth ground of appeal.²³¹

(iii) *Victims V02's response*

126. Victims V02 'request the Appeals Chamber to adjudicate the arguments [in the Victims V01's first ground of appeal] and to draw all the necessary legal consequences'.²³² They do not present any arguments.

²²² [Mr Lubanga's Response to Victims V01's Appeal](#), paras 8-12.

²²³ [Mr Lubanga's Response to Victims V01's Appeal](#), paras 11-12.

²²⁴ [Mr Lubanga's Response to Victims V01's Appeal](#), para. 13.

²²⁵ [Mr Lubanga's Response to Victims V01's Appeal](#), paras 14-21.

²²⁶ [Mr Lubanga's Response to Victims V01's Appeal](#), paras 22-23.

²²⁷ [Mr Lubanga's Response to Victims V01's Appeal](#), para. 24.

²²⁸ [Mr Lubanga's Response to Victims V01's Appeal](#), para. 27.

²²⁹ [Mr Lubanga's Response to Victims V01's Appeal](#), para. 31.

²³⁰ [Mr Lubanga's Response to Victims V01's Appeal](#), para. 35.

²³¹ [Mr Lubanga's Response to Victims V01's Appeal](#), para. 33.

²³² [Victims V02's Consolidated Response to the Appeal Briefs](#), paras 153-154.

(iv) OPCV's response

127. The OPCV avers that, in its view, the *Lubanga* Appeal Judgment on Reparations ‘[did] not necessarily require an individual judicial assessment of the applicants’ dossiers’ but it did not exclude such an assessment either.²³³ The OPCV submits that the Trial Chamber ‘never intended to replace a collective procedure with a procedure involving a systematic individual examination of the dossiers submitted by the applicants’ and that the purpose of the procedure was rather to collect the necessary information to perform its task ‘and to provide the Trust Fund with indications for its task of assessing all the other dossiers of potential victims’.²³⁴ The OPCV submits that the Trial Chamber provided guidelines to the TFV because it ‘currently has neither the experience nor the expertise required for assessing and screening hundreds of dossiers of potential victims’.²³⁵ Referring to the *Al Mahdi* Appeal Judgment on Reparations, the OPCV argues that the Trial Chamber did not err in deciding to delegate to the TFV the ‘administrative process of screening the applications for reparations’.²³⁶ And, it refers to the discretion Trial Chambers have in determining reparations.²³⁷

128. As to the argument that the Trial Chamber did not differentiate between the various types of harm that the victims suffered, the OPCV argues that it did and that it approved the implementation of services and not of fixed awards, delegating to the TFV the task of organising victims’ access to those services based on their needs.²³⁸ In relation to the argument that the Trial Chamber did not consider the amount of the aggregate harm nor the cost of reparation programmes in deciding on Mr Lubanga’s liability, the OPCV contends that the Trial Chamber fixed a figure of USD 10,000,000, considering that it ‘would correspond to the services required to address the types of harm suffered by the estimated number of victims’ and it did this based on information provided in the proceedings.²³⁹ The OPCV also raises a preliminary

²³³ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 15.

²³⁴ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 16.

²³⁵ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 17.

²³⁶ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 18.

²³⁷ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 18.

²³⁸ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 21.

²³⁹ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 22.

issue, dealt with below, arguing that this ground of appeal should be dismissed for procedural reasons.²⁴⁰

(v) *Victims V01's reply*

129. Victims V01 argue that, contrary to the OPCV's averment that the Trial Chamber's individual assessment of the victims' eligibility was in their interest, the Trial Chamber itself was aware of the repercussions of, more than ten years after the events in question, obliging the victims to recall the trauma they had suffered.²⁴¹ Victims V01 contend that the Trial Chamber did not decide to assess the victims' eligibility itself because of the TFV's alleged lack of expertise and that the TFV possesses the requisite expertise, of which the Trial Chamber was aware.²⁴² It also submits that the Trial Chamber did not properly make use of the TFV's efforts in this case.²⁴³

(vi) *Submissions of the parties on the questions posed by the Appeals Chamber*

130. Victims V01 submit that Trial Chamber I and the Appeals Chamber decided not to award individual reparations and that the Trial Chamber should, therefore, not make an individual assessment of the potential victims.²⁴⁴ They argue that it is more appropriate for the TFV to assess the admissibility of victims into programmes and that the premature assessment that has taken place has negative consequences for the victims.²⁴⁵

131. Mr Lubanga argues that the filing of a full dossier is also required for victims who had already been authorised to participate in the proceedings, since the standard of proof is higher at the reparations stage.²⁴⁶

132. The OPCV submits that, compiling a sufficient pool of victims was necessary to understand whether the information was 'representative of all victims' and

²⁴⁰ [OPCV's Consolidated Response to the Appeal Briefs](#), paras 19-20.

²⁴¹ [Victims V01's Reply](#), para. 30, referring to [Order of 9 February 2016](#), para. 13.

²⁴² [Victims V01's Reply](#), paras 32-39, referring to [Order of 9 February 2016](#), para. 16.

²⁴³ [Victims V01's Reply](#), paras 36-39.

²⁴⁴ [Victims V01's Submissions Following the Appeals Chamber's Questions](#), para. 15.

²⁴⁵ [Victims V01's Submissions Following the Appeals Chamber's Questions](#), para. 16.

²⁴⁶ [Mr Lubanga's Submissions Following the Appeals Chamber's Questions](#), paras 15-16. While Mr Lubanga made these submissions in a section referring to his first ground of appeal, the Appeals Chamber considers that they are relevant to this discussion under Victims V01's first ground of appeal.

assessing the individual requests was needed to know if the sample was composed of genuine victims.²⁴⁷ It submits that ‘victims who participated at trial should automatically receive reparations, unless by virtue of the scope of the conviction or new information eventually collected by their Legal Representatives they no longer qualify as victims’.²⁴⁸

(b) Determination by the Appeals Chamber

(i) Preliminary issue

133. The OPCV essentially submits that Victims V01 are barred from challenging the issues raised under this ground of appeal, as 1) the Impugned Decision ‘simply applied a principle established by previous decisions of the [Trial] Chamber’, 2) Victims V01 had sought leave to appeal only one of those previous decisions, and 3) as a result of the Trial Chamber’s rejection of Victims V01’s request for leave to appeal, that decision – the Order of 21 October 2016 – is *res judicata*.²⁴⁹ Victims V01 reply that it was not that order, but the Order of 9 February 2016, which set out the impugned procedure for the assessment of eligibility and which Victims V01 did not seek to appeal.²⁵⁰ They also argue that the OPCV’s assertion that a decision denying leave to appeal precludes an appeal against the final judgment is ‘a novel position to take’.²⁵¹

134. The request for leave to appeal, to which the OPCV refers, concerned two orders rendered by the Trial Chamber on 21 October 2016. In the first of those orders, the Trial Chamber approved a plan concerning symbolic reparations submitted by the TFV.²⁵² The second order contained the Trial Chamber’s instruction to the TFV to continue the identification process.²⁵³ On 28 October 2016, Victims V01 filed a

²⁴⁷ [OPCV’s Submissions Following the Appeals Chamber’s Questions](#), para. 26, referring to [Order of 22 February 2017](#), para. 12.

²⁴⁸ [OPCV’s Submissions Following the Appeals Chamber’s Questions](#), para. 28.

²⁴⁹ [OPCV Consolidated Response to the Appeals Brief](#), paras 19-20, 25.

²⁵⁰ [Victims V01’s Reply](#), para. 24.

²⁵¹ [Victims V01’s Reply](#), para. 27.

²⁵² ‘[Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations](#)’, 21 October 2016, ICC-01/04-01/06-3251.

²⁵³ [Order of 21 October 2016](#).

request for leave to appeal those orders.²⁵⁴ On 8 December 2016, the Trial Chamber rejected that request.²⁵⁵

135. The Appeals Chamber finds the OPCV's arguments to be misconceived. Regarding challenges to procedural issues in a final appeal, the Appeals Chamber recalls that 'it must be possible to raise procedural errors on appeal pursuant to article 81 (1) (a) (i) of the Statute in relation to decisions rendered during trial, and such errors may lead to the reversal of a decision under article 74 of the Statute, provided that it is materially affected by such errors'.²⁵⁶ The Appeals Chamber sees no reason why this principle should not apply in respect of the errors raised by Victims V01 in this ground of appeal which affect the reparations order issued by the Trial Chamber under article 75 of the Statute (the Impugned Decision).

136. Victims V01 raise, under this ground of appeal, the issue of whether it was correct for the Trial Chamber to verify the eligibility of individual victims for the reparations award. The Trial Chamber's rejection of Victims V01's request for leave to appeal orders setting out some aspects of this verification process does not render the matter *res judicata* and cannot preclude the raising of the same matter in their final appeal. The Trial Chamber was simply of the view that the matter did not meet the requirements of article 82(1)(d) of the Statute – this does not mean that the same issue cannot be raised in a final appeal, also for the reasons set out in the previous paragraph. As to whether Victims V01 should have sought leave to appeal other orders, the Appeals Chamber considers that, the matter of whether the procedure it had put in place was correct, had been put before the Trial Chamber.²⁵⁷ The OPCV's objections are therefore rejected.

²⁵⁴ [Application from the V01 group of victims requesting leave to appeal the "Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016" and the "Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations" of 21 October 2016](#), 28 October 2016, ICC-01/04-01/06-3254-tENG.

²⁵⁵ [Decision rejecting the application for leave to appeal of the Legal Representatives of the 01 Group of Victims](#), 8 December 2016, ICC-01/04-01/06-3263-tENG, p. 10.

²⁵⁶ [Ngudjolo A Judgment](#), para. 247 (emphasis removed). See also [Kony et al. OA 3 Judgment](#), paras 46-47.

²⁵⁷ See *supra*, paras 16, 49.

(ii) Merits

137. Victims V01 argue that the Trial Chamber erred by individually assessing the eligibility of victims, in breach of rules 97(1) and 98(3) of the Rules, and by exceeding the mandate entrusted to it by the Appeals Chamber.²⁵⁸ The Appeals Chamber notes that Victims V01's argument is twofold. They allege an error of law on account of the purported inconsistency of the Trial Chamber's ruling with the Rules, on the one hand, and with the Appeals Chamber's instructions set out in its previous ruling in this case, on the other.

138. The Appeals Chamber notes that the relevant legal provisions – article 75(1) of the Statute, rules 94-98 of the Rules (which include the two specific provisions referred to by Victims V01) and the Regulations of the TFV – do not stipulate who should assess eligibility in cases where collective reparations are awarded nor how exactly this should be done. Furthermore, as discussed earlier in this judgment, in the type of reparations proceedings facing the Trial Chamber in the present case, the Appeals Chamber has found that trial chambers need not, in all cases, individually consider requests for reparations which have been filed.²⁵⁹ It does not, however, follow from this that a trial chamber is precluded from doing so. The Appeals Chamber is therefore unable to accept the argument that the applicable provisions, including the two rules on which Victims V01 rely, precluded the Trial Chamber's assessment of eligibility of victims for the award for reparations.

139. Regarding the circumstances of the present case, the Appeals Chamber notes that, in its *Lubanga* Reparations Decision, Trial Chamber I had held that, 'in the circumstances of this case, the identification of the victims and beneficiaries [...] should be carried out by the TFV'.²⁶⁰ Having examined appeals against that decision, the Appeals Chamber found it 'appropriate to exceptionally seek the Trust Fund's assistance in requesting that it provide [...] the anticipated monetary amount that it consider[ed] necessary to remedy the harms caused by the crimes for which Mr Lubanga was convicted'.²⁶¹ The Appeals Chamber issued that instruction with the knowledge that the TFV had received the requests for reparations filed in the present

²⁵⁸ [Victims V01's Appeal Brief](#), paras 14-32.

²⁵⁹ *See supra*, para. 86, referring to [Lubanga Appeal Judgment on Reparations](#), paras 149-152.

²⁶⁰ [Lubanga Reparations Decision](#), para. 283.

²⁶¹ [Lubanga Appeal Judgment on Reparations](#), para. 240.

case.²⁶² The Appeals Chamber indicated that the role of the Trial Chamber was to ‘monitor and oversee the implementation stage of the [amended reparations] order, including having the authority to approve the draft implementation plan submitted by the Trust Fund’.²⁶³

140. Regarding the screening of victims’ eligibility, the Appeals Chamber directed the TFV to ‘provide Mr Lubanga with the opportunity to review its proposed screening process of victims at the implementation stage, subject to any protective measures’.²⁶⁴ This is indicative of the Appeals Chamber’s understanding that the TFV would be involved in the screening process at the implementation stage, consistent with the above-quoted ruling of Trial Chamber I, which was not challenged on appeal. Trial Chamber I and the Appeals Chamber thus gave specific instructions to the TFV with regard to the assessment of eligibility of beneficiaries. The Trial Chamber’s role in that assessment was not specifically set out. Although the Appeals Chamber held that the Trial Chamber would have the authority to approve the draft implementation plan, there was no clear indication that the Trial Chamber should or should not be involved in the assessment of eligibility.

141. As seen in the Impugned Decision, the Trial Chamber did in fact assess the eligibility of the victims who had come forward in this case. For the following reasons, the Appeals Chamber finds no error.

142. First, as indicated above, the Appeals Chamber did not prohibit the Trial Chamber from assessing eligibility. Second, the Appeals Chamber notes that trial chambers have a large degree of discretion in deciding how to conduct reparations proceedings. In this case, the Trial Chamber decided that it needed to receive and assess victims’ dossiers in order to reach a decision as to Mr Lubanga’s overall monetary liability. This decision properly fell within the Trial Chamber’s discretion to conduct the proceedings before it, based on the circumstances of the case. The Trial Chamber, having received those dossiers, thereafter assessed them and relied on the

²⁶² For instance, the Appeals Chamber did not amend the Trial Chamber’s instruction that the Registrar transmit all requests to the TFV and it instructed the Registrar to seek the victims’ consent to disclosure of confidential information and instructed the TFV to refrain from further reviewing of the requests until such consent was received ([Lubanga Appeal Judgment on Reparations](#), para. 162).

²⁶³ [Lubanga Amended Reparations Order](#), para. 76.

²⁶⁴ [Lubanga Amended Reparations Order](#), para. 66.

information contained within them in setting the size of the reparations award for which Mr Lubanga was liable.²⁶⁵ The Trial Chamber also used the information in the dossiers to determine the percentage of victims who went through the official demobilization programmes²⁶⁶ and the number of victims who went missing in service,²⁶⁷ information it used in order to reach a determination as to the overall number of victims. When reckoning *ex aequo et bono* the harm suffered by each victim, the Trial Chamber had regard to ‘the results of the sample’ of the victims’ dossiers²⁶⁸ and it also noted that, by examining that sample, it devised a method for the screening of the victims for eligibility to be undertaken later by the TFV in respect of future victims who may come forward.²⁶⁹ The Appeals Chamber finds that, by verifying the eligibility of individual victims in the context in which it did – namely in order to determine the size of the reparations award – the Trial Chamber neither breached the applicable law, nor disregarded instructions of the Appeals Chamber. The Appeals Chamber therefore finds that Victims V01 have not demonstrated that the Trial Chamber’s decision to assess eligibility amounts to an error.

143. The Appeals Chamber rejects this ground of Victims V01’s appeal.

5. *Victims V01’s second ground of appeal*

(a) **Submissions on appeal**

(i) *Victims V01’s submissions*

144. Victims V01 allege that the Trial Chamber committed an error of law by assessing eligibility for collective reparations on the basis of different procedures.²⁷⁰ They contend, *inter alia*, that the participating victims were misled ‘by the contradictions between Trial Chamber II’s decisions and those of Trial Chamber I and the Appeals Chamber, by the *ex post facto* interpretations of the Trust Fund’s assessment process and by the changes made one after the other throughout the

²⁶⁵ [Impugned Decision](#), para. 35.

²⁶⁶ [Impugned Decision](#), para. 220.

²⁶⁷ [Impugned Decision](#), para. 221.

²⁶⁸ [Impugned Decision](#), para. 259.

²⁶⁹ [Impugned Decision](#), para. 38.

²⁷⁰ [Victims V01’s Appeal Brief](#), p. 15. *See also* [Victims V01’s Submissions Following the Appeals Chamber’s Questions](#), para. 19.

procedure'.²⁷¹ Victims V01 argue that this situation 'led to discrimination against the participating victims', in violation of international law.²⁷²

(ii) *Mr Lubanga's response*

145. Mr Lubanga argues that the Trial Chamber erred in law when deciding that victims who had not submitted a dossier by 31 March 2017 would be screened for eligibility for reparations at the implementation stage.²⁷³ He contends that the dossiers that the TFV subsequently receives will no longer be transmitted to him and he will have no opportunity to make representations.²⁷⁴

(iii) *OPCV's response*

146. The OPCV submits that, since the Trial Chamber rejected Victims V01's request for leave to appeal a particular order it had issued, any appeal now concerning the terms of that order is inadmissible.²⁷⁵ Regarding the merits of this ground of Victims V01's appeal, the OPCV argues that the compilation of information about the victims was not imposed by the Trial Chamber but was decided by the TFV and the legal representatives of the victims.²⁷⁶

(iv) *Victims V02's response*

147. Victims V02 argue that the Trial Chamber's decision to exclude some participating victims 'borders on discrimination' within the community.²⁷⁷ Victims V02 submit, for instance, that out of 137 participating victims in their group, 58 were part of the sample interviewed by the TFV and only 37 were found to qualify for reparations.²⁷⁸

(v) *Submissions of the parties on the questions posed by the Appeals Chamber*

148. Victims V01 submit that 'the only way to put the victims back on an equal footing is to extend the reparations to all the victims whom the Trust Fund has

²⁷¹ [Victims V01's Appeal Brief](#), para. 35.

²⁷² [Victims V01's Appeal Brief](#), paras 41-43.

²⁷³ [Mr Lubanga's Response to Victims V01's Appeal](#), paras 37-39, 42-43.

²⁷⁴ [Mr Lubanga's Response to Victims V01's Appeal](#), paras 40-41.

²⁷⁵ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 25

²⁷⁶ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 24, referring to '[Order to complete the process of identifying victims potentially eligible to benefit from reparations](#)', dated 21 December 2016 and registered on 22 December 2016, ICC-01/04-01/06-3267-tENG, para. 11.

²⁷⁷ [Victims V02's Consolidated Response to the Appeal Briefs](#), para. 157.

²⁷⁸ [Victims V02's Consolidated Response to the Appeal Briefs](#), para. 158.

identified as eligible’ and that ‘[s]uch a decision should not affect the size of the award ordered against Mr Lubanga’.²⁷⁹ Regarding the victims who have participated in the proceedings, Victims V01 argue that a chamber had already determined their standing to participate and, on that basis, it is possible to determine, on a balance of probabilities, that most of them are genuine victims rather than impostors, unless new information raises doubts and requires revocation of their status as victims.²⁸⁰

149. Victims V02 submit that, if the victims who were authorised to participate were automatically to receive reparations, the procedure for victims applying to participate should nonetheless follow its normal course.²⁸¹

150. The OPCV submits that the fact that victims were assisted by different actors in the application process does not imply that those who failed in their applications were discriminated against, but that this is the consequence of the decentralisation of the application process among the joint efforts of the Registry, the OPCV, the TFV and the legal representatives.²⁸²

(b) Determination by the Appeals Chamber

(i) Preliminary issue

151. The OPCV submits that Victims V01 are barred from challenging the terms of the Trial Chamber’s order of 21 October 2016, as the Trial Chamber rejected their request for leave to appeal that order.²⁸³ The Appeals Chamber rejects this objection from the OPCV, for reasons set out earlier in this judgment.²⁸⁴

(ii) Merits

(a) Whether the participating victims were unaware of the Trial Chamber’s intention to re-examine their victim status

152. The Appeals Chamber notes Victims V01’s averment that some of the victims who were already authorised to participate in the proceedings were unaware of the Trial Chamber’s intention to re-examine their status as victims for the purposes of

²⁷⁹ [Victims V01’s Submissions Following the Appeals Chamber’s Questions](#), para. 22.

²⁸⁰ [Victims V01’s Submissions Following the Appeals Chamber’s Questions](#), para. 17.

²⁸¹ [Victims V02’s Submissions Following the Appeals Chamber’s Questions](#), para. 15.

²⁸² [OPCV’s Submissions Following the Appeals Chamber’s Questions](#), para. 31.

²⁸³ [OPCV’s Consolidated Response to the Appeal Briefs](#), para. 25.

²⁸⁴ *See supra*, para. 135.

these reparations proceedings.²⁸⁵ Victims V01 appear to argue that such intention could not be anticipated and they refer to the reparations order issued in another case, in which, they argue, the trial chamber ‘did not re-examine the status of the participating victims even when ruling on the individual applications for reparations’.²⁸⁶

153. It is noted that the order to which Victims V01 (and Victims V02²⁸⁷) refer, issued by Trial Chamber VIII in the case of *Al Mahdi*, does not support the proposition that Trial Chamber VIII did not re-examine the victim status of those victims who had been previously authorised to participate. The passage from that ruling which Victims V01 quote does not specify whether that chamber re-examined the victim status. Rather, it sets out the applicable law. The Appeals Chamber also notes that the quoted passage specifically recognises the difference between the standards of proof applicable to the authorisation to participate in the proceedings and to the determination of eligibility for reparations, which demonstrated that Trial Chamber VIII, in that case, might in fact have contemplated the possibility of re-examining the victim status at the reparations stage against the different standard of proof.²⁸⁸

154. The Appeals Chamber notes that different standards of proof were adopted in the present case for purposes of authorising participation in the proceedings and for reparations. In particular, the Appeals Chamber notes that Trial Chamber I carried out a *prima facie* analysis of the victims’ applications to participate.²⁸⁹ As discussed elsewhere in this judgment,²⁹⁰ for purposes of determining eligibility for reparations in the present case, the Trial Chamber applied the standard of ‘a balance of

²⁸⁵ [Victims V01’s Appeal Brief](#), para. 33.

²⁸⁶ [Victims V01’s Appeal Brief](#), para. 33 (emphasis removed), referring to [Al Mahdi Reparations Order](#), para. 39.

²⁸⁷ [Victims V02’s Consolidated Response to the Appeal Briefs](#), para. 156.

²⁸⁸ [Al Mahdi Reparations Order](#), para. 39.

²⁸⁹ ‘[Decision on 32 applications to participate in the proceedings](#)’, 27 August 2013, ICC-01/04-01/06-3045-Red2 (A4 A5 A6), para. 16.

²⁹⁰ *See supra*, para. 33.

probabilities', initially approved by Trial Chamber I²⁹¹ and not contested in the previous appellate proceedings in the present case.²⁹²

155. These rulings make it clear that the Trial Chamber intended to apply a standard different from the *prima facie* one applied for participation. Furthermore, in the Order of 9 February 2016, the Trial Chamber stated that, after receiving the batches of victims' files from the TFV, it would 'issue decisions regarding the status of the victims eligible to benefit from reparations'.²⁹³ Subsequently, the TFV and the OPCV, upon the Trial Chamber's instruction, approached the victims to interview them and to prepare their dossiers for the purposes of the reparations proceedings. These facts must have put the participating victims on notice of the fact that their status as victims would be re-examined by the Trial Chamber. The issue of how this reassessment would actually take place, and whether it was clear to the victims as to what was expected, is addressed below. However, to the extent that the victims argue that they were unaware of the Trial Chamber's intention to re-examine their status as victims for the purposes of these reparations proceedings, the argument is rejected.

156. At the same time, the Appeals Chamber stresses the importance of trial chambers providing a clear indication to victims who have already been authorised to participate in proceedings, and to other victims seeking reparations, as to the standard of proof that will apply to the assessment of their eligibility for reparations. This is also referred to elsewhere in this judgment. It is particularly significant in cases where the trial chamber intends to re-examine the status of already participating victims for purposes of reparations due to, for instance, a different standard of proof that may apply. In addition, the trial chamber must notify, as early as practicable, the victims who were authorised to participate in those proceedings, but who also seek reparations, that they will be screened again in the reparations proceedings.

(b) Whether discrimination was occasioned by amendments to the title and contents of the forms

²⁹¹ [Lubanga Reparations Decision](#), para. 253.

²⁹² [Lubanga Appeal Judgment on Reparations](#), para. 84.

