Cour
Pénale
Internationale

International
Criminal
Court

Original: **French**

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

THE APPEALS CHAMBER

Before: **Judge Piotr Hofmański**
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 Document

Response of the Legal Representatives of the V01 Group of Victims to the Appeal Brief of the Defence for Mr Thomas Lubanga Dyilo against the "*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*" handed down by Trial Chamber II on 15 December 2017 and Amended by the Decisions of 20 and 21 December 2017

Source: **Legal Representatives of the V01 Group of Victims**

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

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PROCEDURAL HISTORY

1. On 15 December 2017, Trial Chamber II ("Chamber") handed down the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable" ("Decision"),[1] which was notified to the parties and participants with two public annexes[2] and one confidential redacted annex.[3]

2. On 20 December 2017, the Chamber issued a corrected version of the Decision further to the request of the Defence for Thomas Lubanga Dyilo of 18 December 2017 for the Chamber to correct the substantive error of fact consisting in stating that Mr Lubanga had been sentenced to 15 and not 14 years' imprisonment.[4]

3. On 16 January 2018, the Defence filed a notice of appeal against all of the operative provisions of the Decision.

4. On 15 March 2018, the Defence filed its appeal brief, containing six grounds of appeal ("Defence Appeal Brief").[5]

5. This submission is the response to that appeal brief, in accordance with regulation 59 of the Regulations of the Court.

[1] ICC-01/04-01/06-3379-Conf; ICC-01/04-01/06-3379-Red.
[2] ICC-01/04-01/06-3379-AnxI-AnxI and ICC-01/04-01/06-3379-AnxIII.
[3] ICC-01/04-01/06-3379-Conf-AnxII-Red.
[4] ICC-01/04-01/06-3382.
[5] "Appeal Brief of the Defence for Mr Thomas Lubanga Dyilo against the '*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*' handed down by Trial Chamber II on 15 December 2017", ICC-01/04-01/06-3394-Conf-tENG.

SUBMISSIONS

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

6. The Defence contends that the Chamber made an error of law by ruling "on its own motion" on the harm supposedly suffered by unidentified persons who had not put any application before it.[6]

7. Moreover, the Defence takes issue with the Chamber for giving consideration, in its assessment of "the scope and extent of any damage, loss and injury to […] the victims", not only to the identified victims "who had applied to the Court for reparations", but also to "[TRANSLATION] hundreds and possibly thousands more victims who are unidentified and had not made any application to the Chamber".[7]

8. The Defence contends that, in so ruling, without any justification of "exceptional circumstances" or the notice required by rule 95 of the Rules of Procedure and Evidence, the Chamber made an error of law by exceeding the parameters of the matter *sub judice* and therefore that the reasons advanced by the Chamber in support of its decision are without merit.[8]

[6] Defence Appeal Brief, para. 26.
[7] *Ibid*., para. 25.
[8] *Ibid*., paras. 27-28.

Response

9. The Defence observes correctly that, in these proceedings, the Court did not determine the size of the reparations on the basis of individual applications filed in accordance with rule 94 and/or rule 95 but did so "on its own motion". It is true that none of the victims "had applied to the Court for reparations", for the very reason that Trial Chamber I had already decided that the reparations proceedings would not be based on applications for reparations – filed pursuant to rule 84 or to be filed after notification by the Chamber pursuant to rule 95(1) – and that the applications already filed would not be examined by the Court. That decision was confirmed by the Appeals Chamber in its Judgment on the Appeals of 3 March 2015.[9]

10. The Appeals Chamber defined the limited role of Trial Chamber II in the reparations proceedings as being to

> monitor and oversee the implementation stage of the present order, including having the authority to approve the draft implementation plan submitted by the Trust Fund. The Chamber may be seized of any contested issues arising out of the work and the decisions of the Trust Fund.[10]

The Appeals Chamber's Judgment made it clear that "the duties assigned to the newly constituted Trial Chamber, namely the approval of the draft implementation plan and the hearing of any contested issues, are limited."[11]

11. At the behest of the Chamber – not on the initiative of the victims – a number of dossiers of potential victims were prepared by the Trust Fund for Victims

[9] "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2", 3 March 2015, ICC-01/04-01/06-3129.
[10] "Order for Reparations", Annex A of the "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 3 March 2015", ICC-01/04-01/06-3129-AnxA, para. 76.
[11] Judgment on the Appeals, 3 March 2015, ICC-01/04-01/06-3129, para. 234.