²⁹³ [Order of 9 February 2016](#), para. 18.

157. Victims V01 further argue that the title and content of the reparations forms were amended.²⁹⁴ They do not specify what amendments were made and how those amendments discriminate between the various groups of victims. The Appeals Chamber notes that the Trial Chamber appears to have been aware of the risk of differences between the forms used. In its order of 10 October 2016, the Trial Chamber noted that it was for the OPCV to decide on the suitable approach for the conduct of interviews with potential victims.²⁹⁵ However, the Trial Chamber considered it appropriate to use, ‘for the sake of consistency’, the form previously used by the TFV.²⁹⁶

158. The Appeals Chamber further notes certain adjustments to the identification procedure, introduced in the course of the process. For instance, after the TFV’s experience with potentially eligible victims showing signs of re-traumatisation during the interviews,²⁹⁷ the OPCV considered ways of simplifying the procedure.²⁹⁸ However, there is no indication that such adjustments to the procedure led to discrimination.

159. The Appeals Chamber therefore rejects this argument of Victims V01.

(c) Whether participating victims were disadvantaged vis-à-vis other victims

160. Victims V01 submit that most of the participating victims were minors at the time their applications for authorisation to participate were filled in and that those applications were based on information provided by family members of the direct victims; they submit that most of those family members were illiterate, some signed with fingerprints and that therefore the applications could easily contain errors or misunderstandings, some of which were subsequently corrected by the victims in the interviews with the TFV; they submit that, although the TFV took this into consideration in their assessments, they did not always make note on the forms.²⁹⁹

²⁹⁴ [Victims V01’s Appeal Brief](#), para. 41.

²⁹⁵ [Order of 21 October 2016](#), para. 19.

²⁹⁶ [Order of 21 October 2016](#), para. 19.

²⁹⁷ [First Submission of Victim Dossiers](#), para. 50.

²⁹⁸ [‘Consolidated response to the submissions filed on 31 May and 7 June 2016 by the Trust Fund for Victims’](#), 1 July 2016, ICC-01/04-01/06-3212-tENG, paras 28-29.

²⁹⁹ [Victims V01’s Appeal Brief](#), para. 41.

Victims V01 submit that the new possible victims were interviewed as adults and because they had not submitted earlier applications, ‘there were no discrepancies attributable to the amount of time that had elapsed’.³⁰⁰ The Appeals Chamber notes that Victims V01 do not explain why this difference between the participating victims and the victims who applied for reparations without having previously participated in the proceedings allegedly amounts to discrimination. They do not explain how the Trial Chamber treated such participating victims. In particular, Victims V01 do not argue that the Trial Chamber found anyone ineligible for reparations solely on the basis of inconsistency of the accounts given by family members with the account given by the direct victims at a later stage of the proceedings and that, in doing so, the Trial Chamber failed to consider the difficulty which Victims V01 describe in the present argument. The Appeals Chamber rejects this argument of Victims V01.

(d) Whether the preparation of dossiers by the TFV differed from that by the OPCV

161. Victims V01 also submit that the forms of the participating victims were filled out by the TFV, whereas the forms of new victims were prepared by the OPCV, acting as legal representative.³⁰¹ Victims V01 do not specify differences between the dossiers prepared by these two entities and do not demonstrate, nor is it apparent from the relevant documents, that the eligibility assessment carried out by the Trial Chamber was affected by the alleged difference in the preparation of dossiers by the TFV and the OPCV.

(e) Whether the previously participating victims were ‘misled by the contradictions’ between various decisions and were disadvantaged vis-à-vis future victims

162. Victims V01 submit that, while some previously participating victims were excluded from reparations, ‘after judicial proceedings in which the Defence was afforded notice and the opportunity to be heard, and against the advice of the Trust

³⁰⁰ [Victims V01’s Appeal Brief](#), para. 41.

³⁰¹ [Victims V01’s Appeal Brief](#), para. 41.

Fund’, the eligibility of the victims who come forward in the future will be determined by the TFV ‘after a purely administrative procedure’.³⁰²

163. The Appeals Chamber notes that the Impugned Decision does not set out a detailed procedure for the future assessment of potential victims’ eligibility, the Trial Chamber indicating that screening would be carried out by the TFV but providing no further details as to what the procedure would entail.³⁰³ The Appeals Chamber notes that the Trial Chamber directed the TFV to follow the method of screening of the victims for eligibility, which it devised in the Impugned Decision, and that this was aimed at ensuring that the same method would apply to all victims. The Appeals Chamber further recalls that, in the *Lubanga* Amended Reparations Order, it stated that the Trial Chamber should ‘monitor and oversee the implementation stage of the [amended reparations] order, including having the authority to approve the draft implementation plan submitted by the Trust Fund’.³⁰⁴ In the context of this case, and bearing in mind the procedure put in place by the Trial Chamber prior to the Impugned Decision, in particular its approach to the assessment of the eligibility for reparations of the applicants who had submitted requests for reparations – as considered under Victims V01’s first ground of appeal – the Appeals Chamber understands that such monitoring and oversight should, in this case, include the Trial Chamber’s approval of the TFV’s findings as to victims’ eligibility for reparations. This would ensure that both the victims who have already been assessed, and those who will come forward, all have the benefit of judicial approval. In taking this matter forward, the TFV and the Trial Chamber should ensure that they follow the guidance set out in this judgment, in addition to that contained in its 2015 judgment and that contained in the Impugned Decision.

164. In finding in this way, the Appeals Chamber notes that the goal of Victims V01 was presumably to ensure only administrative review by the TFV, without involvement by the Trial Chamber, and that the Appeals Chamber’s conclusion here results in future victims and, as seen below, the victims in, *inter alia*, the Victims V01 group, who have been found ineligible, being subjected to both administrative and

³⁰² [Victims V01’s Appeal Brief](#), para. 41.

³⁰³ [Impugned Decision](#), paras 38, 292 - 297.

³⁰⁴ [Lubanga Amended Reparations Order](#), para. 76.

judicial review. However, the Appeals Chamber finds that this result simply follows on from the Trial Chamber's approach in this case and the need to ensure equal treatment for the potential victims in this case. In addition, and for the reasons that follow, the Appeals Chamber considers that the victims in the Victims V01 group, who raised this argument, are not prejudiced as such, as they will have a second opportunity to convince the TFV and the Trial Chamber of their eligibility for reparations, based on the findings in the Impugned Decision and this judgment.

165. In this regard, the Appeals Chamber notes that the approach taken by the Trial Chamber, to have two phases in which potential victims may seek reparations, results in future victims, coming forward during the second phase, potentially having an advantage, vis-à-vis the victims already assessed by the Trial Chamber, in knowing in detail the factors which the Trial Chamber found relevant in its assessment and the Trial Chamber's reasons for concluding that some victims were ineligible for reparations. It is only in the Impugned Decision that most of these specific criteria were clearly set out, as were shortcomings in the dossiers, which led to their rejection. In particular, as discussed above, the Trial Chamber stated that, by examining that sample, it devised a method for the screening of the victims for eligibility to be undertaken later by the TFV in respect of future victims who may come forward.³⁰⁵ The Trial Chamber, therefore, was presumably aware that it was providing guidance in the Impugned Decision for the benefit of future victims and those victims being assessed by it in the Impugned Decision could, consequently, not have been fully on notice as to what the Trial Chamber would take into account in reaching its decisions; on the contrary, potential victims who will come forward in future will be able to benefit from this detailed indication of what is required. The Appeals Chamber considers that this brings about a risk of discrimination.

166. The Appeals Chamber also recalls Victims V01's argument that the victims who had been authorised to participate in the proceedings were 'misled by the contradictions' between decisions of Trial Chamber I, the Appeals Chamber and the Trial Chamber, as a result of which almost half of them were excluded from the

³⁰⁵ [Impugned Decision](#), para. 38.

TFV's programme.³⁰⁶ They also argue that the participating victims were not informed that their interviews with the TFV would be considered a request for reparations 'for the simple reason that the Appeals Chamber had decided that the reparations would not be awarded on the basis of individual applications'.³⁰⁷

167. The Appeals Chamber notes that varying views were expressed, by the relevant Chambers and the TFV, in the course of the reparations proceedings, as to the procedure for the eligibility assessment. In its orders issued in the course of the proceedings, the Trial Chamber indicated that it intended to assess the eligibility of victims itself. For instance, in the Order of 9 February 2016, the Trial Chamber stated that, after receiving the batches of victims' files from the TFV, it would 'issue decisions regarding the status of the victims eligible to benefit from the reparations'.³⁰⁸ At the same time, ambiguity may have been created as a result of the findings in the 2015 Judgment by the Appeals Chamber, which did not specifically refer to the involvement by the Trial Chamber in the screening of eligibility in this case. In its submissions to the Trial Chamber, the TFV expressed reservations with regard to the procedure set out by the Trial Chamber. It argued that the 'individualised approach' adopted by the Trial Chamber and 'resulting in a judicial person-by-person determination of eligibility of individual victims as a precondition for adoption of the implementation plan', was 'in conflict with the Appeals Chamber judgment on reparations as well as the letter and spirit of the applicable law, including the Statute, the Rules and the [Regulations of the TFV]'.³⁰⁹ It advocated a different procedure from the one which the Trial Chamber contemplated and submitted that the implementation of reparations, including a verification process,³¹⁰ 'is clearly designed as an administrative exercise'.³¹¹

168. The Appeals Chamber accepts that the differences between these approaches and potential ambiguity created may have led to uncertainty as to what was required of potential victims submitting requests. They may have also affected the manner in

³⁰⁶ [Victims V01's Appeal Brief](#), para. 35.

³⁰⁷ [Victims V01's Appeal Brief](#), para. 41.

³⁰⁸ [Order of 9 February 2016](#), para. 18.

³⁰⁹ [TFV's Request for Leave to Appeal](#), para. 14.

³¹⁰ [TFV's Request for Leave to Appeal](#), paras 24-26.

³¹¹ [TFV's Request for Leave to Appeal](#), para. 28.

which the entities concerned interviewed potential victims and prepared their dossiers. It is conceivable that, as a result, some accounts included in the victims' dossiers were more detailed than others and attached (more) supporting documentation than others. This, in turn, may have led the Trial Chamber to find some of the dossiers to insufficiently substantiate the potential victims' allegations regarding their victimhood.

169. As a result of all of the above, the Appeals Chamber finds that the Trial Chamber's overall procedure for the eligibility assessment failed to ensure equal conditions for all victims and amounts to an error. This error materially affects the Impugned Decision, as some of the victims concerned may have been found eligible had they known more fully what was expected of them in submitting their dossiers, and the Trial Chamber could have given them an additional opportunity to supplement their dossiers or clarify their accounts.

170. The Appeals Chamber notes that Victims V01 are the only group of victims who expressly raise this error and that they appear to raise it with respect to victims who were previously authorised to participate in the proceedings. In their responses to Victims V01's appeal, Victims V02 only request the Appeals Chamber 'to adjudicate [Victims V01's] arguments'³¹² and the OPCV opposes these particular arguments of Victims V01.³¹³ However, the Appeals Chamber finds it appropriate to extend its ruling to all victims who are potentially affected, including those who have not participated in the pre-trial and trial proceedings. Even though the OPCV did not support Victims V01's arguments in this ground of appeal, the Appeals Chamber finds that it would be inappropriate, and to the detriment of the victims in that group, to exclude them from this finding. The Appeals Chamber therefore amends the Impugned Decision to the extent that the Trial Chamber finds that 48 persons had not proven, to the requisite standard, that they qualify as victims for reparations in this case.³¹⁴ The Impugned Decision is amended such that the victims whom the Trial Chamber found ineligible to receive reparations, and who consider that their failure to sufficiently substantiate their allegations, including by supporting documentation,

³¹² [Victims V02's Consolidated Response to the Appeal Briefs](#), para. 156.

³¹³ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 24.

³¹⁴ [Impugned Decision](#), para. 190.

resulted from insufficient notice of the requirements for eligibility, may seek a new assessment of their eligibility by the TFV, together with other victims who may come forward in the course of the implementation stage and as envisaged by the Trial Chamber in the Impugned Decision³¹⁵; any recommendations as to eligibility made by the TFV shall be subject to the approval of the Trial Chamber, as set out above.

171. The Appeals Chamber notes that this amendment may result in some or all of the above-mentioned 48 persons being found eligible for reparations. However, they will be considered along with any other potential victims who may come forward, as referred to above, during the implementation process and therefore this amendment does not affect the overall monetary award made in this case; the procedure adopted in this case, which has not been overturned on appeal, was such that the monetary award was fixed in the Impugned Decision, while a second phase allows for additional victims to come forward; the 48 victims may take part in the latter phase.

(f) Conclusion

172. For the foregoing reasons, the Appeals Chamber grants the second ground of Victims V01's appeal in part and amends the Impugned Decision as set out above. It rejects the remainder of this ground of appeal.

B. Assessment of the individual applications

1. Mr Lubanga's second ground of appeal

(a) Submissions of the parties

(i) Mr Lubanga's submissions

173. Mr Lubanga asserts that the Trial Chamber misapplied the standard of proof of a 'balance of probabilities', which it had stated should apply.³¹⁶ He argues that most of the victims deemed eligible for reparations did not provide any supporting documentation.³¹⁷ Mr Lubanga raises a number of arguments regarding alleged deficiencies and a lack of coherence in some of the requests of victims whom the

³¹⁵ See [Impugned Decision](#), paras 292-297 and the disposition.

³¹⁶ [Mr Lubanga's Appeal Brief](#), paras 50-52.

³¹⁷ [Mr Lubanga's Appeal Brief](#), paras 63-65.

Trial Chamber found eligible during the proceedings.³¹⁸ He also challenges the Trial Chamber's findings regarding the unidentified, potentially eligible victims.³¹⁹

(ii) *Victims V01's response*

174. Victims V01 agree with Mr Lubanga, albeit on different grounds, that the Trial Chamber misapplied the standard of proof when examining the dossiers of victims.³²⁰ In their view, the Trial Chamber rejected many dossiers which 'did not contain any factor suggestive of fraud'.³²¹ With respect to the unidentified potential victims, Victims V01 submit that, while it is 'impossible to determine the exact number', the balance of probabilities favours 'a large number of victims'.³²²

(iii) *Victims V02's response*

175. Victims V02 argue that, in considering that accounts of some applicants, albeit uncorroborated by supporting documentation, were 'coherent and credible' and satisfied the standard of a balance of probabilities, the Trial Chamber did not make an error of law.³²³ They disagree with Mr Lubanga's allegations of error in the Trial Chamber's findings on eligibility³²⁴ and the findings regarding the unidentified potential victims.³²⁵

(iv) *OPCV's response*

176. The OPCV argues that 'it is clear from th[e] case law that the standard of proof applied depends on the "various factors specific to the case" and must reflect the difficulty "victims face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence"'.³²⁶ They assert that such difficulty has a significant impact in this case.³²⁷

³¹⁸ [Mr Lubanga's Appeal Brief](#), paras 71-105.

³¹⁹ [Mr Lubanga's Appeal Brief](#), paras 106-146.

³²⁰ [Victims V01's Response to Mr Lubanga's Appeal](#), paras 25, 33.

³²¹ [Victims V01's Response to Mr Lubanga's Appeal](#), para. 30.

³²² [Victims V01's Response to Mr Lubanga's Appeal](#), paras 39-41.

³²³ [Victims V02's Consolidated Response to the Appeal Briefs](#), paras 68-70.

³²⁴ [Victims V02's Consolidated Response to the Appeal Briefs](#), paras 71-106.

³²⁵ [Victims V02's Consolidated Response to the Appeal Briefs](#), paras 107-119.

³²⁶ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 37.

³²⁷ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 37.

(v) *Mr Lubanga's reply*

177. Mr Lubanga reiterates that a standard of proof based on the 'coherent and credible' nature of statements is lower than the standard of a balance of probabilities.³²⁸ He argues that Victims V01 misrepresent his position.³²⁹

(vi) *Submissions of the parties on the questions posed by the Appeals Chamber*

178. Victims V01 submit that the Trial Chamber, in its assessment of eligibility, applied a standard of proof that is stricter than the balance of probabilities.³³⁰ Victims V01 argue that, to determine whether a person who claims to be a victim is telling the truth, a coherent and credible account is important, but other factors should also be assessed, with examples then provided.³³¹ They argue that, contrary to proceedings based on individual claims for reparations, where there should be notice of and the opportunity to make submissions on each victim's allegations, screening for admission to a collective reparations programme is not a matter for judicial proceedings, as the convicted person's contribution to the reparations programme will be determined based on the cost of a programme of services and not admission or rejection of a potential recipient of reparations.³³²

179. With regard to the applicable standard of proof and the need for corroboration of the victims' accounts, the OPCV submits that Mr Lubanga is alleging errors of fact which Mr Lubanga failed to substantiate.³³³ It further submits that the Trial Chamber applied the correct standard, namely, it assessed 'the coherence and credibility of the evidence on file to meet the balance of probabilities standard'.³³⁴

(b) Relevant parts of the Impugned Decision

180. In addressing '[t]he concept of victim: conditions and standards applicable to the reparations phase',³³⁵ the Trial Chamber first recalled that in order for a natural person to qualify as a victim for the purposes of reparations under rule 85(a) of the

³²⁸ [Mr Lubanga's Reply](#), paras 16-18.

³²⁹ [Mr Lubanga's Reply](#), para. 19.

³³⁰ [Victims V01's Submissions Following the Appeals Chamber's Questions](#), para. 23.

³³¹ [Victims V01's Submissions Following the Appeals Chamber's Questions](#), para. 24.

³³² [Victims V01's Submissions Following the Appeals Chamber's Questions](#), para. 25.

³³³ [OPCV's Submissions Following the Appeals Chamber's Questions](#), paras 34-35. *See also* paras 44, 46.

³³⁴ [OPCV's Submissions Following the Appeals Chamber's Questions](#), para. 38.

³³⁵ [Impugned Decision](#), paras 40-43.

Rules, he or she must provide identification and sufficient proof of the harm suffered and of the causal nexus between the crime and the harm.³³⁶ Harm may be material, physical or psychological.³³⁷ The Trial Chamber also underlined that the harm to the victim need not be direct but must have been personally suffered. It stated that, in determining the eligibility of an indirect victim, ‘it is a prerequisite that there was a close personal relationship between the direct victim and the indirect victim, such as that binding a child soldier and his or her parents’.³³⁸

181. The Trial Chamber explained that the standard of causation requires that the crimes of which the person was convicted were the ‘proximate cause’ of the harm for which reparations are sought, and consists of a ‘but-for’ relationship between the harm and the crime.³³⁹ Lastly, it noted that the standard of proof as to whether a victim qualifies for an award is a balance of probabilities.³⁴⁰

182. Regarding the content of the dossiers before it, the Trial Chamber stated:

The Chamber sees that the dossiers which the 473 potentially eligible victims filed through their legal representatives consist of an application for reparations in the form of a questionnaire, in which the potentially eligible victim recounts his or her experience as a direct or an indirect victim, and documents as proof of identity. Some dossiers also comprise one or two documents containing statements written and signed by a person acting as a witness and intended to corroborate the allegations and the identity of a potentially eligible direct victim. Some dossiers also include supporting documentation, such as certificates of separation [*attestations de sortie*] from an armed group, photographs taken in soldier’s uniform, photographs of militia-member tattoos, and written statements declaring that the harm alleged was a consequence of membership of the militia.³⁴¹

183. In explaining the method used to assess the victims’ dossiers, the Trial Chamber noted that, as argued by Mr Lubanga, ‘in most cases the potentially eligible victims were not in a position to submit supporting documentation to prove their allegations’.³⁴² However, it considered that rule 94(1)(g) of the Rules requires

³³⁶ [Impugned Decision](#), para. 40, referring to [Lubanga Amended Reparations Order](#), para. 22, and [Lubanga Appeal Judgment on Reparations](#), para. 81.

³³⁷ [Impugned Decision](#), para. 41, referring to [Lubanga Amended Reparations Order](#), para. 10.

³³⁸ [Impugned Decision](#), para. 41, referring to [Lubanga Amended Reparations Order](#), para. 63.

³³⁹ [Impugned Decision](#), para. 42, referring to [Lubanga Amended Reparations Order](#), para. 59.

³⁴⁰ [Impugned Decision](#), para. 43, referring to [Lubanga Amended Reparations Order](#), paras 22, 65.

³⁴¹ [Impugned Decision](#), para. 44.

³⁴² [Impugned Decision](#), para. 61.

applicants to present documentation to support their applications for reparations ‘[t]o the extent possible’.³⁴³ In the Trial Chamber’s view, ‘this rule makes allowance for the fact that potentially eligible victims are not always in a position to furnish documentary evidence in support of all the harm alleged, given the circumstances in the DRC and the many years that have elapsed since the material events’.³⁴⁴

184. The Trial Chamber observed that, even in those cases where some corroborating evidence was produced, ‘its probative value [was] limited’.³⁴⁵ Thus, it considered that

63. [...] to assess victim status, the Chamber looks for corroborating evidence that would specifically establish child-soldier status. The Chamber looks mainly at whether the statements made by a potentially eligible victim in the dossier are consistent with one another. Where it sees necessary (in particular where the Defence raises discrepancies between the statements in the dossier and those in a previous application for reparations, or where deficient statements in the dossier need to be made complete), the Chamber also considers the statements provided by the victim in his or her application for participation and/or a previous application for reparations.

64. The Chamber pays particular attention to the level of detail of the facts described, including the circumstances of enlistment, the positions held and duties performed in the UPC/FPLC, the living conditions in the militia and the circumstances in which the victim left the UPC/FPLC. The Chamber also looks at references to relevant information, such as the activities connected to child-soldier status, the sites of recruitment, training, deployment (including battlefields) and demobilization, the names of superiors in the UPC/FPLC militia, and the organizations responsible for demobilization. In that connection, it is of note that in *Katanga*, the Chamber considered – as have other Chambers of this Court in relation to applications for participation – that the mere fact that an application for reparations contains slight discrepancies does not, on the face of it, cast doubt on its credibility.³⁴⁶

185. The Trial Chamber further stated that, in this case, ‘the crimes of which Mr Lubanga was convicted entail as a precondition to qualify for reparations as a victim –

³⁴³ [Impugned Decision](#), para. 61.

³⁴⁴ [Impugned Decision](#), para. 61, referring to [Lubanga Amended Reparations Order](#), para. 22.

³⁴⁵ [Impugned Decision](#), para. 62.

³⁴⁶ [Impugned Decision](#), paras 63-64 (footnotes omitted), referring to [Katanga Order for Reparations](#), para. 70; [Katanga Decision on Applications for Participation](#), paras 33, 34; [Katanga Grounds for Decision on Victims Participation](#), para. 32; [Ntaganda Decision on Victims Participation in the Confirmation Hearing](#), para. 23; [Ntaganda Decision on Victims Participation at Trial](#), para. 46; Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ‘[Corrigendum to Decision on the Registry Report on six applications to participate in the proceedings](#)’, 28 October 2011, ICC-02/05-03/09-231-Corr, para. 24.

direct or indirect – that the enlistment, conscription or active participation in hostilities of a child under the age of 15 years in the UPC/FLPC’s armed forces in a non-international armed conflict between 1 September 2002 and 13 August 2003 (“child-soldier status”) be established on a balance of probabilities’.³⁴⁷ The Trial Chamber then set out the criteria for eligibility as follows:

So, in the case of a potentially eligible direct victim, the Chamber verifies (1) identity and looks at (2) the direct victim’s child-soldier status. In the case of a potentially eligible indirect victim whose identity it has verified, the Chamber looks at (3) the child-soldier status of the direct victim and whether there was a close personal relationship between the direct and the indirect victim. Where the direct victim’s child-soldier status is established and, in the case of an application from an indirect victim, where the close personal relationship with the direct victim is established, the Chamber then considers (4) whether the potentially eligible direct or indirect victim has established on a balance of probabilities the existence of the harm alleged and (5) the causal nexus between the harm alleged and the crimes of which Mr Lubanga was convicted.³⁴⁸

186. With respect to direct victims, the Trial Chamber considered that a victim must establish that he or she was under the age of 15 years when either i) enlisted or conscripted into an armed wing of the UPC/FPLC or ii) used by Mr Lubanga to participate actively in hostilities in a non-international armed conflict between 1 September 2002 and 13 August 2003.³⁴⁹ Where it noted discrepancies in the date of birth in the case file presented by a victim, the Trial Chamber nonetheless determined that such ‘discrepancies have no bearing on the determination of the age of a potentially eligible victim, insofar as the various dates of birth provided would, in any case, mean that the victim was under the age of 15 years at the material time’.³⁵⁰

187. With respect to the membership of potential victims in the armed wing of the UPC/FPLC, the Trial Chamber observed that

the only bounds set by the operative provisions of [the *Lubanga* Conviction Decision] concern the crimes of which Mr Lubanga was convicted – conscripting and enlisting children under the age of 15 years into the UPC/FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute – and the time frame of the charges, 1 September 2002 to 13 August 2003. The [*Lubanga* Conviction

³⁴⁷ [Impugned Decision](#), para. 66.

³⁴⁸ [Impugned Decision](#), para. 67.

³⁴⁹ [Impugned Decision](#), para. 78.

³⁵⁰ [Impugned Decision](#), para. 88.

Decision] does not, however, exhaustively enumerate the sites of the crimes committed or Mr Lubanga's co-perpetrators.³⁵¹

188. The Trial Chamber proceeded to make findings on the temporal and geographical scope of the crimes for the purpose of determining eligibility.³⁵² In this regard, it found that an eligible victim may well have been conscripted or enlisted prior to the period of the charges.³⁵³ It also found that determining eligibility is possible in the absence of specific information about the group affiliation in a certificate of de-mobilisation,³⁵⁴ or in the absence of any certificate of de-mobilisation at all.³⁵⁵

189. The Trial Chamber determined that the *Lubanga* Conviction Decision did not exhaustively name the commanders who belonged to the UPC/FPLC at the relevant time,³⁵⁶ and that it may consider commanders who were not mentioned in the *Lubanga* Conviction Decision.³⁵⁷ The Trial Chamber also determined that the *Lubanga* Conviction Decision did not exhaustively enumerate the sites where children under the age of 15 years were enlisted, conscripted, or deployed. It did, however, exclude the sites outside of Ituri from the parameters of the geographic scope under consideration.³⁵⁸ The Trial Chamber noted that, although the *Lubanga* Conviction Decision referred to one headquarters and three training centres, it would take into consideration allegations of potential victims that they had been trained outside of training centres.³⁵⁹ Similarly, the Trial Chamber determined that, although the *Lubanga* Conviction Decision mentioned only one visit to a training camp by Mr Lubanga, this did not exclude the possibility that he visited that camp more often or that he also visited other camps.³⁶⁰

190. The Trial Chamber concluded that 36 of the 385 dossiers of potential direct victims had not established that they were conscripted or enlisted into the UPC/FPLC

³⁵¹ [Impugned Decision](#), para. 91.

³⁵² [Impugned Decision](#), paras 92-94.

³⁵³ [Impugned Decision](#), paras 93, 126.

³⁵⁴ [Impugned Decision](#), para. 97.

³⁵⁵ [Impugned Decision](#), para. 101.

³⁵⁶ [Impugned Decision](#), para. 105.

³⁵⁷ [Impugned Decision](#), para. 109.

³⁵⁸ [Impugned Decision](#), paras 132-135.

³⁵⁹ [Impugned Decision](#), paras 141-142.

³⁶⁰ [Impugned Decision](#), paras 148-150.

or that Mr Lubanga used them to participate actively in hostilities during the period of the charges, and they were not eligible for reparations.³⁶¹

191. With respect to the eligibility of indirect victims, the Trial Chamber considered that an indirect victim was not in a ‘position to know and describe the detailed circumstances of a child soldier’s deployment or demobilization to the same level of detail as the child soldier’. The Trial Chamber, therefore, did not require an indirect victim to be able to provide exact dates in this regard, or to provide a certificate of demobilization or separation.³⁶² The Trial Chamber considered written statements of indirect victims, and gave particular regard to any inconsistencies between the statements and the accounts of other witnesses to determine whether they cast doubt on the credibility of the indirect victim.³⁶³

192. As to the close personal relationship, the Trial Chamber recalled its findings in the *Katanga* case that the concept of ‘family’ should be treated ‘with due regard for family and social structures in the DRC and in Ituri in particular’.³⁶⁴

193. The Trial Chamber concluded that 12 of the 88 dossiers of potential indirect victims had not established a close personal relationship with a direct victim who was conscripted or enlisted into the UPC/FPLC, or used by Mr Lubanga to participate actively in hostilities, at the relevant time, and they were not eligible for reparations.³⁶⁵

194. Finally, as to the total number of direct and indirect victims, the Trial Chamber found that the two records of children who participated in demobilization, disarmament, and reintegration programmes submitted by the Registry were an ‘indication that the total number of victims affected by the crimes of which Mr Lubanga was convicted [was] far greater than the number of persons in the sample who have established that they [were] victims for the purposes of reparations’.³⁶⁶ The Trial Chamber reviewed the various estimates of children conscripted or enlisted into

³⁶¹ [Impugned Decision](#), para. 155.

³⁶² [Impugned Decision](#), para. 161.

³⁶³ [Impugned Decision](#), paras 162-163.

³⁶⁴ [Impugned Decision](#), para. 168.

³⁶⁵ [Impugned Decision](#), para. 169.

³⁶⁶ [Impugned Decision](#), para. 199.

the FPLC, or used to participate actively in hostilities, advanced by the parties and the TFV, and found that ‘the number of victims who suffered harm as a consequence of the crimes of which Mr Lubanga was convicted far exceed[ed] the 425 persons who [had] established that they [were] victims for the purposes of reparations and that there [were] hundreds and possibly thousands more victims’.³⁶⁷

195. The Trial Chamber then reviewed the additional documents entered into the record by the Registry from ‘official sources and/or the public domain, such as the UN and various governmental and non-governmental organizations’.³⁶⁸ The Trial Chamber recalled Mr Lubanga’s objections,³⁶⁹ but underscored that the documents were relevant and had an illustrative character. As such, the Trial Chamber saw no need to ‘engage in a detailed analysis of the reliability of each [document]’.³⁷⁰ After performing a ‘compilation and analysis of these data, coefficients and statistics’, the Trial Chamber considered that the number of direct victims was ‘in the range of 2,451 to 5,938’.³⁷¹ It included its calculations in Annex III to the Impugned Decision.

196. The Trial Chamber ultimately concluded that it was ‘unable to arrive at a precise number of victims of the crimes of which Mr Lubanga was convicted’.³⁷² The Trial Chamber noted that although ‘the individual identification of a greater number of victims to set the size of the reparations award would have been desirable, the necessary consultations would have unduly prolonged the proceedings, prejudicing not only Mr Lubanga’s right to notice within a reasonable time of his obligations arising from reparations, but also the right of victims to receive prompt reparations’.³⁷³ The Trial Chamber noted that a review of the information extracted from DRC databases gives a ‘general indication that the number of victims exceeds the number in the sample [of 425 victim-applications]’.³⁷⁴ The Trial Chamber then referred again to its estimates of between 2,451 and 5,938 victims, and to the submissions received from the parties, and found it ‘established to the requisite

³⁶⁷ [Impugned Decision](#), para. 212.

³⁶⁸ [Impugned Decision](#), para. 213.

³⁶⁹ [Impugned Decision](#), paras 214-215.

³⁷⁰ [Impugned Decision](#), para. 216.

³⁷¹ [Impugned Decision](#), para. 222; *see also* paras 223-230.

³⁷² [Impugned Decision](#), para. 233.

³⁷³ [Impugned Decision](#), para. 234.

³⁷⁴ [Impugned Decision](#), para. 241.

standard of proof that, along with the 425 victims in the sample, hundreds and possibly thousands more victims were affected by the crimes of which Mr Lubanga was convicted'.³⁷⁵

(c) Determination by the Appeals Chamber

(i) The findings as to the 425 victims found to be eligible by the Trial Chamber

(a) Uncorroborated statements

197. The Appeals Chamber notes at the outset that Mr Lubanga does not assert that the standard of 'a balance of probabilities', which the Trial Chamber set out to apply to its assessment of eligibility in the Impugned Decision, should not have been employed, or that some other standard should apply in the circumstances. Therefore, the Appeals Chamber will not address whether that standard was appropriate.³⁷⁶ However, Mr Lubanga does allege that the methods relied on by the Trial Chamber fell short of the requirements of that standard. He argues that the Trial Chamber found a number of victims eligible whose uncorroborated accounts it considered 'coherent and credible', although 'the standard of proof based on the "coherent and credible" nature of the applicants' statements is lower than the standard of a balance of probabilities'.³⁷⁷ As such, he argues that the Trial Chamber erred.

198. The Appeals Chamber finds this argument to be based upon an incorrect premise because it is apparent that the Trial Chamber did indeed set out to apply the standard advocated by Mr Lubanga. That is, the Trial Chamber clearly stated that 'the standard of proof as to whether a victim qualifies for an award is a balance of

³⁷⁵ [Impugned Decision](#), para. 244.

³⁷⁶ In this particular case, Trial Chamber I found that 'the standard of "a balance of probabilities" [was] sufficient and proportionate to establish the facts that [were] relevant to an order for reparations when it is directed against the convicted person' ([Lubanga Order of Trial Chamber I on Reparations](#), para. 253). In Mr Lubanga's appeal of Trial Chamber I's order, he did not challenge the standard of proof applied. The Appeals Chamber noted this fact ([Lubanga Appeal Judgment on Reparations](#), para. 84, noting that '[Mr Lubanga] does not appear to allege that the standard of "balance of probabilities" is an error', and deciding 'not to address it further'), and in the Appeals Chamber's 2015 *Lubanga Amended Reparations Order*, it found that the standard of 'a balance of probabilities' shall apply in this case ([Lubanga Amended Reparations Order](#), para. 65). The Appeals Chamber also noted, however, that fact finders in other mass claims programs have adopted 'flexible evidential standards based on a "plausibility test" in order to accommodate the situation of the victims, who usually have difficulties in providing the documentation that is required' ([Lubanga Amended Reparations Order](#), p. 15, n. 37, referring to P. Lewis and H. Friman, 'Reparations to Victims' in R. S. Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 474, 486).

³⁷⁷ [Mr Lubanga's Appeal Brief](#), paras 55, 58, 62.

probabilities³⁷⁸ and it proceeded to analyse the evidence and information available to it and relevant to each of the requisite elements for victim status to see whether the elements were proven to that standard. The Trial Chamber determined that a ‘precondition to qualify for reparations’ was that the victim status was ‘established on a balance of probabilities’.³⁷⁹ And, following its analysis, the Trial Chamber found that 425 applicants had ‘shown on a balance of probabilities’ that they were victims entitled to reparations.³⁸⁰ Therefore, the Appeals Chamber finds that the Trial Chamber did in principle assess victim status for the purpose of reparations on the standard of a balance of probabilities.

199. Regarding the Trial Chamber’s references to the standard of ‘coherent and credible’, the Appeals Chamber notes that the Trial Chamber referred to certain evidence that it considered to be of a limited probative value; however it found that it could be taken into account as corroborative of a victim’s account if the latter was considered to be ‘coherent and credible’.³⁸¹ It also referred to how it would take into account locations, dates, and commanding officers that were not mentioned in the *Lubanga* Conviction Decision and considered that they could be taken into account if the accounts of potentially eligible victims were ‘coherent and credible’.³⁸²

200. The Appeals Chamber finds that, in respect of both examples, in referring to victims’ accounts as being ‘coherent and credible’, the Trial Chamber was not explaining that it was finally persuaded to a degree that all the allegations therein were proved, but simply that the accounts were, as stated, generally reliable. The Trial Chamber indicated that it still proceeded to weigh the accounts included in the requests for reparations together with the other available evidence with a view to finally determining whether the factual allegations were proven to the requisite standard.³⁸³ Therefore, Mr Lubanga has not demonstrated that the Trial Chamber

³⁷⁸ [Impugned Decision](#), para. 43.

³⁷⁹ [Impugned Decision](#), para. 66.

³⁸⁰ [Impugned Decision](#), para. 190.

³⁸¹ [Impugned Decision](#), paras 97, 152, 165.

³⁸² [Impugned Decision](#), paras 94, 109, 142.

³⁸³ See [Impugned Decision](#), para. 90, where the Trial Chamber explained its methodology as follows: ‘The victim’s eligibility is determined with regard to the quality of all of the evidence he or she provides and in consideration of the requisite standard of proof – a balance of probabilities’.

assessed the allegations on a standard of ‘coherent and credible’ rather than on a balance of probabilities.

201. Mr Lubanga’s principal argument, in relation to the submission of uncorroborated statements, appears to be that the Trial Chamber erred in law by finding that the applicants’ claims, albeit ‘coherent and credible’, were established on a balance of probabilities where they were not accompanied by corroborating evidence.³⁸⁴ Mr Lubanga presents jurisprudence of the ECCC, Supreme Court Chamber, to support the principle that ‘statements of civil parties uncorroborated by any other evidence are not sufficient’.³⁸⁵ The Appeals Chamber notes, at the outset, that these arguments relate to the evidence supporting requests for reparations. Although the Trial Chamber did not make specific findings on the merits of requests for individual reparations, it did examine them in order to assess the eligibility of victims from the sample for collective reparations and to make a finding as to Mr Lubanga’s monetary liability. Therefore, in its determination of the issues raised under the present ground of appeal, the Appeals Chamber will be guided by relevant aspects of rule 94 of the Rules.³⁸⁶

202. The Appeals Chamber observes that rule 94(1)(g) of the Rules states that, in conjunction with a written description of the victim’s allegations, a request for reparations must contain ‘[t]o the extent possible, any relevant supporting documentation, including names and addresses of witnesses’.³⁸⁷ The Appeals Chamber considers that the requirement to provide, to the extent possible, supporting documents and information under rule 94(1)(g) of the Rules, both serves to assist a trial chamber in its assessment of a claim while also providing the convicted person with an opportunity to challenge the requests submitted.³⁸⁸ However, the rule also allows for the possibility that a request that is not supported by relevant

³⁸⁴ [Mr Lubanga’s Appeal Brief](#), paras 59-70.

³⁸⁵ [Mr Lubanga’s Appeal Brief](#), para. 59, referring to [Kaing Guek Eav Appeal Judgment](#), para. 647.

³⁸⁶ *See supra*, paras 86-87.

³⁸⁷ Regulation 88(2) of the Regulations of the Court provides guidance in respect of the information accompanying the application form submitted pursuant to rule 94 of the Rules: ‘The Registrar shall seek all necessary additional information from a victim in order to complete his or her request in accordance with rule 94, sub-rule 1, and shall assist victims in completing such a request’.

³⁸⁸ *See* rule 94(2) of the Rules, requiring, in respect of requests under sub-rule (1), as follows: ‘At commencement of the trial and subject to any protective measures, the Court shall ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges [...]’.

documentation may nevertheless be filed. In this regard, and as correctly noted by the Trial Chamber,³⁸⁹ rule 94(1)(g) of the Rules acknowledges that victims are not always in a position to provide supporting documentation. Consequently, the Appeals Chamber considers that the fact that potential victims generally did not submit documents in support of their written allegations does not lead inexorably to the conclusion that the Trial Chamber was prevented from finding that their victimhood was established to a balance of probabilities.

203. In reparations proceedings, the Appeals Chamber has stated that ‘what is [...] “sufficient” for purposes of an applicant meeting the burden of proof will depend upon the circumstances of the specific case’.³⁹⁰ The Appeals Chamber considers that the trial chamber enjoys a certain amount of flexibility in the assessment of claims that have been submitted.³⁹¹ In this regard, an assessment of the ‘sufficiency’ of the evidence is not limited to the evidence submitted by the victim in question.³⁹² Rather, corroboration may come from extrinsic evidence, including the testimonial and documentary evidence entered into the record and the statements of other victims in their requests. In the exercise of its discretion, a trial chamber may consider that a victim’s account has sufficient probative value in light of the totality of the evidence so as to find that the allegations therein satisfy the burden of proof, even in the absence of supporting documents.³⁹³ A trial chamber may also consider the significance of the allegation sought to be proven. In this respect, some allegations are critical to the overall assessment of the person’s eligibility and, unless they are

³⁸⁹ [Impugned Decision](#), para. 61.

³⁹⁰ [Lubanga Appeal Judgment on Reparations](#), para. 81; *see also* [Katanga Judgment on Reparations](#), para. 75.

³⁹¹ *See* in the context of victim participation, [Judgment on the appeals of decisions on participation in the Situation in Uganda](#), para. 38, holding: ‘What evidence (be it documentary or otherwise) may be sufficient cannot be determined in the abstract, but must be assessed on a case-by-case basis and taking into account all relevant circumstances, including the context in which this Court operates’.

³⁹² *See* [Kaing Guek Eav Appeal Judgment](#), para. 592, comparing a victim’s statement to the ‘bulk of the evidence before the Chamber regarding established practices at [the detention centre]’. The Trial Chamber of the ECCC has explained that civil party applications are finally determined ‘on the basis of all evidence submitted in the course of proceedings’ ([Kaing Guek Eav Judgment E188](#), para. 636).

³⁹³ *See* [Kaing Guek Eav Appeal Judgment](#), para. 597, holding that ‘a civil party applicant’s statement alone may suffice as substantiation of an allegation, especially where it is the most obvious or only available evidence. Such finding, however, requires that the statement be credible by virtue of inherent consistency, exhaustiveness and plausibility in the overall context’.

otherwise corroborated, the trial chamber may decline to find the person eligible without documentation supporting those allegations.³⁹⁴

204. Mr Lubanga argues that ‘[t]here are no cogent grounds to reasonably explain the lack of corroborating evidence’, including witness statements and civil status documents.³⁹⁵ The argument appears to be that, if a request for reparations is not supported by documentation, cogent grounds must exist to explain the absence of such documentation. The Appeals Chamber notes that, as just discussed, a trial chamber may find a person eligible for reparations, even where he or she has not supplied any documentation. It also recalls that the difficulty victims may face in obtaining supporting documentation can be taken into consideration when determining the appropriate standard of proof in reparations proceedings.³⁹⁶ The Appeals Chamber considers that a trial chamber is also not prevented from finding a person eligible for reparations in circumstances where he or she did not give reasons for his or her inability to provide supporting documentation. However, to allow the trial chamber to properly reach a conclusion, it is in the interest of the person who is unable to supply any documentation to explain his or her reasons for this inability. At any rate, the trial chamber’s enquiry is whether the relevant facts have been established to the applicable standard of proof. Such was the Trial Chamber’s enquiry in the present case. The Appeals Chamber also notes the Trial Chamber’s finding that, ‘in most cases the potentially eligible victims were not in a position to submit supporting documentation to prove their allegations’,³⁹⁷ and its reference to ‘the circumstances in the DRC and the many years that have elapsed since the material events’.³⁹⁸

³⁹⁴ See in the context of participation in the proceedings, [Judgment on the appeals of decisions on participation in the Situation in Uganda](#), para. 36, holding that ‘[w]hen a Pre-Trial Chamber is considering whether an applicant fulfils the criteria of rule 85 (a) of the Rules of Procedure and Evidence because he or she suffered emotional harm as the result of the loss of a family member, it must require proof of the identity of the family member and of his or her relationship with the applicant. The Chamber must be satisfied that the family member existed and that he or she had the requisite relationship with the applicant’.

³⁹⁵ [Mr Lubanga’s Appeal Brief](#), paras 65, 67.

³⁹⁶ [Lubanga Amended Reparations Order](#), para. 22; [Al Mahdi Judgment on Reparations](#), para. 42.

³⁹⁷ [Impugned Decision](#), para. 61.

³⁹⁸ [Impugned Decision](#), para. 61.

205. The Appeals Chamber therefore rejects the argument that, without more, the absence of ‘cogent grounds’ for victims’ inability to provide documentation should have prevented the Trial Chamber from finding those victims eligible.

206. In view of the foregoing, the Appeals Chamber finds that Mr Lubanga has not demonstrated an error in the Trial Chamber’s approach to corroboration.

(b) Deficiencies and lack of coherence

207. For the 473 applicants who had submitted written requests for reparations prior to the Impugned Decision, Mr Lubanga argues that the Trial Chamber ‘failed to draw the necessary conclusions from the factual incoherence and evidentiary deficiencies that it identified, or should have identified’.³⁹⁹ He argues that, ‘[i]n considering that the incoherence and deficiencies did not mar the credibility of the applications before it, the Chamber made a further error of law, or, at the very least, clearly misappreciated the facts against the applicable standard of proof’.⁴⁰⁰ Mr Lubanga raises a number of arguments in this connection.

208. First, he argues that the Trial Chamber failed to draw the necessary conclusions about the credibility of victims who gave statements with discrepancies in dates of birth⁴⁰¹ or other key events.⁴⁰² Second, Mr Lubanga argues that the Trial Chamber should not have considered certain training locations,⁴⁰³ commanding officers,⁴⁰⁴ and dates of enlistment⁴⁰⁵ mentioned in victims’ written statements. And finally, he argues that the Trial Chamber erred in considering certificates of demobilisation, which he says were inherently unreliable.⁴⁰⁶ The Appeals Chamber shall address these arguments in turn.

209. The Appeals Chamber notes at the outset that Mr Lubanga makes most of these arguments in the abstract without indicating any individual victim whose request should have been rejected if the Trial Chamber had not made erroneous

³⁹⁹ [Mr Lubanga’s Appeal Brief](#), para. 71.

⁴⁰⁰ [Mr Lubanga’s Appeal Brief](#), para. 71.

⁴⁰¹ [Mr Lubanga’s Appeal Brief](#), paras 72-75.

⁴⁰² [Mr Lubanga’s Appeal Brief](#), paras 89-92, 97-99, 100-101, 102-103.

⁴⁰³ [Mr Lubanga’s Appeal Brief](#), paras 93-94.

⁴⁰⁴ [Mr Lubanga’s Appeal Brief](#), paras 95-96.

⁴⁰⁵ [Mr Lubanga’s Appeal Brief](#), paras 76-81.

⁴⁰⁶ [Mr Lubanga’s Appeal Brief](#), paras 82-88.

assessments. Therefore, in examining Mr Lubanga's allegations, the Appeals Chamber will analyse the Trial Chamber's explanation of its approach, as set out in the Impugned Decision.

(i) Alleged failure in assessment of discrepancies in victims' written statements

210. Mr Lubanga submits that the Trial Chamber should not have dismissed discrepancies in dates of birth without scrutinising the dossiers, and that it should have drawn conclusions as to the victims' credibility.⁴⁰⁷ First, the Appeals Chamber is not persuaded that the credibility of a victim's account is 'inevitably affected'⁴⁰⁸ by internal discrepancies regarding the date of birth. The Appeals Chamber notes the Trial Chamber's finding that slight inconsistencies in a victim's application do not, on their own, cast doubt on the application's credibility.⁴⁰⁹ In this case, the Trial Chamber considered the conditions under which identity records were created and the low level of education among children who were conscripted or enlisted into the FPLC or used to participate actively in hostilities.⁴¹⁰ Despite finding minor discrepancies, the Trial Chamber determined that, they had no bearing on the determination of a potentially eligible victim's age.⁴¹¹ The Appeals Chamber recalls the discretion of a trial chamber to weigh the sufficiency of the evidence in light of the circumstances of the case, and finds that Mr Lubanga has not demonstrated an error here.

211. In addition to internal inconsistencies, Mr Lubanga also refers to the manner in which the Trial Chamber dealt with inconsistencies between the facts alleged in victims' requests and those established in the Conviction Decision.

⁴⁰⁷ [Mr Lubanga's Appeal Brief](#), paras 72-75.

⁴⁰⁸ [Mr Lubanga's Appeal Brief](#), para. 74.

⁴⁰⁹ See [Impugned Decision](#), para. 64, referring to, *inter alia*, [Katanga Order for Reparations](#), para. 70; [Katanga Decision on Applications for Participation](#), paras 33-34; [Katanga Grounds for Decision on Victims Participation](#), para. 32; [Ntaganda Decision on Victims Participation in the Confirmation Hearing](#), para. 23; [Ntaganda Decision on Victims Participation at Trial](#), para. 46; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, '[Corrigendum to Decision on the Registry Report on six applications to participate in the proceedings](#)', 28 October 2011, ICC-02/05-03/09-231-Corr, para. 24.