("Trust Fund") and the Office of Public Counsel for Victims ("OPCV"), further to the decisions of 9 February and 15 July 2016[12] and 21 October 2016.[13] The Chamber requested individual dossiers to be prepared to constitute a sample of potential victims that could provide it with useful information about the scope of the harm for the purpose of determining the size of the reparations award against the convicted person.[14] It was only after the Trust Fund submitted a first batch of dossiers that the Chamber – wrongly, in the view of the victims[15] – considered that the forms filled out by the Trust Fund were equivalent to "applications for reparations".[16]

12. Trial Chamber I's decision to proceed with reparations *proprio motu* and not on the basis of individual applications was affirmed by the Appeals Chamber and is therefore final. The ground that contests that decision must therefore be considered inadmissible.

13. In the alternative, the Legal Representatives also consider this ground to be without merit. As the Appeals Chamber recalled, rules 94 and 95 on the one hand, and rule 98(3) on the other, provide for two fundamentally different procedures:[17] individual reparations, which are based on individual

[12] Order of 9 February 2016, ICC-01/04-01/06-3198-tENG, para. 15; "Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations", 15 July 2016, ICC-01/04-01/06-3218-tENG, para. 8.
[13] "Order relating to the request of the Office of Public Counsel for Victims of 16 September 2016", 21 October 2016, ICC-01/04-01/06-3252-tENG, para. 15.
[14] "Order Instructing the Parties to File Submissions on the Evidence Admitted for the Determination of Thomas Lubanga Dyilo's Liability for Reparations", 13 July 2017, ICC-01/04-01/06-3339-tENG.
[15] "Corrigendum to the Appeal Brief against the *"Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu*' Handed Down by Trial Chamber II on 15 December 2017", ICC-01/04-01/06-3396-Conf-tENG.
[16] "Decision on the Applications of the Office of Public Counsel for Victims and the Legal Representatives of the V02 Group of Victims for Leave to Reply to the Observations of the Defence Team of Thomas Lubanga Dyilo of 22, 30 and 31 May 2017", 16 June 2017, ICC-01/04-01/06-3331-tENG.
[17] "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2", 3 March 2015, ICC-01/04-01/06-3129, para. 149.

applications; and collective reparations, which are awarded by the Court on its own motion and implemented by the Trust Fund.

14. To justify not awarding the reparations on the basis of individual applications but *proprio motu* and in the form of a range of services to be organized by the Trust Fund, the Appeals Chamber invoked the need to award collective reparations only:

> when only collective reparations are awarded pursuant to rule 98(3) of the Rules of Procedure and Evidence […] a trial Chamber is not required to rule on the merits of the individual requests for reparations. Rather, the determination that it is more appropriate to award collective reparations operates as a decision denying, as a category, individual reparation awards.[18]

15. The determination that it was inappropriate to award individual reparations and the decision to opt for collective reparations only were therefore implicitly considered by the Appeals Chamber to constitute an exceptional circumstance within the meaning of article 75(1), justifying the Chamber's decision to act "on its own motion" and not upon request. That seems logical, given that individual victims do not have standing to "request" collective reparations, and that communities as such cannot intervene as victims. Collective reparations are therefore by definition organized on the initiative of the Court, as stated explicitly in rule 98(3) of the Rules of Procedure and Evidence in the wording "The Court may order…".

16. To assert that the Court should always proceed upon request, even when awarding collective reparations, amounts to claiming that rule 98(3) violates article 75 of the Statute.

17. Given the option chosen by the Appeals Chamber and the limited mandate it assigned to Trial Chamber II, the latter could not have decided to award

[18] "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2", 3 March 2015, ICC-01/04-01/06-3129, para. 152.

individual reparations or to implement the procedure provided for under rule 95(1), which consists in notifying victims to file applications. The Decision could not have violated that rule, as claimed under this ground, since that rule was not applicable to the procedure in question.

B. SECOND GROUND OF APPEAL – MISAPPLICATION OF THE STANDARD OF PROOF

18. The Defence claims that the Chamber misapplied the balance of probabilities standard of proof because the methods relied on by the Chamber to determine the number of beneficiaries – both "those who submitted applications for reparations to the Chamber" and the unidentified victims "[TRANSLATION] who may be identified during the implementation of reparations" – fall short of the requirements of that standard.