⁴¹⁰ [Impugned Decision](#), paras 80-87.

⁴¹¹ [Impugned Decision](#), para. 88.

212. In particular, Mr Lubanga challenges the Trial Chamber's assessment of the credibility of victims' allegations when they stated that they continued to fight on the side of the UPC/FPLC after 2 June 2004, given that, he submits, 'the UPC no longer had an armed wing as of 2 June 2004'.⁴¹² He argues that the victims' statements cast serious doubt on the credibility of their accounts and the Trial Chamber should not have presumed that they only made an error in the date.⁴¹³ The Trial Chamber determined that it is not necessarily fatal to a victim's claim for reparations that he or she included a date that was inconsistent with the findings in the *Lubanga* Conviction Decision. The Trial Chamber considered that, in spite of an apparent mistake in providing such dates, victims could qualify for reparations if their requests demonstrate to the requisite standard of proof that they were conscripted or enlisted or that the UPC/FPLC used them to participate actively in hostilities during the time frame of the charges, and that they were under the age of 15 years at the material time.⁴¹⁴ Mr Lubanga has not demonstrated an error in this approach of the Trial Chamber.

213. Mr Lubanga submits that the Trial Chamber misappreciated the facts by considering some victims' allegations that they had been Chief Kahwa's subordinates after 2 December 2002, despite evidence of his removal.⁴¹⁵ The Trial Chamber found that the victims might have mistaken the dates and that it would nevertheless look at whether their accounts demonstrate victimhood in relation to the crimes of which Mr Lubanga was convicted.⁴¹⁶ Mr Lubanga has not demonstrated an error in the Trial Chamber's approach.

214. Mr Lubanga also alleges that the Trial Chamber failed to draw conclusions as to the credibility of victims alleging that they belonged to the UPC/FPLC after March 2003, although they were subordinates of Commanders Kasangaki and Kakwavu, who had defected by that time.⁴¹⁷ The Appeals Chamber notes that the Trial Chamber considered similar objections from Mr Lubanga. It held that it would consider

⁴¹² [Mr Lubanga's Appeal Brief](#), paras 89-92.

⁴¹³ [Mr Lubanga's Appeal Brief](#), para. 90.

⁴¹⁴ [Impugned Decision](#), para. 130.

⁴¹⁵ [Mr Lubanga's Appeal Brief](#), paras 97-99.

⁴¹⁶ [Impugned Decision](#), para. 115.

⁴¹⁷ [Mr Lubanga's Appeal Brief](#), paras 102-103.

allegations of victims that they were subordinates of Commander Kasangaki, as the *Lubanga* Conviction Decision listed him among other commanders in the UPC/FPLC's hierarchy and 'sa[id] nothing of any defection by Commander Kasangaki'.⁴¹⁸ In view of these clear findings of Trial Chamber I in the *Lubanga* Conviction Decision, Mr Lubanga has failed to demonstrate an error in the Trial Chamber's finding. Regarding Commander Kakwavu, the Trial Chamber dismissed a similar objection on the basis that Trial Chamber I had decided not to rely on the evidence which Mr Lubanga presented in support of his argument.⁴¹⁹ Mr Lubanga has not demonstrated an error in the Trial Chamber's conclusion.

215. Finally, Mr Lubanga argues that the Trial Chamber erred in finding that it could not be ruled out that a victim was enlisted or conscripted into both the militia of Mr Lubanga and the militia of Mr Katanga at different times.⁴²⁰ He submits that 'there was nothing in the dossier of the possible victim to have prompted such conclusions' and that such a victim's statement was 'completely unrealistic'.⁴²¹ Mr Lubanga does not explain further why the Trial Chamber erred. The Appeals Chamber finds that Mr Lubanga has failed to identify an error.

(ii) Alleged failure in assessment of training locations, dates of recruitment, and commanding officers

216. Mr Lubanga alleges errors in the Trial Chamber's conclusions regarding victims who provided dates of enlistment in the UPC/FPLC prior to 1 September 2002, and submits that the UPC did not have a military wing until September 2002.⁴²² He argues that the Trial Chamber misappreciated the facts.⁴²³ The Appeals Chamber notes that 1 September 2002 is the earliest date in the period of the charges. However, the Trial Chamber referred to evidence relied upon by Trial Chamber I and demonstrating that children were recruited into the ranks of an armed group affiliated with the UPC prior to the period of the charges. In particular, Mr Lubanga and others

⁴¹⁸ [Impugned Decision](#), paras 122-123.

⁴¹⁹ [Impugned Decision](#), paras 110-112, referring to [Lubanga Conviction Decision](#), para. 856.

⁴²⁰ [Mr Lubanga's Appeal Brief](#), paras 100-101.

⁴²¹ [Mr Lubanga's Appeal Brief](#), paras 100-101.

⁴²² [Mr Lubanga's Appeal Brief](#), paras 76-81.

⁴²³ [Mr Lubanga's Appeal Brief](#), para. 81.

were involved in the recruitment and training of children for the purpose of a military campaign dedicated to overthrowing Bunia as early as 2000,⁴²⁴ and such activities carried on throughout the summer of 2002.⁴²⁵ Once Mr Lubanga assumed the position of President of the UPC and Commander in Chief of the FPLC army in September 2002, others responsible for the campaign came under Mr Lubanga's command,⁴²⁶ and the armed forces that had been under their leadership became the FPLC.⁴²⁷ In the Impugned Decision, the Trial Chamber thus concluded that 'the fact that the military wing of the UPC was established by September 2002 does not preclude earlier recruitment'.⁴²⁸ The Appeals Chamber finds that Mr Lubanga has not demonstrated that the Trial Chamber erred in accepting accounts of victims claiming to have been recruited to the UPC/FPLC before September 2002.

217. Mr Lubanga further argues that the Trial Chamber misappreciated the facts by considering victims' allegations that they were trained elsewhere than at the enumerated training centres.⁴²⁹ The Trial Chamber found that 'the UPC/FPLC headquarters in Bunia and the military camps at Rwampara, Mandro and Mongbwalu [were] the sole training centres where child soldiers were trained'.⁴³⁰ However, it indicated that it would nevertheless take into consideration allegations that victims were trained elsewhere where their accounts were coherent and credible.⁴³¹ The Appeals Chamber agrees with the Trial Chamber's apparent understanding that the Conviction Decision does not categorically exclude that training could have taken

⁴²⁴ [Lubanga Conviction Decision](#), paras 1031 (finding 'sufficiently reliable' the evidence that the accused sent children to Uganda during the summer of 2000), 1043 (finding evidence to conclusively demonstrate that military training took place in Uganda for Hema youths, including young children, during the summer of 2000 and that Mr Lubanga was involved with the group of soldiers, which included children, sent by the mutineers to Uganda for training), 1045 (strong support for the suggestion that during the summer of 2000, the accused and other persons were jointly involved in organising the training of Hema youths in the context of the mutiny).

⁴²⁵ [Lubanga Conviction Decision](#), paras 1077-1083, 1111.

⁴²⁶ [Lubanga Conviction Decision](#), paras 1105 (documents provide clear support for the oral evidence of various witnesses linking the armed takeover of Bunia with Mr Lubanga), 1112 (many of the individuals who signed founding documents were, or became, members of the UPC/FPLC), 1116, noting that '[o]n 2 and 3 September 2002 [Mr Lubanga] appointed the executive of the UPC/FPLC, including Floribert Kisembo and Bosco Ntaganda – the same men who had been the architects of the rebellion against the RCD-ML and who had been actively involved in recruiting and training recruits prior to the takeover of Bunia' (footnote omitted).

⁴²⁷ [Lubanga Conviction Decision](#), paras 1119, 1135.

⁴²⁸ [Impugned Decision](#), para. 126.

⁴²⁹ [Mr Lubanga's Appeal Brief](#), paras 93-94.

⁴³⁰ [Impugned Decision](#), para. 142.

⁴³¹ [Impugned Decision](#), para. 142.

place outside the four localities mentioned in that decision. Therefore, it would not necessarily have been unreasonable for the Trial Chamber to consider allegations concerning training locations other than Bunia, Rwampara, Mandro, and Mongbwalu, provided the victims' accounts were coherent and credible.

218. Mr Lubanga alleges that the Trial Chamber misappreciated the facts by failing to draw conclusions as to the credibility of the accounts of victims who referred to commanding officers who did not appear in statements of witnesses given at trial.⁴³² The Appeals Chamber observes that the *Lubanga* Conviction Decision does not designate an exhaustive list of commanders responsible for training in, and recruitment for, the FPLC army. Rather, the conclusions drawn by Trial Chamber I as to any such specific persons are qualified by the words 'including', 'including particularly', 'such as', 'e.g.', and 'at least'.⁴³³ Moreover, the Appeals Chamber observes that Trial Chamber I described the UPC/FPLC's personnel hierarchy in a way that is clearly non-exhaustive and meant simply to identify some of the principal positions held within the organisation.⁴³⁴ Thus, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to consider requests for reparations that refer to names of commanding officers not specifically mentioned in the evidence discussed in the *Lubanga* Conviction Decision.⁴³⁵

(iii) Alleged failure in assessment of certificates of demobilisation

219. Mr Lubanga refers to Trial Chamber I's findings from the criminal trial regarding the probative value of logbooks from a demobilisation centre. He argues that because Trial Chamber I concluded that it could not rely on such logbooks, Trial Chamber II should not have relied on certificates of demobilisation in the Impugned

⁴³² [Mr Lubanga's Appeal Brief](#), paras 95-96.

⁴³³ See [Lubanga Conviction Decision](#), paras 911, 1045, 1112, 1267, 1271, 1352-1354.

⁴³⁴ See [Lubanga Conviction Decision](#), paras 1170-1176, describing the 'general hierarchy and structures within the UPC/FPLC, as well as the functions exercised by *some of its staff*' (emphasis added). See also [Lubanga Conviction Decision](#), para. 1214.

⁴³⁵ [Impugned Decision](#), paras 108-109. See also [Impugned Decision](#), para. 91, noting that 'the Judgment Handing Down Conviction does not, however, exhaustively enumerate [...] Mr Lubanga's co-perpetrators'.

Decision as the certificates and the logbooks were created at the same time and on the basis of the same information.⁴³⁶

220. The Appeals Chamber finds that Mr Lubanga has not substantiated his argument that the certificates of demobilisation were issued on the basis of the same information as that for the logbooks referred to in the *Lubanga* Conviction Decision. The Appeals Chamber also finds that the Trial Chamber generally approached certificates of demobilisation with caution, conceding that they were alone insufficient to establish the victim status,⁴³⁷ and considering other identification evidence in light of the fact that most of the applicants did not present a certificate of demobilisation.⁴³⁸ Therefore, the Appeals Chamber finds that Mr Lubanga has not demonstrated that the Trial Chamber erred by relying on certificates of demobilisation in its assessment of the requests.

(c) Conclusion on the 425 victims found to be eligible by the Trial Chamber

221. In view of the foregoing, the Appeals Chamber rejects Mr Lubanga's argument that the Trial Chamber made errors of law and misappreciated the facts in its findings on the eligibility of the 425 victims from the sample.

(ii) The finding as to the unidentified possible victims

222. Mr Lubanga challenges the Trial Chamber's findings as to the existence of 'hundreds and possibly thousands more victims' who are unidentified.⁴³⁹ Referring to the reports and demobilisation lists relied upon, Mr Lubanga argues that '[t]he relevance and reliability of these documents fall well short of the requisite standard of proof'.⁴⁴⁰

223. The Appeals Chamber acknowledges that the Trial Chamber set out only to determine an estimate of the approximate number of victims who had not already come forward during the proceedings before the Trial Chamber.⁴⁴¹ It is also

⁴³⁶ [Mr Lubanga's Appeal Brief](#), paras 82-88.

⁴³⁷ [Impugned Decision](#), para. 97.

⁴³⁸ [Impugned Decision](#), paras 100-101.

⁴³⁹ [Mr Lubanga's Appeal Brief](#), paras 106-109.

⁴⁴⁰ [Mr Lubanga's Appeal Brief](#), para. 108.

⁴⁴¹ [Impugned Decision](#), paras 199, 202, 218, 237.

acknowledged that the Trial Chamber did so in an attempt to fix the amount of Mr Lubanga's liability for collective reparations, as directed by the Appeals Chamber. However, the Appeals Chamber recalls its finding above that, if a trial chamber resorts to estimates as to numbers of victims, such estimates must be based on a sufficiently strong evidential basis.⁴⁴²

224. One of the factors that a trial chamber must consider in deciding what reparations are 'appropriate' for the purposes of article 75(2) of the Statute is how many victims are likely to come forward and benefit from collective reparations programs during the implementation phase.⁴⁴³ In its inquiry, a trial chamber must endeavour to obtain an estimate that is as concrete as possible. The Appeals Chamber will, on this basis, consider Mr Lubanga's arguments regarding the sources of documentary evidence relied upon – that is, the 26 reports of NGOs and international organisations entered into the record through the Registry⁴⁴⁴ (hereinafter: 'Additional Documents') and the demobilisation records. The Appeals Chamber will deal with these sources of evidence in turn.

(a) Reports of NGOs and International Organisations

225. Mr Lubanga first submits that the Trial Chamber committed an error of law by 'failing to take into account and respond to the Defence arguments' that called into question the relevance and reliability of the Additional Documents.⁴⁴⁵ It seems that Mr Lubanga is arguing that the Trial Chamber wholly failed to consider his submissions. The Appeals Chamber notes that the Trial Chamber did specifically consider Mr Lubanga's arguments, summarising them in the Impugned Decision.⁴⁴⁶ The Trial Chamber responded to these arguments by noting that the Additional Documents were relevant and that they 'appear fairly consistent with one another as regards the widespread use of child soldiers in Ituri'.⁴⁴⁷ The Trial Chamber also specifically dealt with the argument that some reports referred to children older than

⁴⁴² See *supra*, para. 90.

⁴⁴³ See *supra*, para. 89.

⁴⁴⁴ '[Order Instructing the Registrar to File Additional Documents in the Case Record](#)', dated 20 July 2017 and registered on 21 July 2017, ICC-01/04-01/06-3344-tENG.

⁴⁴⁵ [Mr Lubanga's Appeal Brief](#), paras 110-116.

⁴⁴⁶ [Impugned Decision](#), paras 214-216.

⁴⁴⁷ [Impugned Decision](#), para. 216.

15 years⁴⁴⁸ and to facts concerning the DRC as a whole, rather than the UPC/FPLC in Ituri.⁴⁴⁹ The Appeals Chamber therefore finds that Mr Lubanga has not demonstrated that the Trial Chamber did not consider his arguments.

226. Mr Lubanga further argues that the Trial Chamber erred by ‘eschewing any analysis of the reliability of these reports’,⁴⁵⁰ while ‘it is clear that the 26 additional documents entered in the record, which the Chamber relied on to set Mr Lubanga’s civil liability, fall short of the requisites of relevance and reliability’.⁴⁵¹ The Appeals Chamber, however, notes that the Trial Chamber’s approach was to refer to the Additional Documents ‘by way of illustration’.⁴⁵² The Trial Chamber also pointed to the consistency of these documents regarding ‘the widespread use of child soldiers in Ituri’.⁴⁵³ The Appeals Chamber also notes that the Trial Chamber applied coefficients to account for the scope of the reports, which in some cases was broader than that of the charges in the present case. For instance, the Trial Chamber applied a coefficient to account for the proportion of the ethnic Hema group⁴⁵⁴ and for the proportion of children under the age of 15 years.⁴⁵⁵ The Appeals Chamber considers that the Trial Chamber did address the concerns about the reliability of the Additional Documents.

227. Mr Lubanga makes a number of specific challenges to the relevance and reliability of the Additional Documents. He submits that some of them describe events outside of the time frame of the charges and events which concern the entire DRC and not the UPC/FPLC in Ituri.⁴⁵⁶ Mr Lubanga also argues that some of the estimates concern children older than 15 years.⁴⁵⁷ He also contends that the documents are based on hearsay, that some of them merely repeat estimates contained in others and that they are not specific about their sources.⁴⁵⁸

⁴⁴⁸ [Impugned Decision](#), para. 225; [Annex III to Impugned Decision](#), pp. 12-14.

⁴⁴⁹ [Annex III to Impugned Decision](#), pp. 10-12.

⁴⁵⁰ [Mr Lubanga’s Appeal Brief](#), para. 116.

⁴⁵¹ [Mr Lubanga’s Appeal Brief](#), para. 117.

⁴⁵² [Impugned Decision](#), para. 216.

⁴⁵³ [Impugned Decision](#), para. 216.

⁴⁵⁴ [Impugned Decision](#), para. 228; [Annex III to Impugned Decision](#), pp. 10-12.

⁴⁵⁵ [Impugned Decision](#), para. 225; [Annex III to Impugned Decision](#), pp. 13-14.

⁴⁵⁶ [Mr Lubanga’s Appeal Brief](#), para. 118.

⁴⁵⁷ [Mr Lubanga’s Appeal Brief](#), paras 119-120.

⁴⁵⁸ [Mr Lubanga’s Appeal Brief](#), paras 121-133.

228. The Appeals Chamber recalls that the Trial Chamber’s approach was to account for certain potential inaccuracies of the Additional Documents by means of coefficients. The Appeals Chamber also notes that the Trial Chamber referred to findings made by Trial Chamber I in the Conviction Decision regarding ‘a significant number of children under the age of 15 [...] used by the UPC/FPLC as escorts and bodyguards for the main staff and the commanders, between September 2002 and 13 August 2003’⁴⁵⁹ and ‘the widespread recruitment of young people, including children under the age of 15’.⁴⁶⁰ Furthermore, the Appeals Chamber recalls that the range of 2,451 to 5,938 direct victims – an estimate made on the basis of the analysis of the Additional Documents – concerns those who ‘served in the UPC’s ranks at some point during the time frame of the charges’.⁴⁶¹ This figure served the Trial Chamber to conclude that, ‘along with the 425 victims in the sample, hundreds and possibly thousands more victims were affected by the crimes of which Mr Lubanga was convicted’.⁴⁶² However, to set the amount of Mr Lubanga’s liability, the Trial Chamber also considered the parties’ submissions as to the number of ‘potentially eligible victims’⁴⁶³, ‘who might qualify’⁴⁶⁴ and ‘whom [...] [the parties] expect to represent’.⁴⁶⁵ As discussed earlier,⁴⁶⁶ the latter estimate is directly relevant to the amount of Mr Lubanga’s liability. Therefore, while not discounting Mr Lubanga’s concerns about the reliability of the Additional Documents, the Appeals Chamber finds that, given the Trial Chamber’s use of coefficients and the limited significance of the estimate based on these documents, it was not unreasonable for the Trial Chamber to rely on them to conclude that the 425 victims are only a sample of the potentially eligible victims and that hundreds and possibly thousands more victims suffered harm as a consequence of the crimes of which Mr Lubanga was convicted.⁴⁶⁷

229. The Appeals Chamber also notes Mr Lubanga’s argument that the Trial Chamber relied on a report of the World Bank in Annex III to the Impugned Decision

⁴⁵⁹ [Impugned Decision](#), para. 238, referring to [Lubanga Conviction Decision](#), para. 857.

⁴⁶⁰ [Impugned Decision](#), para. 238, referring to [Lubanga Conviction Decision](#), para. 911.

⁴⁶¹ [Impugned Decision](#), para. 243.

⁴⁶² [Impugned Decision](#), para. 244.

⁴⁶³ [Impugned Decision](#), para. 208.

⁴⁶⁴ [Impugned Decision](#), para. 208.

⁴⁶⁵ [Impugned Decision](#), para. 211.

⁴⁶⁶ *See supra*, para. 119.

⁴⁶⁷ [Impugned Decision](#), paras 199, 231, 240, 244.

of which he had no advance notice.⁴⁶⁸ The Trial Chamber acknowledged in Annex III that this report was not among annexes to its order of 21 July 2017, ‘the Chamber having had access to it only recently’.⁴⁶⁹ The Trial Chamber considered that it was nonetheless appropriate to rely on this report ‘in view of the role the World Bank played in the demobilization of child soldiers’.⁴⁷⁰ The Appeals Chamber expresses concern that Mr Lubanga did not have a sufficient opportunity to challenge the relevance and reliability of this document, but notes that Mr Lubanga does not substantiate the impact of this failure.

(b) Demobilisation records

230. Mr Lubanga argues that the Trial Chamber erred in law or misappreciated the facts by disregarding his submissions on the reliability of the demobilisation lists which the Trial Chamber considered when making an estimate as to the number of victims of the crimes of which he was convicted.⁴⁷¹ Specifically, he submits that the Trial Chamber erred by relying on such lists, contrary to a finding on their unreliability made in the *Lubanga* Conviction Decision by Trial Chamber I.⁴⁷² Mr Lubanga contends that most of the listed children provided the same date of recruitment, which, in his view, ‘strains credibility’.⁴⁷³ He argues that the Trial Chamber misapplied the requisite standard of proof by establishing mortality figures and the proportions of ethnic groups within the Ituri population.⁴⁷⁴

231. The Appeals Chamber notes that the lists in question here were entered into the record through the Registry during the reparations phase subsequent to trial, on 25 January 2017 and 20 February 2017.⁴⁷⁵ The Trial Chamber differentiated the lists used for reparations from those discussed at trial and Mr Lubanga refers to this differentiation in his present submissions. In Annex III to the Impugned Decision, the Trial Chamber explained as follows:

⁴⁶⁸ [Mr Lubanga’s Appeal Brief](#), para. 134.

⁴⁶⁹ [Annex III to Impugned Decision](#), para. 8, n. 25.

⁴⁷⁰ [Annex III to Impugned Decision](#), para. 8, n. 25.

⁴⁷¹ [Mr Lubanga’s Appeal Brief](#), paras 135-138, 142.

⁴⁷² [Mr Lubanga’s Appeal Brief](#), paras 139-140, 142.

⁴⁷³ [Mr Lubanga’s Appeal Brief](#), para. 141.

⁴⁷⁴ [Mr Lubanga’s Appeal Brief](#), paras 144-145.

⁴⁷⁵ Annex to ‘Rapport du Greffier sur l’exécution de l’Ordonnance ICC-01/04-01/06-3260’, dated 24 January 2017 and registered on 25 January 2017, ICC-01/04-01/06-3272-Conf-AnxIII; ‘Annex to ‘Transmission of the Observations of the Government of the Democratic Republic of the Congo in Response to Order ICC-01/04-01/06-3260’, 20 February 2017, ICC-01/04-01/06-3274-Conf-AnxI.

As regards the Defence's remarks on the need to follow the principle laid down by the Trial Chamber, it must be noted that the said principle does not appertain to demobilization records in general; it was set out with reference to a particular "logbook" which the Prosecution tendered in evidence. The lists containing, respectively, 282 and 202 names are not "logbooks" but documents of a different nature, purpose and origin.⁴⁷⁶ [Footnotes omitted.]

232. The Trial Chamber also found that the lists cover a 'significant subset of the persons concerned (15% of the 3,000 victims estimated by the TFV)', and that the particulars of children extracted from the DRC's databases were 'precisely recorded' in the lists. The Trial Chamber then concluded that the lists 'can be considered to have representative value'.⁴⁷⁷ The Appeals Chamber therefore finds that the Trial Chamber did consider Mr Lubanga's submissions⁴⁷⁸ on the reliability of the documents in question.

233. Furthermore, in the Impugned Decision the Trial Chamber relied on the lists to conclude that 'these two lists are a first indication that the total number of victims affected by the crimes of which Mr Lubanga was convicted is far greater than the number of persons in the sample who have established that they are victims for the purposes of reparations'.⁴⁷⁹ As discussed above, the Trial Chamber relied on a number of other reports, on the findings from trial, and on the parties' submissions to reach its finding as to Mr Lubanga's monetary liability. Therefore, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to rely on the demobilisation lists for the limited purpose of showing that the total number of victims affected by Mr Lubanga's crimes was 'far greater' than the 425 in the sample.

(c) Conclusion on 'unidentified possible victims'

234. Based on the foregoing, the Appeals Chamber finds that Mr Lubanga has not demonstrated an error.

(d) Conclusion

235. For the foregoing reasons, the Appeals Chamber rejects Mr Lubanga's second ground of appeal.

⁴⁷⁶ [Annex III to Impugned Decision](#), p. 14.