Response

1) *The standard of proof of a balance of probabilities*

19. The Defence accepts that the standard of proof applicable to reparations is a balance of probabilities. This is also the standard that the Chamber claims to have applied to determine the size of Mr Lubanga's liability for reparations. The Chamber did indeed apply this rule to estimate the total number of direct and indirect victims and the total extent of the harm, by finding, for example, that the monetary value of the harm was more likely to be USD 10,000,000 than the estimate of USD 6,000,000 submitted by the participating victims and the OPCV at the Chamber's behest. Conversely, the Chamber jettisoned this standard when it assessed the dossiers of the potential victims already

identified, in effect applying instead the *actori incumbit probatio* standard of proof used in both civil and criminal courts in Germano-Roman law countries.[19]

20. A balance of probabilities is the standard required in civil disputes in common-law jurisdictions. It involves evaluating and weighing factors that could incline the judge to one side or the other. It permits reasonable doubt and gives the plaintiff the benefit of the doubt so long as the probability that the damage is real is greater than the contrary hypothesis. A member of the highest court of the United Kingdom expressed it as follows:

> In this country we do not require documentary proof. We rely heavily on oral evidence, especially from those who were present when the alleged events took place. Day after day, up and down the country, on issues large and small, judges are making up their minds whom to believe. They are guided by many things, including the inherent probabilities, any contemporaneous documentation or records, any circumstantial evidence tending to support one account rather than the other […]. In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof.[20]

21. As the Defence points out in its Appeal Brief, this is also the standard generally applied in international law in the context of asylum, as well as in reparations

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[19] The principle according to which burden of proof rests with the plaintiff is enshrined in article 1353 (formerly 1315) of the French Civil Code: "[TRANSLATION] A person who demands the performance of an obligation must prove it. Reciprocally, a person who claims to be released from an obligation must prove the payment or the fact that caused the extinction of his obligation." This is also the conventional standard of proof in criminal cases in French courts: "[TRANSLATION] The application of the burden of proof in criminal procedure is akin to that established by the rules of civil procedure. The public prosecutor and the civil complainant, as plaintiffs, must produce evidence of the crime underpinning their respective complaints; on the other hand, the law expressly places the onus on the prosecuted person to prove certain exceptional facts likely to exclude or mitigate his liability.]" (G. Levasseur, "La charge de la preuve", in G. Stéfani and G. Levasseur, *Procédure pénale* (Paris: Dalloz, 2nd ed., 1962), p. 276, at https://ledroitcriminel.fr/la_science_criminelle/penalistes/les_poursuites_penales/la_preuve/levasseur_charge_preuve.htm

[20] House of Lords, cited in HHJ Stephen Davies, "Proof on the balance of probabilities: what this means in practice" (Thomson Reuters Practical Law), at https://uk.practicallaw.thomsonreuters.com/2-500-6576?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1

programmes to determine whether torture or other grave human rights violations have occurred, and sometimes even in reparations programmes for economic loss, such as at the United Nations Compensation Commission, established after the First Gulf War.[21] The judge or examiner applying this standard does not require the victims to produce documentary or testimonial evidence of what happened to them, but instead weighs the account given by the potential victim against known objective factors – such as his or her membership of a particular social, religious or ethnic group, his or her age, sex, sexual orientation and political opinions, and his or her presence in a given place – and any counter-factors with a view to determining whether the alleged facts are plausible or not. In *Katanga*, for example, the Chamber found that any person who was present in Bogoro on the day the village was attacked was likely to have suffered at least psychological harm.[22]

22. The Defence contests the manner in which the Chamber applied the standard of proof, both to the harm suffered by the already identified potential victims and to that of the victims who may yet be identified in the future. Curiously, the Defence's main contention is the Chamber's lack of rigour in its assessment of the first category, to which it devotes much more space than to the second (11 versus 7 pages of the Appeal Brief). Yet the Chamber ordered Mr Lubanga to pay USD 3,400,000 for the harm caused to the first category and USD 6,400,000 for the second category, even though it was far more stringent in assessing the harm of the victims already identified.

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[21] The United Nations Compensation Commission applies this standard with utmost flexibility to claims presented by individuals. See Kazazi, "An Overview of Evidence Before the United Nations Compensation Commission", *International Law Forum* (1999), pp. 219-255, footnote 18, at https://www.deepdyve.com/lp/brill/an-overview-of-evidence-before-the-united-nations-compensation-xSB54IaKYE?shortRental=true

[22] *Katanga*, "Order for Reparations pursuant to Article 75 of the Statute", 24 March 2017, ICC-01/04-01/07-3728-tENG, paras. 129-131.

2) *Potential victims identified in the proceedings*

23. The number of victims in the sample of dossiers prepared by the Trust Fund and the OPCV was not the main factor in the Chamber's determination of the harm. The Chamber nevertheless devoted considerable time and energy to examining the sample with a view to determining which persons were likely to have been victims of the crimes committed by Mr Lubanga and which were more likely not to have been.