⁴⁷⁷ [Annex III to Impugned Decision](#), p. 14.

⁴⁷⁸ [Mr Lubanga's Submissions on Evidence](#), para. 62.

⁴⁷⁹ [Impugned Decision](#), para. 199.

2. *Mr Lubanga's third ground of appeal*

(a) **Submissions on appeal**

(i) *Mr Lubanga's submissions*

236. Mr Lubanga submits that the Trial Chamber erred in law or misappreciated the facts in finding that he had sufficient information to challenge the evidence brought despite the extensive redactions it permitted to the victims' requests for reparations.⁴⁸⁰ He submits that article 75(3) of the Statute and rules 94(2) and 97(3) of the Rules vest the convicted person with a right 'to canvass the submissions and the evidence brought before the bench' during the reparations stage.⁴⁸¹ He submits that the Court, under regulations 99 and 100 of the Regulations of the Registry, may order redactions from the victims' applications for participation or reparations 'where the safety of the persons in question so justifies'.⁴⁸² He argues that full disclosure to all parties is the rule and that redactions are an exception and that a trial chamber must conduct 'a careful case-by-case assessment, balancing the various interests at stake', the victims' need for protective measures and the accused's fair trial rights, in keeping with the principle of equality of arms.⁴⁸³

237. Mr Lubanga submits that the Trial Chamber committed an error of law, which had an impact on the final award, in depriving him of his fair trial rights when ordering systematic redactions in the absence of an objective risk.⁴⁸⁴ Mr Lubanga gives several examples of applicants for whom there was inadequate disclosure⁴⁸⁵ and argues that the Trial Chamber committed an error of law or, at the very least, clearly misappreciated the facts.⁴⁸⁶

(ii) *Victims V01's response*

238. Victims V01 point out that '[g]iven that the reparations will be collective only, they do not see how it is in the interests of [Mr Lubanga] to have an opportunity to

⁴⁸⁰ [Mr Lubanga's Appeal Brief](#), para. 157.

⁴⁸¹ [Mr Lubanga's Appeal Brief](#), para. 149.

⁴⁸² [Mr Lubanga's Appeal Brief](#), para. 151.

⁴⁸³ [Mr Lubanga's Appeal Brief](#), paras 152-155, referring to [Katanga Judgment on Pre-Trial Chamber I's First Decision](#), para. 70. See also [Mr Lubanga's Appeal Brief](#), paras 153-155.

⁴⁸⁴ [Mr Lubanga's Appeal Brief](#), paras 166, 171-172.

⁴⁸⁵ [Mr Lubanga's Appeal Brief](#), paras 193-196.

⁴⁸⁶ [Mr Lubanga's Appeal Brief](#), paras 198-207.

challenge the individual situation of each victim'.⁴⁸⁷ They submit that Mr Lubanga's argument 'contradicts [his] argument under the fourth ground [of appeal]', and that the cost of a collective reparations programme is 'only very partially influenced by the number of victims of the crimes committed – and at the very most by the number of persons who decide to participate in the programmes and even then only to a limited extent'.⁴⁸⁸

(iii) *Victims V02's response*

239. Victims V02 refer to security concerns and claim that the redactions to applications for reparations were in fact 'minor ones and cannot, alone, violate the right of the Defence to a fair trial'.⁴⁸⁹

(iv) *OPCV's response*

240. The OPCV submits that the issue raised now is *res judicata*.⁴⁹⁰ It also refers to the *Al Mahdi* Appeal Judgment on Reparations, recalling that the Appeals Chamber found that Trial Chamber VIII had 'erred in ordering victims to reveal their identity to Mr Al Mahdi as a precondition to having their claims for individual reparations assessed by the TFV', and claiming that this should find application even in the context of collective reparations.⁴⁹¹

(b) Relevant background

241. In the *Lubanga* Appeal Judgment on Reparations, the Appeals Chamber considered, *inter alia*, Mr Lubanga's argument that Trial Chamber I had denied him the opportunity to challenge the individual requests for reparations by finding that such requests were not necessary and by allowing extensive redactions.⁴⁹² The Appeals Chamber recalled its finding in the same judgment that Trial Chamber I's decision had been to order reparations on a collective basis under rule 98(3) of the Rules and not to rule on the merits of the individual requests, and that the Appeals Chamber had found no error in this respect. It recalled its finding that Trial Chamber

⁴⁸⁷ [Victims V01's Response to Mr Lubanga's Appeal](#), para. 46.

⁴⁸⁸ [Victims V01's Response to Mr Lubanga's Appeal](#), para. 46.

⁴⁸⁹ [Victims V02's Consolidated Response to the Appeal Briefs](#), paras 122-124.

⁴⁹⁰ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 39.

⁴⁹¹ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 40.

⁴⁹² [Lubanga Appeal Judgment on Reparations](#), para. 163, referring to [Mr Lubanga's A A2 A3 Appeal Brief](#), paras 39-40, 49-50, 54-59, and 61-69; *see also* [Mr Lubanga's A A2 A3 Appeal Brief](#), paras 48, 51-53, 60, and 70-78.

It's 'determination that it was more appropriate to award collective reparations operated as a decision denying, as a category, individual reparation awards'. It therefore considered that 'the issue of Mr Lubanga's ability to challenge individual reparation *requests* as such [was] moot'.⁴⁹³

242. The Appeals Chamber proceeded to interpret Mr Lubanga's argument to 'essentially raise the issue of whether the procedures provided for under rule 98 of the Rules of Procedure and Evidence infringe on his rights, given that the same individuals who filed individual requests may be eligible to participate in an award for collective reparations, but Mr Lubanga will not be able to challenge them in the manner he otherwise would have been able to under the application based procedures of rule 94 of the Rules of Procedure and Evidence'.⁴⁹⁴ Noting regulation 55 of the Regulations of the TFV, the Appeals Chamber observed that the 'Regulations of the Trust Fund provide for the inclusion of unidentified beneficiaries into a reparations programme and for their identification only at the implementation stage'.⁴⁹⁵ The Appeals Chamber concluded that 'the procedures under rule 98 of the Rules of Procedure and Evidence and the Regulations of the Trust Fund do not infringe on Mr Lubanga's rights'.⁴⁹⁶ In the amended order, appended to this judgment, the Appeals Chamber instructed the Registrar to consult 'with the victims who submitted individual applications for reparations in this case in order to seek their consent to disclosure of confidential information to the Trust Fund for purposes of participation in the eventual collective programme(s) that are to be designed by the Trust Fund'.⁴⁹⁷ Likewise, the Appeals Chamber instructed the TFV to, *inter alia*, 'permanently remove any confidential information it may have stored electronically or elsewhere in the case that consent is not granted' and, 'to seek consent to participate [in the collective reparation awards] from the victims whose applications are forwarded to it'.⁴⁹⁸ The Trial Chamber, once seized of this case, issued several decisions on the issue of redactions. These include the Order of 9 February 2016, the Order of 1 November 2016, the Order of 22 February 2017, and the Decision of 5 June 2017.

⁴⁹³ [Lubanga Appeal Judgment on Reparations](#), para. 164 (emphasis in the original).

⁴⁹⁴ [Lubanga Appeal Judgment on Reparations](#), para. 165.

⁴⁹⁵ [Lubanga Appeal Judgment on Reparations](#), para. 167.

⁴⁹⁶ [Lubanga Appeal Judgment on Reparations](#), para. 168.

⁴⁹⁷ [Lubanga Amended Reparations Order](#), para. 73.

⁴⁹⁸ [Lubanga Amended Reparations Order](#), para. 74.

Each is set out in further detail below, within the determination of this ground of appeal. In the Impugned Decision, the Trial Chamber recalled the orders it had issued on the subject, in addition to the filings by the parties.⁴⁹⁹ It set out its interpretation of the law regarding redactions in these proceedings and concluded that Mr Lubanga had ‘sufficient information to impugn the evidence brought against [him] in a process which duly afforded [him] notice and the opportunity to be heard, and, hence, a fair hearing’.⁵⁰⁰

(c) Determination by the Appeals Chamber

243. At the outset, the Appeals Chamber notes the OPCV’s argument that Mr Lubanga’s argument regarding the scope of redactions to the victims’ requests for reparations has been rejected twice – by the Appeals Chamber in 2015 and by the Trial Chamber – and ‘that this argument is no longer admissible at this stage of the proceedings since the issue is *res judicata*’.⁵⁰¹

244. The Appeals Chamber recalls that Mr Lubanga had previously alleged, on appeal, that Trial Chamber I had violated his right to challenge the individual requests for reparations by allowing extensive redactions to the victims’ identifying information in their individual requests for reparations.⁵⁰² As indicated above, the Appeals Chamber considered in its 2015 judgment that, given the type of reparations awarded in this case, the issue of Mr Lubanga’s ability to challenge individual requests was moot.⁵⁰³ This presumably included the issue of redactions to those requests. It is significant that, in 2015, the Appeals Chamber did not rule on the merits of Mr Lubanga’s argument. Furthermore, the circumstances are now materially different because the Trial Chamber itself assessed the eligibility of victims for reparations. Therefore, the 2015 ruling is not *res judicata* in this respect and the present ground of appeal is not inadmissible due to that ruling.

⁴⁹⁹ [Impugned Decision](#), paras 45-52.

⁵⁰⁰ [Impugned Decision](#), para. 59.

⁵⁰¹ [OPCV’s Consolidated Response to the Appeal Briefs](#), para. 39.

⁵⁰² [Lubanga Appeal Judgment on Reparations](#), para. 163, referring to [Mr Lubanga’s A A2 A3 Appeal Brief](#), paras 39-40, 49-50, 54-59, and 61-69; *see also* [Mr Lubanga’s A A2 A3 Appeal Brief](#), paras 48, 51-53, 60, and 70-78.

⁵⁰³ [Lubanga Appeal Judgment on Reparations](#), para. 164.

245. Regarding the second limb of the OPCV's objection, the Appeals Chamber considers that the Trial Chamber ruling on the issue of redactions does not preclude Mr Lubanga from raising it on final appeal, as any decisions thereon were procedural decisions prior to, and leading up to, issuance of the Impugned Decision.⁵⁰⁴ The Appeals Chamber will consider the arguments made on appeal concerning the level of redactions applied.

246. Mr Lubanga makes submissions as to the legal framework that should regulate a chamber's decision in relation to redactions.⁵⁰⁵ He argues that, in deciding that he had sufficient information to impugn the evidence, despite the extensive redactions made, the Trial Chamber 'made an error of law or, at the very least, clearly misappreciated the facts'.⁵⁰⁶ Before addressing Mr Lubanga's arguments, the Appeals Chamber finds it necessary to consider the legal framework regulating the information a convicted person should receive in reparations proceedings, a necessary consideration to inform the Chamber of the limitations, if any, which can subsequently be made. In this regard, article 75(3) of the Statute and rules 94(2), 95(1) and 97(3) of the Rules deal with the manner in which, *inter alia*, the convicted person participates in reparations proceedings. Article 75(3) of the Statute provides that

[b]efore making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person [...].

This provision is further implemented through rules 94(2) and 95(1) of the Rules. Rule 94(2), dealing with requests for reparations, is relevant to the instant case, given the manner in which the Trial Chamber proceeded and, in particular, its decision to assess eligibility itself. It provides that

[a]t commencement of the trial and subject to any protective measures, the Court shall ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges [...]. Those notified shall file with the Registry any representation made under article 75, paragraph 3.

⁵⁰⁴ See *supra*, para. 135; [Ngudjolo A Judgment](#), para. 247. See also [Kony et al. OA 3 Judgment](#), paras 46-47.

⁵⁰⁵ [Mr Lubanga's Appeal Brief](#), paras 147-155.

⁵⁰⁶ [Mr Lubanga's Appeal Brief](#), para. 157.

247. In the instant case, it seems that the majority of victims' dossiers were gathered during the reparations proceedings before the Trial Chamber and were therefore not, as per rule 94(2) of the Rules, notified '[a]t commencement of the trial'. No other provision regulates what should happen with requests that are submitted at a later stage. However, bearing in mind the spirit of the provision – that, among others, the person who is the subject of the proceedings should receive the information on the basis of which the Chamber will make an award against him or her – and the principle of equality of arms, the Appeals Chamber considers that it should equally apply in respect of dossiers received after the commencement of the trial. In principle, and subject to what is said below, any such dossiers should therefore be notified to the convicted person in a timely manner allowing him or her to have adequate time to make representations thereon.

248. In this regard, the Appeals Chamber notes that, rule 97(3) of the Rules provides that, '[i]n all cases, the Court shall respect the rights of victims and the convicted person'. The Appeals Chamber determined, in its 2015 judgment in this case, that among the rights a convicted person enjoys is the right 'to a fair and impartial trial'.⁵⁰⁷ As the trial of the person has concluded, in the context of reparations, this right is understood to be the right to fair and impartial reparations proceedings. In its interpretation of the applicable provisions, the Appeals Chamber will be guided by human rights jurisprudence in order to ensure that its interpretation is consistent with internationally recognised human rights. In the case law of international human rights bodies, the concept of a 'fair and impartial trial' includes the principle of equality of arms in an adversarial proceeding which, in principle, is the same in both civil and criminal cases.⁵⁰⁸ Equality of arms implies that each party must be afforded a reasonable opportunity to present his or her case under conditions

⁵⁰⁷ [Lubanga Amended Reparations Order](#), para. 49.

⁵⁰⁸ [Dombo Beheer B.V. v. the Netherlands](#), para. 33; [Nideröst-Huber v. Switzerland](#), paras 23, 28; [Werner v. Austria](#), paras 61-66; [Perić v. Croatia](#), paras 18-19. The IACtHR holds that 'minimum guarantees established' for criminal cases 'should also apply to [matters which concern the determination of the rights and obligations of a civil, labour, fiscal or any other nature] and, therefore, in that respect, a person has the right to due process in the terms recognized for criminal matters, to the extent that it is applicable to the respective procedure' ([Ivcher-Bronstein v. Peru](#), para. 103). The HRC has recognised the right to a fair trial including the guarantee of equality of arms between the parties in civil cases, see [Jansen-Gielen v. The Netherlands](#), para. 8.2; [Aarela and Nakkalajarvi v. Finland](#), para. 7.4.

that do not place him or her at a substantial disadvantage *vis-à-vis* the other party.⁵⁰⁹ Each party must be given the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party.⁵¹⁰ Indeed, at stake here is the ‘litigants’ confidence in the workings of justice, which is based on, *inter alia*, the knowledge that they have had the opportunity to express their views on every document in the file’.⁵¹¹ That said, the Appeals Chamber recognises that reparations proceedings before this Court are *sui generis* and, therefore, the principles set out above apply to the reparations proceedings where appropriate and in accordance with how they are being conducted in each case.

249. Turning to the possible limitations that may be made to the provision of information to the convicted person, in notifying requests for reparations, rule 94(2) of the Rules provides for notification to be ‘subject to any protective measures’. Protective measures are addressed in article 68(1) of the Statute, which provides that ‘[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims. [...]. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’. Various provisions regulate disclosure and redactions in the criminal phase of the proceedings but, other than provisions in the Regulations of the Registry⁵¹² that regulate action by that organ, there are no other specific provisions regulating redactions in reparations proceedings.

250. The Appeals Chamber addressed this issue in the case of *Al Mahdi* when it decided on a challenge by the victims to the fact that, if they wished to be considered eligible for individual reparations, they were required to disclose their identity to the

⁵⁰⁹ [Dombo Beheer B.V. v. the Netherlands](#), para. 33; [Werner v. Austria](#), para. 63; [Beer v. Austria](#), para. 17; [Perić v. Croatia](#), para. 19; [Regner v. the Czech Republic](#), para. 146.

⁵¹⁰ [Ruiz Mateos v. Spain](#), para. 63; [McMichael v. United Kingdom](#), para. 80; [Lobo Machado v. Portugal](#), para. 31; [Werner v. Austria](#), paras 65-67; [Beer v. Austria](#), para. 17; [Pellegrini v. Italy](#), para. 44.

⁵¹¹ [Nideröst-Huber v. Switzerland](#), para. 29; [Beer v. Austria](#), para. 18; [Ziegler v. Switzerland](#), para. 38; see also [Gryaznov v. Russia](#), paras 52-53 (finding a violation of the principle of equality of arms where an applicant is not given access to the opposing parties’ observations and evidence and thus deprived of an ‘opportunity to comment on the observations and to question the authenticity, relevance and lawfulness of the evidence’; the ECtHR held that the principle of adversarial proceedings and equality of arms ‘requires that each party be given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the other party’).

⁵¹² Regulations 97-100.

convicted person for the purposes of the eligibility screening that would take place by the TFV.⁵¹³

251. First, the Appeals Chamber would note Mr Lubanga's argument that Mr Al Mahdi's rights, as considered by the Appeals Chamber at that time, were not affected in the way his were in this case.⁵¹⁴ The Appeals Chamber notes that that case concerned redactions during the eligibility screening by the TFV, after the monetary liability of Mr Al Mahdi had already been fixed by the trial chamber in that case (and confirmed by the Appeals Chamber). The Appeals Chamber stated that 'the Trial Chamber accorded too much weight to the role of Mr Al Mahdi in the screening process and failed to properly consider the concerns that had been expressed by the relevant victims, when they had asked for a redacted version of their applications, excluding their identifying information, to be filed in the first place'; it noted that 'the Trial Chamber made a wholesale, general ruling, based on concerns for the role of the defence, that all victims' identities should be disclosed [...] [and] failed to explain why circumstances had changed to the extent they had, to justify such a finding, in particular when these identities had been redacted until the moment of the Impugned Decision'.⁵¹⁵ The Appeals Chamber noted that Mr Al Mahdi's interests at that particular stage of the proceedings were limited, in that his monetary liability had already been set and the results of the screening process would have no impact on this.⁵¹⁶ It stated that '[a] wholesale ruling, granting access to all victims' identifying information, at a stage of the proceedings where the interest of the defence is limited in this way, is disproportionate'.⁵¹⁷ It concluded that those applying for reparations should be eligible for screening by the TFV even if they did not wish to disclose their identity to Mr Al Mahdi.⁵¹⁸

252. Thus, in the case of *Al Mahdi*, the Appeals Chamber overturned the Trial Chamber's decision and authorised, in a general manner, the TFV to screen (all) applicants even if they did not consent to disclose their identities to the defence, on

⁵¹³ [Al Mahdi Judgment on Reparations](#).

⁵¹⁴ [Mr Lubanga's Appeal Brief](#), paras 186-187

⁵¹⁵ [Al Mahdi Judgment on Reparations](#), para. 92.

⁵¹⁶ [Al Mahdi Judgment on Reparations](#), para. 93.

⁵¹⁷ [Al Mahdi Judgment on Reparations](#), para. 93.

⁵¹⁸ [Al Mahdi Judgment on Reparations](#), para. 95.

the basis that Mr Al Mahdi's interest was limited at that particular stage of the proceedings as the Trial Chamber had already fixed his monetary liability. In the instant case, the challenge concerns a different stage of the proceedings. The Trial Chamber had yet to rule on Mr Lubanga's monetary liability and ordered redactions, in a general manner, to all requests for reparations which formed part of the information it was then assessing with a view to deciding on reparations and, in particular, the monetary liability of Mr Lubanga. Therefore, the Appeals Chamber agrees that Mr Lubanga's interest is not limited in the present proceedings in the same way in which Mr Al Mahdi's interest was in his case. Nevertheless, the Appeals Chamber notes that, as set out below, given the Trial Chamber's approach to the setting of the amount of Mr Lubanga's liability, the impact of individual eligibility assessments on Mr Lubanga's financial liability is also limited.

253. The Appeals Chamber's reasoning in *Al Mahdi*, in addressing the issue of redactions to requests for reparations, is pertinent. The Appeals Chamber referred to its jurisprudence on redactions in the criminal phase of the trial, which the Appeals Chamber finds equally helpful in the instant case. The Appeals Chamber noted that

[w]hen ruling on requests for redactions, a trial chamber must take into account and balance the rights and interests of the parties as per article 68 of the Statute, which provides that “[t]he Court shall take appropriate measures to protect the safety [...] of victims and witnesses. [...] These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. Although said in the context of criminal proceedings, the Appeals Chamber has stated that, in so doing, a chamber should apply the principle of proportionality, in the sense of balancing those two requirements, and make its determination on a case-by-case basis, taking into account the “various interests involved”. The Appeals Chamber has further elaborated on the “appropriate factors” it considered a chamber should take into consideration and balance, and summarized them as such:

Whether information relating to persons at risk may be redacted must be determined on a case-by-case basis. The Appeals Chamber has had previous occasion to set out those factors to be addressed by the Pre-Trial Chamber when considering a request for non-disclosure prior to the hearing to confirm the charges, pursuant to rule 81(4). Those factors can be summarised briefly as: a thorough consideration of the danger that the disclosure of the identity of the person may cause; the necessity of the protective measure, including whether it is the least intrusive measure necessary to protect the person concerned; and the fact that any protective measures taken shall not be prejudicial to or

inconsistent with the rights of the accused and a fair and impartial trial.⁵¹⁹

254. The Appeals Chamber therefore recognises that the right to receive information in proceedings at this Court may be limited in certain circumstances. Indeed, the general fair trial right to receive relevant evidence is not absolute.⁵²⁰ In the context of criminal proceedings, there may be restrictions on the right to a fully adversarial procedure where ‘strictly necessary in the light of a strong countervailing public interest, such as [...] the protection of the fundamental rights of another person’.⁵²¹ In this sense, the ECtHR has held that fair trial principles require that the difficulties caused to the defendant by a limitation on his or her rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.⁵²²

255. During the reparations phase of this case, the Trial Chamber noted the principle of proportionality applied in the consideration of redactions to evidence submitted in the investigation and criminal trial and found that ‘the same principles apply to the reparations phase’.⁵²³ It is also noted that, in the context of victim participation in the criminal trial, Trial Chamber I applied the above-mentioned human rights principles, expressed as the ‘principle of proportionality’, to Mr Lubanga’s right to disclosure of victims’ applications and the protective measures that may be imposed. It stated that protective measures should: i) restrict the rights of the suspect or accused only as far as necessary, and ii) be put in place where they are the

⁵¹⁹ [Al Mahdi Judgment on Reparations](#), para. 90, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, ‘[Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”](#)’, 14 December 2006, ICC-01/04-01/06-773, para. 34; *The Prosecutor v. Thomas Lubanga Dyilo*, ‘[Reasons for the “Decision on the Prosecutor’s request for redactions for the purposes of disclosure”](#)’, 19 June 2014, ICC-01/04-01/06-3115-Red (OA4 OA5 OA6), para. 5; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ‘[Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9”](#)’, 27 May 2008, ICC-01/04-01/07-521 (OA5), paras 2, 35, 38; *The Prosecutor v. Germain Katanga*, ‘[Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”](#)’, 13 May 2008, ICC-01/04-01/07-476 (OA2), paras 52, 57, 58, 65; [Katanga Judgment on Pre-Trial Chamber I’s First Decision](#), para. 66; *The Prosecutor v. Thomas Lubanga Dyilo*, ‘[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”](#)’, 13 October 2006, ICC-01/04-01/06-568, para. 39.

⁵²⁰ [Kennedy v. the United Kingdom](#), para. 187; [Regner v. the Czech Republic](#), para. 148.

⁵²¹ [Kennedy v. the United Kingdom](#), para. 184; see also [Regner v. the Czech Republic](#), para. 148.

⁵²² [Kennedy v. the United Kingdom](#), para. 184.

⁵²³ [Decision of 5 June 2017](#), paras 4-5.

only sufficient and feasible measure.⁵²⁴ In the Impugned Decision, the Trial Chamber reiterated that it ‘must strike a fair balance between the divergent rights and interests of the victims on the one hand and those of the convicted person on the other’.⁵²⁵ In this sense, the Appeals Chamber notes that the Trial Chamber correctly identified the relevant general considerations applicable to redactions to victims’ requests for reparations.

256. The Appeals Chamber would note that the guiding principle for trial chambers must be to ensure that the convicted person, as a party to the litigation, has a meaningful opportunity to challenge the information on the basis of which a chamber will make an award against him or her. In reaching a decision on redactions to any information that is before it, trial chambers should apply the principles recalled in the *Al Mahdi* case above, weighing the different interests at stake. In doing so, the Appeals Chamber considers that in reparations proceedings, a trial chamber should also take into account the relevance of the information at issue and the purpose for which it will be relied upon, including whether, in reality, its non-disclosure affects the convicted person’s rights. For example, if the information in the requests is considered with a view to deciding on collective reparations but not with a view to deciding on the merits of the individual requests, this may also be taken into account. What this means will depend on the circumstances of each case.

257. The Appeals Chamber notes that the ultimate purpose for which the Trial Chamber used the requests for reparations was limited. In this regard, even though the Trial Chamber made findings as to the eligibility of the 473 victims who filed dossiers before it, it is not clear to the Appeals Chamber that the overall monetary award made, USD 10,000,000, would have changed had the number of eligible victims been different. The overall award made was also based on, *inter alia*, the Trial Chamber’s

⁵²⁴ [‘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’](#), dated 6 May 2008 and registered on 7 May 2008, ICC-01/04-01/06-1308, para. 25; *see also* Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, [‘Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants’](#), 22 February 2010, ICC-01/05-01/08-699, paras 25-26.

⁵²⁵ [Impugned Decision](#), para. 55.

finding as to the additional ‘hundreds and possibly thousands’ of other victims, some of whom may be identified during the implementation of reparations.⁵²⁶ The Appeals Chamber recalls, in this context, that the Trial Chamber assessed the 473 dossiers, as a sample,⁵²⁷ in the context of determining Mr Lubanga’s overall monetary liability and in the knowledge that there were additional victims who had not yet been identified.

258. These considerations will guide the Appeals Chamber’s review of the Trial Chamber’s decision-making approach regarding redactions to be applied to victims’ requests for reparations in this case.

259. As for whether the Trial Chamber correctly assessed the need for redactions in this case, the Appeals Chamber recalls that the Trial Chamber had issued several decisions related to this question and included its findings thereon in the Impugned Decision.

260. In the Order of 9 February 2016, the Trial Chamber stated that it would ‘not be able to rule on the monetary amount of Mr Lubanga’s liability until the potential victims [had] been identified and it [had] examined both their status as victims eligible to benefit from the reparations and the extent of the harm they have suffered. In this context, the Chamber recalls that it is responsible for deciding on the status of eligible victims once the Defence has had the opportunity to submit its observations on the eligibility of each victim’.⁵²⁸ The Trial Chamber instructed the TFV to submit a file with relevant information for each potential victim and to ‘obtain the potential victims’ written consent to transmit this information to the Defence, i.e. their identity, their status as direct or indirect victims and the description of the factual allegations, including the harm suffered’.⁵²⁹

261. On 1 November 2016, the Trial Chamber issued an order instructing the Registry to conduct an assessment of the security situation in the Ituri region and to

⁵²⁶ [Impugned Decision](#), para. 280.

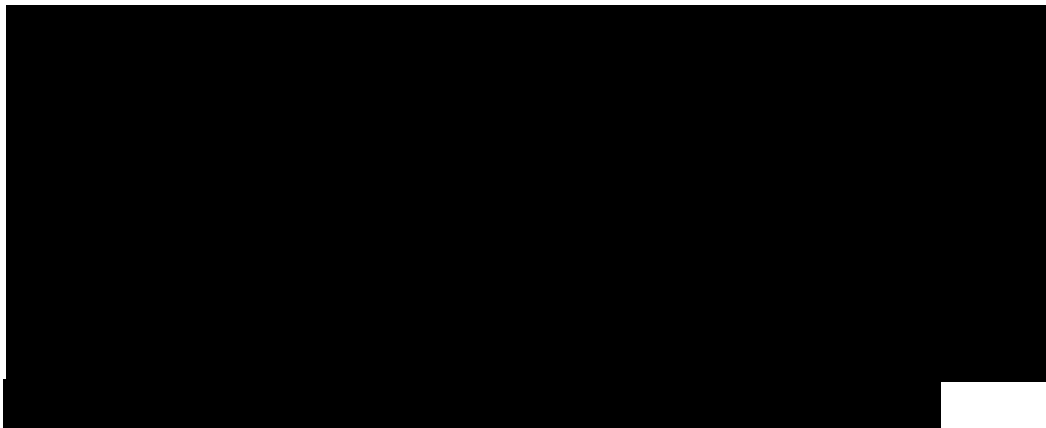
⁵²⁷ [Impugned Decision](#), paras 35, 36, 37.

⁵²⁸ [Order of 9 February 2016](#), para. 14.

⁵²⁹ [Order of 9 February 2016](#), para. 17.

transmit a report to it by 30 November 2016.⁵³⁰ In doing so, the Trial Chamber noted that, following its Order of 9 February 2016, the TFV voiced concerns regarding the process for identifying victims and informed it of the unwillingness of some victims to participate in collective reparations due to security concerns.⁵³¹ It noted that Victims V01 and V02 had submitted that potentially eligible victims were hesitant or unwilling to reveal their identity to the Defence, because Mr Lubanga still holds influence over their communities and that the OPCV stressed the real danger posed by disclosing the identity of the victims to the Defence in the light of the current situation in Ituri.⁵³² It also recalled that, at the oral hearing, the Women’s Initiative for Gender Justice spoke of the victims’ concerns for their safety and fears of being the target of retaliation were they to participate in collective reparations projects.⁵³³ The Trial Chamber also noted Mr Lubanga’s submissions at the hearing that there was a dearth of objective information about the security situation in the Ituri region and the legitimacy of the fears of retaliation expressed by the victims.⁵³⁴

262. The Registry submitted its report on 30 November 2016,⁵³⁵ concluding as follows:



⁵³⁰ Order of 1 November 2016, p. 5.

⁵³¹ Order of 1 November 2016, para. 2, referring to [First Submission of Victim Dossiers](#), para. 56. *See also* [Impugned Decision](#), para. 46.

⁵³² Order of 1 November 2016, para. 2. *See also* [Impugned Decision](#), para. 47.

⁵³³ Order of 1 November 2016, para. 2. *See also* [Impugned Decision](#), para. 48.

⁵³⁴ Order of 1 November 2016, para. 3. *See also* [Impugned Decision](#), para. 49.

⁵³⁵ Report of 30 November 2016.

⁵³⁶ [REDACTED]

263. In the Order of 22 February 2017, dealing with the transmission of victims' files to Mr Lubanga, the Trial Chamber set out modalities of redactions.⁵³⁷ In particular, it ordered the redaction from every dossier of 'information pertaining to the current residence or other contact information that may be used to locate victims who may be eligible'.⁵³⁸ It stated that 'the identities of victims who may be eligible should not be redacted if they [had] consented to the disclosure of such information to the Defence' but that for those who had 'refused to disclose their identities to the Defence for security reasons', the files should be provided to Mr Lubanga at this stage of the proceedings with their names and other identifying information redacted, 'mindful of the victims' concerns'.⁵³⁹ The Trial Chamber also noted that 'information describing the harm suffered and the incidents that caused it may also be useful in enabling the Defence to gauge the extent of the harm alleged'.⁵⁴⁰ It therefore found 'that any information relating strictly to the description of the harm suffered, the events that caused the harm, and the link between such harm and the crimes of which Mr Lubanga has been convicted, should not be redacted, except for information that might reveal the identities of victims who may be eligible who have refused to disclose that information to the Defence'.⁵⁴¹

264. On 5 June 2017, the Trial Chamber rejected Mr Lubanga's application for lesser redacted versions of some of the victims' dossiers. The Trial Chamber considered that,

in all matters relating to reparations, the Chamber must implement appropriate measures to ensure the safety, physical and psychological well-being and privacy of potentially eligible victims. The Chamber further recalls that nothing in the principles applicable to the reparations phase may "prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial". During the reparations phase, as during any proceedings before the Court, the Chamber must "[TRANSLATION] strike a fair balance between the divergent rights and interests of the victims and of the convicted person".⁵⁴²

⁵³⁷ [Order of 22 February 2017](#), para. 13.

⁵³⁸ [Order of 22 February 2017](#), para. 14.

⁵³⁹ [Order of 22 February 2017](#), paras 15-16.

⁵⁴⁰ [Order of 22 February 2017](#), para. 18.

⁵⁴¹ [Order of 22 February 2017](#), para. 13.

⁵⁴² [Decision of 5 June 2017](#), para. 5.

265. The Trial Chamber rejected the argument that only information regarding the current whereabouts of victims, contained in the contact information part of the form, should be redacted and found that it may be necessary to redact a place name found elsewhere in the forms.⁵⁴³ The Trial Chamber also rejected the argument that a large amount of information not related to the current whereabouts in particular in sections of the dossiers dealing with the description of events (places of enlistment and combat, names of camps and commanders and duties of children conscripted or enlisted into the FPLC, or used to participate actively in hostilities) had been redacted and ‘that this information is material to [Mr Lubanga’s] examination of the applicants’ eligibility’.⁵⁴⁴ Noting the Registry’s argument that it had redacted information that could identify third parties, the Trial Chamber stated ‘that any information which might be used to identify and locate a person named or mentioned in an application for reparations, but who has not expressly consented to the disclosure of his or her identity to the Defence must also be redacted’ and that it was ‘justified to redact a place name that might be used to locate a witness or a relative of a Potentially Eligible Victim, the role of a former child soldier [...] or a commander’s name that might be used to identify the direct Potentially Eligible Victim’.⁵⁴⁵ The Trial Chamber found that ‘despite the redactions, the forms disclose enough information for the Defence to meaningfully exercise its right to respond to the files of Potentially Eligible Victims’.⁵⁴⁶

266. The Trial Chamber also addressed the issue of redactions in the Impugned Decision, where it recalled the need to ‘strike a fair balance between the divergent rights and interests of the victims on the one hand and those of the convicted person on the other’.⁵⁴⁷ The Trial Chamber referred to the Appeals Chamber’s finding that ‘the rules applying to criminal proceedings brought against an accused person do not necessarily find application at the reparations phase’.⁵⁴⁸

⁵⁴³ [Decision of 5 June 2017](#), para. 9.

⁵⁴⁴ [Decision of 5 June 2017](#), para. 10.

⁵⁴⁵ [Decision of 5 June 2017](#), paras 11-12.

⁵⁴⁶ [Decision of 5 June 2017](#), para. 13.

⁵⁴⁷ [Impugned Decision](#), para. 55, referring to [Katanga Order for Reparations](#), para. 18. *See also* articles 64 (2) and 68 (1) of the Statute.

⁵⁴⁸ [Impugned Decision](#), para. 55, referring to [Lubanga Appeal Decision on Admissibility](#), para. 70.

267. The Trial Chamber summarised the [REDACTED] and pointed out that the redactions were prompted by concerns raised by the potentially eligible victims themselves.⁵⁴⁹ The Trial Chamber underscored that, in *Katanga*, the victims voiced no such concerns, and yet Trial Chamber II considered the redaction of their contact details to be necessary.⁵⁵⁰ The Trial Chamber found that most of the potentially eligible victims agreed to disclose their identity and, upon an initial perusal of the dossiers, the Trial Chamber noticed that those potential victims who had so agreed and those who had refused furnished similar statements recounting the events and supporting documentation to bolster similar allegations. That being so, the Trial Chamber considered that Mr Lubanga was in a position to make submissions on the dossiers of victims which were similar to the dossiers of those potentially eligible victims who had refused to disclose their identity to Mr Lubanga.⁵⁵¹

268. In light of what it had found, and per the Decision of 5 June 2017, the Trial Chamber concluded as follows:

the Chamber is satisfied that [Mr Lubanga] had sufficient information to impugn the evidence brought against [him] in a process which duly afforded [him] notice and the opportunity to be heard, and, hence, a fair hearing. Accordingly, the Chamber, as guarantor of the interests of the victims and the Defence, in considering the dossiers and the Defence submissions thereon, has decided to take account of all of the information furnished by the potentially eligible victims, including redacted information. Likewise, in setting the size of the reparations award for which Mr Lubanga is liable, the Chamber has decided also to consider the dossiers of those potentially eligible victims who refused to disclose their identity to [Mr Lubanga], where the dossiers satisfy the requisite conditions.⁵⁵²

269. Mr Lubanga's first specific argument is that the Trial Chamber systematically redacted 'information which could reveal the applicants' whereabouts, even though many of them expressed no fear for their safety'.⁵⁵³ Mr Lubanga notes that, '[i]n 13 years of proceedings, none of the victims or witnesses whose identity was disclosed

⁵⁴⁹ [Impugned Decision](#), para. 57, referring to [Registry's First Transmission of Dossiers](#), para. 18. See also [Registry's Second Transmission of Dossiers](#), para. 10.

⁵⁵⁰ [Impugned Decision](#), para. 57, referring to Trial Chamber II, *The Prosecutor v. Germain Katanga*, 'Decision on the "*Demande de clarification concernant la mise en œuvre de la Règle 94 du Règlement de procédure et de preuve*" and future stages of the proceedings', 8 May 2015, ICC-01/04-01/07-3546-tENG, p. 10.

⁵⁵¹ [Impugned Decision](#), para. 58.

⁵⁵² [Impugned Decision](#), para. 59.

⁵⁵³ [Mr Lubanga's Appeal Brief](#), para. 158.

confidentially to Mr Lubanga have been subjected to pressure or retaliation'.⁵⁵⁴ He argues that the Trial Chamber did not consider the dossiers case-by-case in order to assess the risk of danger in case of disclosure, and did not consider making them available to him confidentially.⁵⁵⁵ He argues that, in ordering redactions in this manner, the Trial Chamber made an error of law.⁵⁵⁶ He also argues that the Trial Chamber had a duty to assess, even if it found a risk, the relevance of the information to the defence.⁵⁵⁷ He argues that, because the Trial Chamber carried out a detailed and individualised analysis of each of the requests, he should have been able to make detailed and individualised submissions on them.⁵⁵⁸ And, that his rights were clearly prejudiced as the Trial Chamber used its eligibility findings to reach the monetary value of USD 3,400,000.⁵⁵⁹

270. The Appeals Chamber first notes that it is not the case that the Trial Chamber did not individually assess the need for redactions in any of the individual requests before it. In its Decision of 5 June 2017, the Trial Chamber, in answering a challenge by Mr Lubanga, stated that it had reviewed the 68 files that Mr Lubanga had challenged and was satisfied that the redactions in place were justified.⁵⁶⁰

271. However, leaving this aside, the Appeals Chamber recalls again the circumstances of this case as set out above, in which the requests for reparations had a limited purpose. In such a context, it is not necessarily the case, as argued by Mr Lubanga, that a trial chamber is required, as a matter of law, to 'conduct a case-by-case assessment' of the need for redactions in each individual request for reparations.⁵⁶¹ It may be that the circumstances of a particular case, and the information before it, satisfies a trial chamber that a wholesale ruling, permitting redactions of certain categories of information in all requests for reparations, is reasonable. Whether this is the case will depend on the facts of the case before the chamber. Ultimately, what is required is a careful assessment, as per the principles set

⁵⁵⁴ [Mr Lubanga's Appeal Brief](#), para. 165.

⁵⁵⁵ [Mr Lubanga's Appeal Brief](#), paras 159, 161, 165.

⁵⁵⁶ [Mr Lubanga's Appeal Brief](#), para. 166.

⁵⁵⁷ [Mr Lubanga's Appeal Brief](#), para. 167.

⁵⁵⁸ [Mr Lubanga's Appeal Brief](#), para. 205.

⁵⁵⁹ [Mr Lubanga's Appeal Brief](#), paras 187-188.

⁵⁶⁰ [Decision of 5 June 2017](#), para. 13.

⁵⁶¹ [Mr Lubanga's Appeal Brief](#), para. 153.

out and the facts of the case, with a result that fully protects the right of the convicted person to have knowledge of, and to comment on, the observations filed or evidence adduced by the other party. The Appeals Chamber would recall the Order of 22 February 2017 in which the Trial Chamber issued certain principles that should apply to the situation of redactions in this case. Fixing such principles is not *per se* an error as long as the information before the chamber justifies it in the circumstances of the case.

272. As for his specific argument in relation to redaction of the information regarding the current whereabouts of victims, Mr Lubanga argues that the redactions made it impossible for him to address the dossiers submitted and that disclosure of an applicant's name and surname is insufficient for him to make enquiries. He argues that, without information as to the applicants' current whereabouts, he could not properly investigate their claims.⁵⁶² The Appeals Chamber notes that, in view of the above-mentioned limited purpose of the assessment of the individual dossiers, it was not an error for the Trial Chamber to consider that the whereabouts of victims could be redacted, given the security concerns of which the Trial Chamber was aware. As such redactions did not result in infringement of his rights, the Appeals Chamber finds no error in the Trial Chamber's decision to authorise redactions to the whereabouts of persons who had consented to the disclosure of their dossiers.

273. Mr Lubanga's second specific argument is that the Trial Chamber erred in ordering the redaction of information that could identify the persons whose statements were appended to the applicants' dossiers without assessing a risk to safety.⁵⁶³ In the Decision of 5 June 2017, the Trial Chamber addressed Mr Lubanga's argument that a large amount of information not related to the current whereabouts of victims in particular sections of the dossiers dealing with the description of events (places of enlistment and combat, names of camps and commanders and duties of children conscripted or enlisted into the FPLC, or used to participate actively in hostilities) had been redacted and 'that this information is material to [Mr Lubanga's] examination of the applicants' eligibility'.⁵⁶⁴ The Trial Chamber noted the Registry's argument that it

⁵⁶² [Mr Lubanga's Appeal Brief](#), paras 168-170.

⁵⁶³ [Mr Lubanga's Appeal Brief](#), para. 173.

⁵⁶⁴ [Decision of 5 June 2017](#), para. 10.

had redacted information that could identify third parties and stated ‘that any information which might be used to identify and locate a person named or mentioned in an application for reparations, but who has not expressly consented to the disclosure of his or her identity to the Defence must also be redacted’ and that it was ‘justified to redact a place name that might be used to locate a witness or a relative of a Potentially Eligible Victim, the role of a former child soldier [...] or a commander’s name that might be used to identify the direct Potentially Eligible Victim’.⁵⁶⁵ The Trial Chamber concluded, after reviewing the files referred to by Mr Lubanga, and the redactions he contested, that the redactions were ‘reasonable and justified’ and that ‘the forms disclose enough information for the Defence to meaningfully exercise its right to respond to the files of Potentially Eligible Victims’.⁵⁶⁶ Again, given the context of these proceedings, it was not an error for the Trial Chamber in principle to make such a finding and, on the other hand, the security concerns, which the Trial Chamber appears to have considered to also apply to the persons concerned in the same way as they did to victims themselves, justified redacting that information.

274. Third, Mr Lubanga challenges the ordering of redactions of the names and information that could identify the possible victims who had not consented to the disclosure of their identities to the defence.⁵⁶⁷ He argues that this was not based on a ‘real risk’, that some applicants had said they did not fear for their safety, referring to examples, and that [REDACTED]

[REDACTED]⁵⁶⁸ He also states that some had consented to disclosure but that their accounts were redacted.⁵⁶⁹

275. Regarding the examples of victims whose identity was redacted but who had stated that they did not fear for their safety,⁵⁷⁰ the Appeals Chamber recalls that the Trial Chamber had stated that, ‘the identities of victims who may be eligible should not be redacted if they [had] consented to the disclosure of such information to the

⁵⁶⁵ [Decision of 5 June 2017](#), paras 11-12.

⁵⁶⁶ [Decision of 5 June 2017](#), para. 13.

⁵⁶⁷ [Mr Lubanga’s Appeal Brief](#), para. 176.

⁵⁶⁸ [Mr Lubanga’s Appeal Brief](#), paras 178-180.

⁵⁶⁹ [Mr Lubanga’s Appeal Brief](#), para. 182, n. 114, 115.

⁵⁷⁰ Some of the examples given by Mr Lubanga show that the identity was also redacted with respect to victims who declined to disclose it without expressing fears for security or providing reasons related to security.

Defence' but that for those who had 'refused to disclose their identities to the Defence for security reasons', the files should be provided to Mr Lubanga at this stage of the proceedings with their names and other identifying information redacted, 'mindful of the victims' concerns'.⁵⁷¹ The manner in which redactions were applied is indicative of the emphasis on the victims' desire to withhold information. It appears that the identity of victims who did not consent to disclosure was redacted with the understanding that their refusal to disclose their identity was related to security reasons. The Appeals Chamber considers that, in the particular context of the present proceedings, it would not have been an error to assume that the victims who did not consent to disclose their identity were potentially subject to objective risks to their security, based on [REDACTED] despite the absence of individualised risk assessments and the absence of some of those victims' clear expression of fear for their safety. Furthermore, the relevance of the names of the victims to Mr Lubanga, in the context in which the Trial Chamber used the requests in this case, has not been substantiated. Therefore, the Appeals Chamber finds no error in the Trial Chamber's balancing of the victims' security and the impact of redactions on the rights of Mr Lubanga.

276. Regarding the victims who had consented but whose accounts were redacted, Mr Lubanga cites nine examples in which it seems that the identities were disclosed but some information was redacted within the accounts.⁵⁷² He argues that the redactions 'run counter to the wishes of those possible victims who clearly expressed a preference for their identities and the events of which they were victims to be made known to Mr Lubanga'.⁵⁷³ The Appeals Chamber notes from the examples cited, and without assessing the merit of the redactions made, that it is not the case that the requests in question were heavily redacted. There appear to be some redactions made to, for example, locations. However, the identity, as acknowledged, and other information is accessible to Mr Lubanga. It is not clear that the redactions run counter to the wishes of the applicants and to the principles for redactions set out by the Trial Chamber.

⁵⁷¹ [Order of 22 February 2017](#), paras 15-16.

⁵⁷² [Mr Lubanga's Appeal Brief](#), para. 182, n. 114, 115.

⁵⁷³ [Mr Lubanga's Appeal Brief](#), para. 182.

277. Mr Lubanga also argues that, as to redacting accounts to protect an applicant's identity, it would 'have been wholly impossible' for him to identify persons from the names of commanders, a battle or training site.⁵⁷⁴ However, without examples as to when this occurred, the Appeals Chamber is unable to properly conduct a review.

278. Arguing that the redactions of the identities in most cases, in addition to 'factual details that could directly or indirectly identify them, precluded any investigation or scrutiny of the merits of the redacted dossiers',⁵⁷⁵ Mr Lubanga gives three examples.⁵⁷⁶ He argues that the Trial Chamber erred in concluding that, because he could make submissions on dossiers similar to those which had redactions, his rights were protected.⁵⁷⁷ He argues that 'each account is particular to the possible victim concerned and must be assessed individually, however similar it may be to the account of another applicant'.⁵⁷⁸ It seems from the three examples given, that any factual information that could allow for the making of enquiries in a particular case was redacted, while information as to harm suffered seems to have been included. The Appeals Chamber recalls that the Trial Chamber found that most of the potentially eligible victims agreed to disclose their identity and, upon an initial perusal of the dossiers, the Trial Chamber noticed that those potential victims who had so agreed and those who had refused furnished similar statements recounting the events and supporting documentation to bolster similar allegations. That being so, the Trial Chamber considered that Mr Lubanga was in a position to make submissions on the dossiers of victims which were similar to the dossiers of those potentially eligible victims who had refused to disclose their identity to Mr Lubanga.⁵⁷⁹ Again, based on the context of this case, the Appeals Chamber can find no error in this finding.

279. In light of the above, the Appeals Chamber rejects the third ground of Mr Lubanga's appeal.

⁵⁷⁴ [Mr Lubanga's Appeal Brief](#), para. 184.

⁵⁷⁵ [Mr Lubanga's Appeal Brief](#), para. 189.

⁵⁷⁶ [Mr Lubanga's Appeal Brief](#), paras 193-195.

⁵⁷⁷ [Mr Lubanga's Appeal Brief](#), paras 199-201.

⁵⁷⁸ [Mr Lubanga's Appeal Brief](#), para. 201.

⁵⁷⁹ [Impugned Decision](#), para. 58.

3. *Victims V01's third ground of appeal*

(a) **Submissions on appeal**

(i) *Victims V01's submissions*

280. Victims V01 submit that the Trial Chamber erred in law when it disregarded the TFV's assessment of the dossiers of some victims and disqualified them 'citing formulaic reasons'.⁵⁸⁰ They argue that the Trial Chamber rejected requests of some victims for having provided insufficient detail in relation to some factors, whereas the TFV had not asked such detail of all the victims when preparing their dossiers.⁵⁸¹ Victims V01 also argue that the Trial Chamber 'ignored information in some of the victims' dossiers, misinterpreted phrases taken out of context and committed other abuses of discretion'.⁵⁸²

(ii) *Mr Lubanga's response*

281. Mr Lubanga refers to his third ground of appeal, arguing that his fair trial rights are also applicable to the reparations proceedings and that the Trial Chamber breached those rights in the Impugned Decision.⁵⁸³ He submits that the TFV's assessments cannot be regarded as decisions because assessment of eligibility is a judicial function. He therefore disagrees with Victims V01's assertion that the Trial Chamber *de facto* overturned the TFV's decisions on the eligibility of victims.⁵⁸⁴

(iii) *OPCV's response*

282. The OPCV submits that it was not for the TFV and the victims' representatives, but for the Trial Chamber to make any assessment on the eligibility of the victims at this stage of the proceedings.⁵⁸⁵ The OPCV argues that the procedure 'seems to allow for the victims whose dossiers were rejected to supply additional information to the Trust Fund [...] if the reason for rejection given by the Chamber allows for the submission of additional information'.⁵⁸⁶

⁵⁸⁰ [Victims V01's Appeal Brief](#), pp. 20, 21, paras 44, 45.

⁵⁸¹ [Victims V01's Appeal Brief](#), para. 46.

⁵⁸² [Victims V01's Appeal Brief](#), para. 54.

⁵⁸³ [Mr Lubanga's Response to Victims V01's Appeal](#), paras 44-47, 56.

⁵⁸⁴ [Mr Lubanga's Response to Victims V01's Appeal](#), paras 54-55.

⁵⁸⁵ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 28.

⁵⁸⁶ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 29.

(iv) Victims V02's response

283. Victims V02 request the Appeals Chamber to rule on Victims V01's third ground of appeal and 'draw all the necessary legal consequences'.⁵⁸⁷

(v) Victims V01's reply

284. Regarding the OPCV's argument that the victims whose requests were rejected may still supply additional information, Victims V01 submit that the Trial Chamber expressly ruled that such victims would not receive reparations and that it is unclear how the TFV could review the Trial Chamber's findings.⁵⁸⁸

(b) Relevant parts of the Impugned Decision

285. The relevant parts of the Impugned Decision containing the Trial Chamber's reasons regarding its assessment of the victims' dossiers are summarised under Mr Lubanga's second ground of appeal above. Therefore, that summary is not reproduced here.

(c) Determination by the Appeals Chamber

286. Victims V01 argue that the Trial Chamber disregarded the assessment of eligibility carried out by the TFV.⁵⁸⁹ Victims V01 also submit that the Trial Chamber rejected a number of victims for their failure to provide a witness statement.⁵⁹⁰ Victims V01 argue that the Trial Chamber 'ignored information in some of the victims' dossiers, misinterpreted phrases taken out of context and committed other abuses of discretion'.⁵⁹¹

287. The Appeals Chamber notes that, in view of its conclusion, under Victims V01's second ground of appeal, that the victims whom the Trial Chamber found ineligible for reparations in this case may re-submit their dossiers for a new assessment,⁵⁹² there is no need to examine the present ground of Victims V01's appeal. The Appeals Chamber therefore dismisses this ground of appeal as moot.

⁵⁸⁷ [Victims V02's Consolidated Response to the Appeal Briefs](#), para. 162.

⁵⁸⁸ [Victims V01's Reply](#), para. 32.

⁵⁸⁹ [Victims V01's Appeal Brief](#), paras 47-50, 53.

⁵⁹⁰ [Victims V01's Appeal Brief](#), para. 51.

⁵⁹¹ [Victims V01's Appeal Brief](#), para. 54.

⁵⁹² *See supra*, para. 170.

C. Other grounds of appeal

1. *Mr Lubanga's fifth ground of appeal*

(a) Submissions on appeal

(i) *Mr Lubanga's submissions*

288. Mr Lubanga submits that the Trial Chamber, in fixing his liability for reparations, erred in how it took into account his level of responsibility for the crimes of which he was found guilty, the level of responsibility of others, and in how it took into account several other factors. He submits that the Trial Chamber erred in holding him liable in full for the victims' harm regardless of the existence of other co-perpetrators who contributed to such harm and that it failed to take into account the degree of his participation in the commission of the crimes, including his alleged efforts to demobilise children.⁵⁹³ He avers that, despite his indirect criminal intent, he was not indifferent to the fate of minors deployed in hostilities and on various occasions attempted to remedy this situation.⁵⁹⁴ In his view, the Trial Chamber did not make these considerations in determining his liability for reparations.⁵⁹⁵

289. Mr Lubanga also argues that the Trial Chamber failed to consider his personal efforts to promote peace.⁵⁹⁶ He submits that fairness demands that his purported efforts to promote peace and reconciliation be considered in the determination of his liability for reparations.⁵⁹⁷ Mr Lubanga also submits that the Trial Chamber did not consider his arguments regarding the specific circumstances of the case.⁵⁹⁸ He argues that, 'in the light of the conduct of the national and international authorities who had a responsibility to protect the civilian population, fairness demands fair apportionment of the burden of the reparations',⁵⁹⁹ and that the Trial Chamber made an error of law or misappreciated the facts.⁶⁰⁰

(ii) *Victims V01's response*

⁵⁹³ [Mr Lubanga's Appeal Brief](#), paras 229-254.

⁵⁹⁴ [Mr Lubanga's Appeal Brief](#), para. 252.

⁵⁹⁵ [Mr Lubanga's Appeal Brief](#), para. 253.

⁵⁹⁶ [Mr Lubanga's Appeal Brief](#), paras 255-261.

⁵⁹⁷ [Mr Lubanga's Appeal Brief](#), para. 255.

⁵⁹⁸ [Mr Lubanga's Appeal Brief](#), para. 262.

⁵⁹⁹ [Mr Lubanga's Appeal Brief](#), para. 267.

⁶⁰⁰ [Mr Lubanga's Appeal Brief](#), para. 268.

290. Victims V01 argue that, when only one of the perpetrators is prosecuted, it is impossible to apportion liability among them. They contend that, in such cases, the subsequent perpetrator can be ordered ‘to pay the cost of the reparations *in solidum* with the first perpetrator’, notwithstanding the action that each co-perpetrator has against the other co-perpetrator to recover the amounts paid in excess.⁶⁰¹ They argue that the Trial Chamber did not have to take into account Mr Bosco Ntaganda’s liability, if any, for reparations, and that having done otherwise would violate the presumption of innocence.⁶⁰² They also argue that any peace initiative that Mr Lubanga may have undertaken has no relation to the crimes for which he was convicted.⁶⁰³

(iii) *Victims V02’s response*

291. Victims V02 argue that the Trial Chamber had the duty to consider and did consider Mr Lubanga’s participation in the crimes.⁶⁰⁴ They argue that any efforts made by Mr Lubanga to promote peace seem less significant and influential to merit the Trial Chamber considering them.⁶⁰⁵ They contend that the Trial Chamber made no error of law, nor did it misappreciate any fact in this regard.⁶⁰⁶

(iv) *OPCV’s response*

292. The OPCV contends that Mr Lubanga’s arguments are a mere disagreement with the Trial Chamber’s findings and should therefore be inadmissible.⁶⁰⁷ It submits that there is no merit to Mr Lubanga’s argument that his liability had to be apportioned in light of the other co-perpetrators, as it argues that the Appeals Chamber, in the *Katanga* Judgment on Reparations, found that a trial chamber, at the reparations stage, must not focus on the mode of liability of the convicted person but on the cost of repairing the harm.⁶⁰⁸ The OPCV argues that any effort that Mr

⁶⁰¹ [Victims V01’s Response to Mr Lubanga’s Appeal](#), para. 57.

⁶⁰² [Victims V01’s Response to Mr Lubanga’s Appeal](#), para. 58.

⁶⁰³ [Victims V01’s Response to Mr Lubanga’s Appeal](#), para. 59.

⁶⁰⁴ [Victims V02’s Consolidated Response to the Appeal Briefs](#), paras 134-136.

⁶⁰⁵ [Victims V02’s Consolidated Response to the Appeal Briefs](#), para. 137.

⁶⁰⁶ [Victims V02’s Consolidated Response to the Appeal Briefs](#), paras 138-139.

⁶⁰⁷ [OPCV’s Consolidated Response to the Appeal Briefs](#), para. 44.

⁶⁰⁸ [OPCV’s Consolidated Response to the Appeal Briefs](#), paras 45-46.

Lubanga may have made to promote peace must be distinguished from his criminal liability and the reparations owed to the victims.⁶⁰⁹

(v) *TFV's submissions*

293. The TFV submits that a convicted person's liability should be proportionate to the harm caused and, *inter alia*, to the person's participation in the commission of the crimes.⁶¹⁰

(vi) *Submissions of the parties on the questions posed by the Appeals Chamber*

294. Mr Lubanga, referring to a definition of the principle of *responsabilité solidaire*,⁶¹¹ submits that there are no provisions in the Statute authorising a convicted person to seek contribution from other co-perpetrators or accessories.⁶¹² In his view, due to the considerable span of time between separate trials, a convicted person who pays for other co-perpetrators or accessories has no serious prospect of any real recovery of contribution.⁶¹³ Therefore, Mr Lubanga submits, that the application of this principle to the proceedings before the Court would lead to manifest unfairness.⁶¹⁴

295. Victims V01 consider that all perpetrators in cases of *responsabilité solidaire* and *responsabilité in solidum* bear liability for reparations of the total harm, and that the person who pays can seek contribution from the others.⁶¹⁵ They further submit that war crimes and crimes against humanity are always the deed of many people, a situation which makes apportionment of liability particularly difficult and almost unfeasible.⁶¹⁶

296. Victims V02 consider that *responsabilité solidaire* and *responsabilité in solidum* both mean that, where multiple perpetrators caused harm, each of them is

⁶⁰⁹ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 47.

⁶¹⁰ [TFV's Submissions](#), para. 42.

⁶¹¹ [Mr Lubanga's Submissions Following the Appeals Chamber's Questions](#), para. 59, referring to G. Cornu, 'Vocabulaire juridique', 11th edition, p. 978.

⁶¹² [Mr Lubanga's Submissions Following the Appeals Chamber's Questions](#), para. 62.

⁶¹³ [Mr Lubanga's Submissions Following the Appeals Chamber's Questions](#), para. 63.

⁶¹⁴ [Mr Lubanga's Submissions Following the Appeals Chamber's Questions](#), para. 64.

⁶¹⁵ [Victims V01's Submissions Following the Appeals Chamber's Questions](#), para. 29.

⁶¹⁶ [Victims V01's Submissions Following the Appeals Chamber's Questions](#), para. 30.

liable to repair it in full.⁶¹⁷ This, in their view, does not preclude those responsible from commencing proceedings against each other, seeking a contribution.⁶¹⁸

297. The OPCV recalls that the Appeals Chamber's jurisprudence in *Katanga* is applicable.⁶¹⁹

(b) Relevant parts of the Impugned Decision

298. The Trial Chamber, referring to the *Lubanga* Appeal Judgment on Reparations, recalled that 'the scope of liability for reparations may differ depending on the mode of individual criminal responsibility established *vis-à-vis* the convicted person and on the specific elements of that responsibility'.⁶²⁰

299. The Trial Chamber considered that Trial Chamber I had previously convicted Mr Lubanga as a co-perpetrator under articles 8(2)(e)(vii) and 25(3)(a) of the Statute, that he acted as the President of the UPC/FPLC, commander-in-chief and political leader, and that he made essential contributions to a common plan which resulted in the conscription and enlistment of girls and boys under the age of 15 years into the UPC/FPLC, and the use of those children to participate actively in hostilities.⁶²¹ As for other responsible individuals, the Trial Chamber noted that no convictions had been returned against other persons for the crimes that occasioned the harm suffered by the victims in the present case.⁶²² Such findings are reproduced in full as follows:

272. Turning now to Mr Lubanga's participation in the commission of the crimes of which he was convicted, the Chamber notes that Trial Chamber I in its Judgment Handing Down Conviction found Mr Lubanga guilty as a co-perpetrator of the crimes of conscripting and enlisting children under the age of 15 years into the UPC/FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute between 1 September 2002 and 13 August 2003.

⁶¹⁷ [Victims V02's Submissions Following the Appeals Chamber's Questions](#), para. 20.

⁶¹⁸ [Victims V02's Submissions Following the Appeals Chamber's Questions](#), para. 20, referring to jurisprudence of French Courts, [Victims V02's Submissions Following the Appeals Chamber's Questions](#), paras 21-22.

⁶¹⁹ [OPCV's Submissions Following the Appeals Chamber's Questions](#), para. 47, referring to [Katanga Judgment on Reparations](#), paras 174 *et seq.*

⁶²⁰ [Impugned Decision](#), para. 269, referring to [Lubanga Appeal Judgment on Reparations](#), para. 118.

⁶²¹ [Impugned Decision](#), paras 272, 274-275, 278, referring, *inter alia*, to [Lubanga Conviction Decision](#), paras 1351, 1354, 1356.

⁶²² [Impugned Decision](#), para. 277.

273. In this regard, the Chamber must point out that the Appeals Chamber, after stating that the Statute differentiates between two main forms of criminal responsibility, viz. principal and accessorial, went on to hold that:

this distinction is not merely terminological; making this distinction is important because, generally speaking and all other things being equal, a person who is found to commit a crime him- or herself bears more blameworthiness than a person who contributes to the crime of another person or persons.

274. However, as the Appeals Chamber held, the Chamber must first and foremost consider, vis-à-vis the specific circumstances of the case, Mr Lubanga's participation in the commission of the crimes of which he was convicted. Accordingly, the Chamber will proceed to examine the factual and legal elements of that participation, as determined by Trial Chamber I in the Judgment Handing Down Conviction and confirmed by the Appeals Chamber in its Appeal Judgment Affirming Conviction, so as to set the size of the reparations award for which he is liable.

275. In that connection, the Chamber rehearses the findings made by Trial Chamber I:

1351. The accused and his co-perpetrators 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.

[...]

1354. [...] The Chamber has concluded that between 1 September 2002 and 13 August 2003, a significant number of high-ranking members of the UPC/FPLC and other personnel conducted a large-scale recruitment exercise directed at young people, including children under the age of 15, whether voluntarily or by coercion.

[...]

1356. Thomas Lubanga was the President of the UPC/FPLC, and the evidence demonstrates that he was simultaneously the Commander-in-Chief of the army and its political leader. He exercised an overall coordinating role over the activities of the UPC/FPLC. He was informed, on a substantive and continuous basis, of the operations of the FPLC. He was involved in planning military operations, and he played a critical role in providing logistical support, including as regards weapons, ammunition, food, uniforms, military rations and other general supplies for the FPLC troops. He was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. [...] The Chamber has concluded that these

contributions by Thomas Lubanga, taken together, were essential to a common plan that resulted in the conscription and enlistment of girls and boys below the age of 15 into the UPC/FPLC and their use to actively participate in hostilities.

276. Also worthy of note is the present Chamber's holding in *Katanga*:

[I]n cases coming before the Court, a plurality of persons potentially bear responsibility for having contributed to the commission of the crimes which caused harm to victims. That said, it must be emphasized that the competence over such crimes of a chamber tasked with overseeing the conduct of a case is circumscribed by the charges confirmed against an accused person and the evidence tendered by the parties at trial, and so the bench is not in a position to determine the responsibility of every person who had a part in the crimes at issue.

277. As regards the case at bar, to the Chamber's knowledge no convictions have been returned against other persons for the crimes that occasioned the harm suffered by the victims in the case *sub judice*. In any event, the Chamber's decision is confined to determining Mr Lubanga's individual liability for reparations.

278. In that regard, in making its determination the Chamber relies in particular on the fact that, as aforementioned, Mr Lubanga was President of the UPC/FPLC and both Commander-in-Chief of its army and its political leader. It also relies on the fact that Mr Lubanga's contributions were essential to a common plan, which he and his co-perpetrators shared and which resulted in the conscription and enlistment of girls and boys under the age of 15 years into the UPC/FPLC and in the use of these children to participate actively in hostilities. Lastly, the Chamber relies on the gravity of the crimes in question and the fact that they were perpetrated, as earlier said, on a large scale and in a widespread manner. Mr Lubanga's individual responsibility, so adjudged, informs the Chamber's assessment of the harm suffered by the victims taken as a whole.⁶²³

300. Having reviewed submissions of the parties on how to calculate Mr Lubanga's liability,⁶²⁴ and having regard to the above considerations pertaining to his individual responsibility, the Trial Chamber set '*ex æquo et bono* Mr Lubanga's liability in respect of the 425 victims in the sample at USD 3,400,000. Having regard to, *inter alia*, the finding that 'hundreds and possibly thousands more victims suffered harm as a consequence of the crimes of which Mr Lubanga was convicted', the Trial Chamber

⁶²³ [Impugned Decision](#), paras 272-278 (footnotes omitted).

⁶²⁴ [Impugned Decision](#), paras 261-267.

set *ex aequo et bono* Mr Lubanga's liability in respect of 'other victims who may be identified during implementation of reparations' at USD 6,600,000.⁶²⁵

(c) Determination by the Appeals Chamber

(i) How to apportion liability

301. Mr Lubanga submits that the Trial Chamber erred in holding him liable in full for the victims' harm, regardless of the existence of other co-perpetrators who contributed to such harm, and in failing to consider his mode of participation in the commission of the crimes.⁶²⁶ In Mr Lubanga's view, since each co-perpetrator contributed substantially to the commission of the crimes, each incurs his or her own share of liability.⁶²⁷ He submits that the *Katanga* Trial Chamber ruled out importing the principle of holding any perpetrator liable for the totality of the harm suffered.⁶²⁸ Mr Lubanga avers that if another co-perpetrator were convicted of acts identical to the crimes of which he was found guilty, 'an order against Mr Lubanga for the totality of the reparations would be a legal nonsense',⁶²⁹ and that 'no reparations award could be ordered against that other co-perpetrator, lest the victims be compensated twice for the same harm'.⁶³⁰ Mr Lubanga argues that the Trial Chamber made an error of law in imposing upon him the full award to repair victims of the crimes of which he was convicted as a co-perpetrator.⁶³¹

302. As to the law, the Appeals Chamber recalls that, in its *Lubanga* Appeal Judgment on Reparations, it observed that,

the scope of a convicted person's liability for reparations may differ depending on, for example, the mode of individual criminal responsibility established with respect to that person and on the specific elements of that responsibility. Accordingly, the Appeals Chamber finds it necessary to be guided by [the] principle [...] that: A convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the

⁶²⁵ [Impugned Decision](#), paras 279-281.

⁶²⁶ [Mr Lubanga's Appeal Brief](#), paras 229-254.

⁶²⁷ [Mr Lubanga's Appeal Brief](#), para. 233.

⁶²⁸ [Mr Lubanga's Appeal Brief](#), paras 229-236, referring to [Katanga Order for Reparations](#), para. 263.

⁶²⁹ [Mr Lubanga's Appeal Brief](#), para. 237.

⁶³⁰ [Mr Lubanga's Appeal Brief](#), para. 239.

⁶³¹ [Mr Lubanga's Appeal Brief](#), para. 241.

commission of the crimes for which he or she was found guilty, in the specific circumstances of the case.⁶³²

303. The Appeals Chamber referred to this observation when revisiting the issue of how to calculate liability in its *Katanga* Judgment on Reparations, after noting that ‘in the *Lubanga* Reparations Appeal Judgment, [it] set down principles regarding the scope of a convicted person’s liability for reparations’.⁶³³ Referring to the above-quoted paragraph, the Appeals Chamber observed that ‘[t]his does not mean, however, that the amount of reparations for which a convicted person is held liable must reflect his or her relative responsibility for the harm in question *vis-à-vis* others who may also have contributed to that harm’.⁶³⁴

304. The Appeals Chamber noted that,

[...] in principle, the question of whether other individuals may also have contributed to the harm resulting from the crimes for which the person has been convicted is irrelevant to the convicted person’s liability to repair that harm. While a reparations order must not exceed the overall cost to repair the harm caused, it is not, *per se*, inappropriate to hold the person liable for the full amount necessary to repair the harm.⁶³⁵

[...]

in some cases it may be appropriate for a trial chamber to take into account the role of the convicted person *vis-à-vis* others in the commission of the crimes when deciding on a reparations order against that person. For example, if more than one person is convicted by the Court for the same crimes at the same time, it may be appropriate to apportion liability for the costs to repair. Nevertheless, the focus in all cases should be the extent of the harm and cost to repair such harm, rather than the role of the convicted person.⁶³⁶ [Footnotes omitted.]

305. As to whether the Trial Chamber erred in its assessment of Mr Lubanga’s responsibility, the Appeals Chamber notes that, in assessing the size of the reparations award for which Mr Lubanga was liable, the Trial Chamber recalled parts of the above jurisprudence and that ‘[a]n order for reparations [...] is intrinsically linked to the individual whose criminal responsibility is established in a conviction and whose

⁶³² [Lubanga Judgment on Reparations](#), para. 118.

⁶³³ [Katanga Judgment on Reparations](#), para. 175.

⁶³⁴ [Katanga Judgment on Reparations](#), para. 175.

⁶³⁵ [Katanga Judgment on Reparations](#), para. 178.

⁶³⁶ [Katanga Judgment on Reparations](#), para. 180.

culpability for those criminal acts is determined in a sentence'.⁶³⁷ The Trial Chamber referred to the Appeals Chamber's findings in the *Lubanga* Appeal Judgment on Reparations, noting that 'the scope of liability for reparations may differ depending on the mode of individual criminal responsibility established vis-à-vis the convicted person and on the specific elements of that responsibility'.⁶³⁸ It recalled that the Appeals Chamber stipulated the principle for determining the scope of a person's liability for reparations as follows: 'A convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case'.⁶³⁹

306. The Trial Chamber then referred to the gravity of the crimes of which Mr Lubanga was convicted, as well as their large-scale and widespread nature.⁶⁴⁰ It addressed his participation in the crimes, noting that he was convicted as a co-perpetrator.⁶⁴¹ In considering Mr Lubanga's participation, the Trial Chamber recalled relevant findings from the *Lubanga* Appeal Judgment on Conviction. First, it recalled that Mr Lubanga 'and his co-perpetrators 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', which resulted 'in the conscription and enlistment of boys and girls under the age of 15, and their use to participate actively in hostilities'.⁶⁴² Second, it recalled that during times relevant to Mr Lubanga's charges, 'a significant number of high-ranking members of the UPC/FPLC and other personnel conducted a large-scale recruitment exercise directed at young people, including children under the age of 15, whether voluntarily or by coercion'.⁶⁴³ Third, it recalled that Mr Lubanga 'was the President of the UPC/FPLC, and [...] the Commander-in-Chief of the army and its political leader', and that he 'exercised an overall coordinating role over the activities of the UPC/FPLC'.⁶⁴⁴ The Trial Chamber also recalled the finding of Trial Chamber I that '[the] contributions by Thomas Lubanga, taken together, were

⁶³⁷ [Impugned Decision](#), para. 268.

⁶³⁸ [Impugned Decision](#), para. 269.

⁶³⁹ [Impugned Decision](#), para. 269, referring to [Lubanga Appeal Judgment on Reparations](#), para. 118.

⁶⁴⁰ [Impugned Decision](#), paras 270-271.

⁶⁴¹ [Impugned Decision](#), para. 272.

⁶⁴² [Impugned Decision](#), para. 275, referring to [Lubanga Appeal Judgment on Conviction](#), para. 1351.

⁶⁴³ [Impugned Decision](#), para. 275, referring to [Lubanga Appeal Judgment on Conviction](#), para. 1354.

⁶⁴⁴ [Impugned Decision](#), para. 275.

essential to a common plan that resulted in the conscription and enlistment of girls and boys below the age of 15 into the UPC/FPLC and their use to actively participate in hostilities’.⁶⁴⁵

307. The Trial Chamber concluded by making the findings referred to in more detail above as to Mr Lubanga being liable for USD 10,000,000.

308. Mr Lubanga argues that the Trial Chamber failed to consider his role *vis-à-vis* the co-perpetrators referred to in the *Lubanga* Conviction Decision, including Mr Bosco Ntaganda, who, at the time of Mr Lubanga’s Appeal Brief stood trial before this Court for crimes that, according to Mr Lubanga, include those of which he was convicted.⁶⁴⁶ The Appeals Chamber observes that Mr Bosco Ntaganda has recently been convicted by this Court.⁶⁴⁷ However, it recalls in this regard that, as seen above, in the *Katanga* Judgment on Reparations, it noted that, ‘in principle, the question of whether other individuals may also have contributed to the harm resulting from the crimes for which the person has been convicted is irrelevant to the convicted person’s liability to repair that harm’ and that ‘it is not, *per se*, inappropriate to hold the person liable for the full amount necessary to repair the harm’.⁶⁴⁸

309. As to the argument that the Trial Chamber erred in not properly taking account of Mr Lubanga’s responsibility, the Appeals Chamber notes that the Trial Chamber particularly relied (i) ‘on the fact that [...] Mr Lubanga was President of the UPC/FPLC and both Commander-in-Chief of its army and its political leader’,⁶⁴⁹ (ii) ‘on the fact that Mr Lubanga’s contributions were essential to a common plan, which he and his co-perpetrators shared and which resulted in the conscription and enlistment of girls and boys under the age of 15 years into the UPC/FPLC and in the use of these children to participate actively in hostilities’,⁶⁵⁰ and (iii) ‘on the gravity of the crimes in question and the fact that they were perpetrated, as earlier said, on a

⁶⁴⁵ [Impugned Decision](#), para. 275, referring to [Lubanga Appeal Judgment on Conviction](#), para. 1356.

⁶⁴⁶ [Mr Lubanga’s Appeal Brief](#), paras 240-241. *See also* para. 232.

⁶⁴⁷ [Ntaganda Conviction Decision](#).

⁶⁴⁸ [Katanga Judgment on Reparations](#), para. 178.

⁶⁴⁹ [Impugned Decision](#), para. 278.

⁶⁵⁰ [Impugned Decision](#), para. 278.

large scale and in a widespread manner'.⁶⁵¹ Mr Lubanga has not demonstrated an error in the reasoning of the Trial Chamber.

310. Mr Lubanga further argues that he made efforts to demobilise children,⁶⁵² and that the evidence at trial showed that, 'far from being indifferent to the fate of the minors involved in the hostilities, on numerous occasions [he] made the situation his concern and attempted to remedy it'.⁶⁵³ He argues that '[t]hose considerations, essential for the assessment of the degree of Mr Lubanga's participation in the commission of the crimes, were not, however, analysed by the Chamber in its determination of [his] liability for reparations'.⁶⁵⁴ He avers that, while insufficient to demonstrate the absence of his criminal intent, 'the letters, notes, minutes, reports and decrees referring to measures for the demobilization of minors' were important to determine his degree of participation in the commission of the crimes.⁶⁵⁵ As examples, he refers to the minutes dated 25 February 2003 to argue that they show that 'Mr Lubanga stressed the importance of disarming the children and the need to not expose them to combat'.⁶⁵⁶ He also refers to 'the report of the "*réunion du CEMG avec les commandants des grandes unités*"' to argue that 'Mr Lubanga made clear to the military authorities that he wanted all the minors bearing arms – without exception – to be demobilized',⁶⁵⁷ and to the report of 16 February 2003, *inter alia*, to argue that it confirms 'Mr Lubanga's willingness to demobilize the minors from the self-defence forces'.⁶⁵⁸ He avers that, despite his indirect criminal intent, he was not indifferent to the fate of the minors involved in hostilities, and that on various occasions, he was concerned and attempted to remedy this situation.⁶⁵⁹ In his view, the Trial Chamber did not analyse these considerations in determining his liability for reparations.⁶⁶⁰

311. The Appeals Chamber considers that, in awarding reparations, a trial chamber must remain within the confines of the conviction and sentencing decisions. The

⁶⁵¹ [Impugned Decision](#), para. 278.

⁶⁵² [Mr Lubanga's Appeal Brief](#), paras 248-252.

⁶⁵³ [Mr Lubanga's Appeal Brief](#), para. 252.

⁶⁵⁴ [Mr Lubanga's Appeal Brief](#), para. 253.

⁶⁵⁵ [Mr Lubanga's Appeal Brief](#), para. 248.

⁶⁵⁶ [Mr Lubanga's Appeal Brief](#), para. 249.

⁶⁵⁷ [Mr Lubanga's Appeal Brief](#), para. 250.

⁶⁵⁸ [Mr Lubanga's Appeal Brief](#), para. 251.

⁶⁵⁹ [Mr Lubanga's Appeal Brief](#), para. 252.

⁶⁶⁰ [Mr Lubanga's Appeal Brief](#), para. 253.

efforts that Mr Lubanga referred to could only be relevant at this stage of the proceedings, in which the focus is on repairing the harm, if Mr Lubanga had been able to show that, for example, in relation to a considerable number of victims, especially those assessed as samples by the Trial Chamber, he had helped to demobilise them and that these efforts reduced the level of harm suffered by those victims. If this was the case, this could arguably be relevant to the Trial Chamber's assessment of the overall harm suffered. However, Mr Lubanga has not pointed to any arguments made before the Trial Chamber, during the reparations proceedings, showing how his alleged demobilisation efforts mitigated or reduced the harm.

312. While the Appeals Chamber notes that Mr Lubanga submitted before the Trial Chamber as well that he was concerned and attempted to remedy the situation,⁶⁶¹ he has not demonstrated how such alleged concerns or attempts had any impact on the harm the victims suffered. It is not the case that the trial chamber, when dealing with reparations, should analyse all submissions made before the criminal trial chamber again unless raised by a party in the reparations proceedings, who clearly indicates their relevance to his liability for reparations. In this regard, the Appeals Chamber notes that on appeal Mr Lubanga merely repeats his arguments before the Trial Chamber, referring, *inter alia*, to his closing submissions during his criminal trial before Trial Chamber I and to evidence, which was presented during that stage of the proceedings, on the issue of demobilisation and disarmament of children in self-defence groups.⁶⁶² It is not clearly substantiated, however, how Mr Lubanga intends for those submissions to affect the current reparations proceedings, especially how his actions could in any event have had an impact on the cost to repair the harm.⁶⁶³ The Appeals Chamber therefore rejects these arguments by Mr Lubanga.

⁶⁶¹ [Mr Lubanga's Submissions on Evidence](#), paras 110-122.

⁶⁶² See [Mr Lubanga's Appeal Brief](#), para. 249, n. 149, referring, *inter alia*, to '[Closing submissions of the Defence](#)', 15 July 2011, ICC-01/04-01/06-2773-Red-tENG, paras 922-933.

⁶⁶³ *Cfr.* [Mr Lubanga's Submissions on Evidence](#), paras 99, 102, submitting that his 'liability must be determined in proportion to the amount of harm suffered – not in terms of the cost of implementing the reparations programmes', and 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'.

(ii) *Mr Lubanga's alleged efforts to promote peace and the specific circumstances of the case*

313. The Appeals Chamber turns now to Mr Lubanga's argument that the Trial Chamber failed to consider his personal efforts to promote peace and that, under the circumstances, there was a need to contend with the massacres, and neither the United Nations forces nor the local authorities protected the civilian population.⁶⁶⁴ He argues that there is evidence that he genuinely strove to restore peace, facing opposition from some FPLC leaders.⁶⁶⁵ He avers that, between September 2002 and the day of his arrest by the Congolese authorities, he involved representatives from all communities and regions of Ituri in the Iturian political and administrative institutions in an attempt to bring the communities together and 'achieve a lasting end to the unrest'.⁶⁶⁶ Mr Lubanga refers to speeches presented during his criminal trial proceedings, of which he submits in support of the argument that he was anxious for pacification.⁶⁶⁷ He also refers to evidence that, in his view, shows first that necessity for survival of communities targeted by massacres prompted the common plan aimed at building an armed force and the 'voluntary enlistment of a large number of youths during 2002 and 2003',⁶⁶⁸ second, that the communities could not turn to the 'central Government authorities' for protection and that, '[w]orse still, the Congolese Government authorities' seemed to be involved as organisers or accomplices of the massacres against such communities,⁶⁶⁹ and third, that the United Nations failed to take measures to protect civilians.⁶⁷⁰

314. The Appeals Chamber recalls that, in its *Katanga* Judgment on Reparations, it observed that

the primary consideration is the extent of the harm and cost it takes to repair that harm. Criteria such as the gravity of the crimes or mitigating factors such as characteristics personal to the convicted person are not relevant to this question.

⁶⁶⁴ [Mr Lubanga's Appeal Brief](#), paras 255-268.

⁶⁶⁵ [Mr Lubanga's Appeal Brief](#), para. 256.

⁶⁶⁶ [Mr Lubanga's Appeal Brief](#), para. 257.

⁶⁶⁷ [Mr Lubanga's Appeal Brief](#), para. 258.

⁶⁶⁸ [Mr Lubanga's Appeal Brief](#), para. 264.

⁶⁶⁹ [Mr Lubanga's Appeal Brief](#), para. 265.

⁶⁷⁰ [Mr Lubanga's Appeal Brief](#), para. 266.

The goal of reparations is not to punish the person but indeed to repair the harm caused to others.⁶⁷¹

315. Accordingly, Mr Lubanga's argument here that, essentially, the Trial Chamber failed to consider his good behaviour following the relevant events, is of no merit. As for Mr Lubanga's argument that he had to act pursuant to the specific circumstances of the case, where the government and the international community did not protect civilians, the Appeals Chamber considers this irrelevant at this stage of the proceedings. Mr Lubanga seems to be making an argument of necessity of his actions based on the need for survival of the communities targeted by massacres, as the justification of the common plan for which he was convicted.⁶⁷² The Appeals Chamber finds that this should not be given weight here, as it is unrelated to the goal of reparations.⁶⁷³ The Appeals Chamber considers that it has long passed the stage at the criminal trial where Mr Lubanga could have made this argument. The Appeals Chamber is therefore not persuaded.

316. The Appeals Chamber rejects the fifth ground of Mr Lubanga's appeal.

2. *Mr Lubanga's sixth ground of appeal*

(a) **Submissions on appeal**

(i) *Mr Lubanga's submissions*

317. Mr Lubanga argues that the Court should apply, under article 21 of the Statute, the principle of *non ultra petita*, which, he submits, is an established principle of international law.⁶⁷⁴ He refers to the fact that Victims V01 and V02, as well as the OPCV, claimed USD 6,000,000 in their submissions,⁶⁷⁵ but that the final order was for USD 10,000,000.⁶⁷⁶ Mr Lubanga submits that this was an error of law.⁶⁷⁷

(ii) *Victims V01's response*

318. Victims V01 note in their response that the Trial Chamber did not issue the order against Mr Lubanga on the basis of a request from the victims, but on its own

⁶⁷¹ [Katanga Judgment on Reparations](#), para. 184.

⁶⁷² [Mr Lubanga's Appeal Brief](#), paras 264-266.

⁶⁷³ [Katanga Judgment on Reparations](#), paras 183-184.

⁶⁷⁴ [Mr Lubanga's Appeal Brief](#), paras 269-270.

⁶⁷⁵ [Mr Lubanga's Appeal Brief](#), para. 275.

⁶⁷⁶ [Mr Lubanga's Appeal Brief](#), para. 276.

⁶⁷⁷ [Mr Lubanga's Appeal Brief](#), para. 278.

motion. They submit that victims did not make a claim for a specific amount but, on the request of the Chamber, estimated the amount that might be awarded to the victims if the Chamber decided to award financial compensation instead of ordering collective reparations.⁶⁷⁸

(iii) *Victims V02's response*

319. Victims V02 argue that, based on article 75(1) of the Statute and rule 97(1) of the Rules, 'the Court has the discretion to assess reparations, that is to say, to determine the size of the resulting award, once it has invited and taken account of representations on the extent of any damage, loss and injury to, or in respect of, victims, from or on behalf of the convicted person, victims, other interested persons or interested States'.⁶⁷⁹ They argue that this discretion is highlighted by the fact that 'the size of the reparations award is not expressly stated as one of the particulars to be contained in the applications for reparations, [...], and it does not, as such, have to be taken into consideration by the Chamber'⁶⁸⁰. They refer to a general principle of law that enables judges, in the absence of basic information from the victims to allow for the quantum of harm to be calculated, to reckon the value of an award *ex aequo et bono*.⁶⁸¹ By setting the award, *ex aequo et bono*, at USD 10,000,000, even though the victims had each requested USD 6,000,000, they therefore consider that the Trial Chamber did not rule *ultra petita*.⁶⁸²

(iv) *OPCV's response*

320. The OPCV refers to the Appeals Chamber's jurisprudence in *Katanga* and argues that 'the Trial Chamber has a discretionary power to determine the size of the award independently of the content of the claims submitted to it'.⁶⁸³ The OPCV further argues that its previous request for USD 6,000,000 was made in respect of the victims already known and that it had also stated that it was aware of the same

⁶⁷⁸ [Victims V01's Response to Mr Lubanga's Appeal](#), paras 62-63.

⁶⁷⁹ [Victims V02's Consolidated Response to the Appeal Briefs](#), para. 147.

⁶⁸⁰ [Victims V02's Consolidated Response to the Appeal Briefs](#), para. 148 (emphasis removed).

⁶⁸¹ [Victims V02's Consolidated Response to the Appeal Briefs](#), para. 149.

⁶⁸² [Victims V02's Consolidated Response to the Appeal Briefs](#), para. 151.

⁶⁸³ [OPCV's Consolidated Response to the Appeal Briefs](#), para. 49.

number of potential beneficiaries who had not yet been interviewed. It submits that it therefore ‘might well have arrived at a sum-total of USD 12,000,000’.⁶⁸⁴

(v) *Mr Lubanga’s reply*

321. In reply to the OPCV’s submission that its request for USD 6,000,000 was made only in respect to the victims already known, Mr Lubanga refers to the OPCV’s submission of 8 September 2017 and argues the OPCV’s request was not based on only known victims, but was a total for a possible 3,000 victims.⁶⁸⁵ Mr Lubanga, therefore, argues that it is incorrect for the OPCV to submit that the request could amount to USD 12,000,000.⁶⁸⁶

(b) Procedural background and relevant parts of the Impugned Decision

322. In the *Lubanga* Amended Reparations Order, the Appeals Chamber directed the TFV

to provide, in the draft implementation plan, the anticipated monetary amount that it considers necessary to remedy the harms caused by the crimes for which Mr Lubanga was convicted, based on information gathered during the consultation period leading up to the submission of the draft implementation plan.⁶⁸⁷

323. During the reparations proceedings, on 13 July 2017, the Trial Chamber instructed the parties to,

provide it with an estimate of the current monetary value of the harms alleged by the direct and indirect victims, and to explain the methodology behind that estimate. More specifically, and depending on what they consider fairest and most appropriate to the circumstances of the instant case, the Parties are instructed to provide the Chamber with:

- a *per capita* estimate of the monetary value of the physical harm, psychological harm and material harm caused to Potentially Eligible Victims; or
- a *per capita* estimate of the monetary value of the harm (all types of harm combined) caused to Potentially Eligible Victims; or

⁶⁸⁴ [OPCV’s Consolidated Response to the Appeal Briefs](#), para. 50.

⁶⁸⁵ [Mr Lubanga’s Reply](#), paras 48-51.

⁶⁸⁶ [Mr Lubanga’s Reply](#), para. 52.

⁶⁸⁷ [Lubanga Amended Reparations Order](#), para. 78.

- an aggregate estimate of the monetary value of the harm caused to Potentially Eligible Victims.⁶⁸⁸ [Footnotes omitted.]

324. It further stated:

Recalling that the 474 files in question reflect only a sample of the Potentially Eligible Victims, the Chamber also instructs the Parties to provide it with an estimate of the total number of direct and indirect victims, along with an explanation of the methodology behind that estimate, taking particular account of the information submitted by the TFV and the Registry in the Draft.⁶⁸⁹ [Footnotes omitted.]

325. Having clarified that ‘reparations are collective and will be implemented through educational, occupational and medical services made available to the eligible victims’,⁶⁹⁰ the OPCV estimated USD 6,000,000 as the ‘minimum sum for reparations’.⁶⁹¹ Victims V01, on the other hand, argued that EUR 41,700,000 would repair the harm of 22,000 victims, but submitted that they were ‘in agreement that the amount to be earmarked for reparation can be evaluated at EUR 6,000,000’.⁶⁹² Victims V02, in turn, submitted that they had ‘arrived at an agreed estimate of 1,000 victims’ and stated that they ‘believe[d] that a total amount of USD 6,000,000 [would] be sufficient to repair all the harm’.⁶⁹³ Referring to the USD 6,000,000 estimate, Mr Lubanga submitted that his ‘liability must be determined in proportion to the amount of harm suffered – not in terms of the cost of implementing the reparations programmes’, and 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’.⁶⁹⁴

326. In the Impugned Decision, the Trial Chamber reckoned *ex aequo et bono* ‘Mr Lubanga’s liability in respect of the 425 victims in the sample at USD 3,400,000’⁶⁹⁵ and ‘in respect of those other victims who may be identified during the

⁶⁸⁸ [Order on Submissions on Evidence](#), para. 10.

⁶⁸⁹ [Order on Submissions on Evidence](#), para. 11.

⁶⁹⁰ [OPCV’s Submissions on Evidence](#), para. 32 (emphasis removed).

⁶⁹¹ [OPCV’s Submissions on Evidence](#), paras 42, 50.

⁶⁹² [Victims V01’s Submissions on Evidence](#), paras 74-76.

⁶⁹³ [Victims V02’s Submissions on Evidence](#), para. 29.

⁶⁹⁴ [Mr Lubanga’s Submissions on Evidence](#), paras 99, 102.

⁶⁹⁵ [Impugned Decision](#), para. 279.

implementation of reparations at USD 6,600,000'.⁶⁹⁶ It then set the total reparations award for which Mr Lubanga was liable at USD 10,000,000.⁶⁹⁷

(c) Determination by the Appeals Chamber

327. The Appeals Chamber notes that Mr Lubanga's overarching argument is that the Trial Chamber erred in ruling *ultra petita* by ordering reparations for USD 10,000,000 despite the fact that Victims V01 and V02, as well as the OPCV, claimed USD 6,000,000 in their submissions.⁶⁹⁸ Mr Lubanga submits that this was an error of law given that the *non ultra petita* rule is an established principle of international law.⁶⁹⁹

328. It is noted that in their submissions before the Trial Chamber, the victim groups proposed the sum of USD 6,000,000 to implement the collective reparations programmes for the potential beneficiaries.⁷⁰⁰ Having regard to the parties' submissions,⁷⁰¹ the Trial Chamber reckoned *ex aequo et bono* Mr Lubanga's liability at USD 3,400,000 in relation to the 425 victims found to qualify for reparations and USD 6,600,000 in respect of other victims who may be identified.⁷⁰²

329. The Appeals Chamber recalls that, in the *Katanga* Judgment on Reparations, faced with an argument in that appeal that the principle of *non ultra petita* should apply, stated as follows:

146. The Appeals Chamber recalls that reparations proceedings are governed by article 75 of the Statute, which vests a trial chamber with the power to "determine the scope and extent of any damage", stipulating that, before making an order for reparations, it "may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States". Article 75 (1) of the Statute also grants the possibility, albeit in exceptional circumstances, for a trial chamber to determine the scope and extent of any damage for the purposes of reparations *proprio motu*. Rule 97 (1) of the Rules provides that, "[t]aking into account the scope and extent of any

⁶⁹⁶ [Impugned Decision](#), para. 280.

⁶⁹⁷ [Impugned Decision](#), para. 281.

⁶⁹⁸ [Mr Lubanga's Appeal Brief](#), paras 275-277.

⁶⁹⁹ [Mr Lubanga's Appeal Brief](#), paras 269-270, 278.

⁷⁰⁰ [OPCV's Submissions on Evidence](#), paras 42, 50; [Victims V01's Submissions on Evidence](#), paras 74-76; [Victims V02's Submissions on Evidence](#), paras 28-29.

⁷⁰¹ [Impugned Decision](#), paras 261-267.

⁷⁰² [Impugned Decision](#), paras 279-280.

damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both”.

147. The Appeals Chamber considers that, together, these provisions illustrate that a trial chamber, in making an award for reparations, has the discretion to depart from an applicant’s claim for reparations, if it considers it to be appropriate. In this respect, the Appeals Chamber notes that a trial chamber is permitted to issue a decision on reparations *without* being seized by any party and this, by definition, entails making an award to victims which has not been sought. This precludes the strict applicability of the *ultra petita* principle to reparations proceedings before the Court. Similarly, article 75 (3) of the Statute, stating that a trial chamber “*may* invite and shall *take account* of representations from or on behalf of the convicted person, victims, other interested persons or interested States” (emphasis added), suggests that a trial chamber is not strictly bound by these representations. The Appeals Chamber notes that the same provision requires a trial chamber to take account of representations of the convicted person and victims, as well as of “other interested persons or interested States”. The inclusion of stakeholders other than the convicted person and the victims represents a departure from the *ultra petita* principle, as it assumes that trial chambers are not strictly bound by the parties’ submissions. In this respect, in reparations proceedings, trial chambers may consult different stakeholders, but enjoy discretion in ruling on reparations, based on the different input they receive, and in line with “the scope and extent of any damage, loss and injury to, or in respect of, victims” pursuant to article 75 (1) of the Statute. The Appeals Chamber also notes that, as stated above, the individual assessment of individual claims should only be done when there are very few applications, and the intention is to personalise the award. In all other circumstances, albeit very important in order to understand the nature of the harm alleged, the applications for reparations are not the only basis for an award. Indeed, faced with hundreds or thousands of applications, it would be impracticable to tailor reparations to each claim. In such circumstances, the issue of *ultra petita* does not arise.

148. The Appeals Chamber recalls that, pursuant to article 21 (1) (c) of the Statute, the Court may apply “general principles of law derived by the Court from national laws of legal systems of the world”. Nevertheless, even if the *ultra petita* principle could be considered such a general principle of law, the same provision requires the Court to apply, in the first place, its own Statute, Rules and Elements of Crimes. Given the Court’s framework as set out above, the principle does not apply in reparations proceedings before the Court.⁷⁰³

330. The Appeals Chamber also recalls, as explained more fully under Mr Lubanga’s first ground of appeal above, that the role of the trial chamber is to aim to impose an award that takes into account the circumstances of the case before it, not

⁷⁰³ [Katanga Judgment on Reparations](#), paras 146-148 (footnotes omitted).

necessarily limited to the requests that have been brought before it⁷⁰⁴; this is seen most clearly in cases where the trial chamber chooses not to make an award based on requests for reparations only and, for instance, imposes a collective award, such as in the present case. Such an award, by its nature, cannot stay within the confines of any requests that are submitted.

331. The Appeals Chamber accordingly considers that the Trial Chamber made no error and it therefore rejects this ground of appeal.

VI. APPROPRIATE RELIEF

332. In an appeal pursuant to article 82(4) of the Statute, the Appeals Chamber may confirm, reverse or amend the reparation order appealed (rule 153(1) of the Rules). In the present case, it is appropriate to confirm the Impugned Decision in part and amend it in part such that the victims whom the Trial Chamber found ineligible to receive reparations, and who consider that their failure to sufficiently substantiate their allegations, including by supporting documentation, resulted from insufficient notice of the requirements for eligibility, may seek a new assessment of their eligibility by the TFV, together with other victims who may come forward in the course of the implementation stage and as envisaged by the Trial Chamber in paragraphs 292 – 297 and the disposition of the Impugned Decision; any recommendations as to eligibility made by the TFV shall be subject to the approval of the Trial Chamber.

⁷⁰⁴ See *supra*, paras 79-89.

Judge Eboe-Osuji appends his separate opinion to this judgment. The separate opinion of Judge Ibáñez Carranza will be filed in due course.

Done in both English and French, the English version being authoritative.



Judge Piotr Hofmański

Presiding

Dated this 18th day of July 2019

At The Hague, The Netherlands