24. The Defence asserts that the Chamber misapplied the balance of probabilities standard when it examined the dossiers of already identified victims. That assertion is surprising, considering that the Chamber acceded to most of the Defence requests by deciding that almost half of the victims authorized to participate in the proceedings had been wrongly considered victims by the Chambers that admitted them and by barring the Trust Fund from including them as beneficiaries of the collective reparations. The eligibility of those victims had nevertheless been confirmed by the Trust Fund after a very thorough individual assessment procedure (interviews lasting several hours, an examination of previous applications and of the documents produced, medical and psychological expert reports, etc.).

25. The Legal Representatives are also of the view that the Chamber misapplied the standard of proof with regard to this category of victims, but on different grounds (see Legal Representatives' Appeal Brief, third ground).[23]

26. As a preliminary remark, they reiterate that there was absolutely no need for a process in which the Defence was given notice and an opportunity to be heard or for individual decisions on each victim in the sample taken into account to determine the number of victims and the extent of their harm, especially since

[23] ICC-01/06-01/04-3396-Conf, paras. 44-47.

the Chamber considered from the outset that the sample represented only a small fraction of the victims.

27. The Chamber initially instructed the Trust Fund to prepare individual dossiers for all of the potential victims,[24] but the Trust Fund confined itself to interviewing the victims participating in the proceedings. The Chamber then authorized the OPCV to prepare dossiers and transmit them directly to the Registry without an assessment by the Trust Fund. The Chamber lastly reviewed those individual dossiers in judicial proceedings, ultimately rejecting almost half of the dossiers of the participating victims selected by the Trust Fund while accepting the vast majority of the recently identified victims who had not been assessed by the Trust Fund.

28. To screen the dossiers, the Chamber decided on a series of items – place of recruitment, dates, names of commanders, witness statements, etc. – which it considered to be discriminating for the purpose of assessing the honesty of a victim and barred from the possibility of reparation the persons whose dossiers, prepared by the Trust Fund, contained none or only some of those items. The Decision also instructed the Trust Fund to use the same criteria to assess the dossiers of potential victims who come forward in the future.

29. The Legal Representatives submit that the Trust Fund applied the standard of proof of a balance of probabilities properly. The Trust Fund's examiners were able to take into account factors that supported the probability of victimhood, such as: the victim's age and sex at the time of the events; the victim's ethnicity and the social status of his or her family (the UPC mainly recruited young Hema, especially from families that did not have the resources to support the movement in any other way); the victim's place of residence (in some villages,

[24] "Order instructing the Trust Fund for Victims to supplement the draft implementation plan", 9 February 2016, ICC-01/04-01/06-3198-tENG.

recruitment was wholesale); the victim's participation in the proceedings as part of a group of victims that has been involved for more than a decade, with the risks and effort that implies; the plausibility of the account of the events; the consistency of the account internally and with the known context (recruitment, training and combat locations; commanders, weapons, organization and discipline of the group); any corroboration of the account by other persons, in particular the parents or guardians who filed the application for participation; and expert reports certifying physical or psychological injury consistent with the person's account. Where there were no factors that raised suspicion of fraud or suggested that the alleged facts occurred outside the material time or in a different armed group, the examiners found that the evidence tipped the balance in favour of recognizing the victims as beneficiaries.

30. By contrast, in its review of those assessments, the Chamber strayed far from the balance of probabilities standard. The standard it actually applied (*ex post facto*) was that the victim must "provide sufficient proof of the harm suffered and of the causal nexus between that harm and the crime of which the person was convicted".[25] Instead of weighing, for each dossier, the factors that make the facts alleged by the victim likely against any factors that make fraud likely or that justify exclusion, the Chamber rejected many dossiers which did not contain any factor suggestive of fraud and which the Trust Fund, after a thorough assessment, had found established that the victim's claims were not only likely but even demonstrated.

31. The Chamber has a margin of appreciation, of course, but the proper application of a balance of probabilities would have made it possible to proceed rapidly

[25] "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", with one corrected public annex (Annex I), one public annex (Annex III) and one confidential annex *ex parte*, Registry, Trust Fund for Victims, Legal Representatives of the V01 and V02 Victims, and Office of Public Counsel for Victims (Annex II), and the confidential redacted version of Annex II, ICC-01/04-01/06-3379-Conf-Corr, para. 65.

with reparations, without causing the victims further suffering and without creating discrimination within the group of victims, as the Appeals Chamber advised:

> 64. The legal framework leaves it for chambers to decide the best approach to take in reparations proceedings before the Court. Chambers have thus ample margin to determine how best to deal with the matter before them, depending on the concrete circumstances at hand. However, in the exercise of their discretion, it is clear that proceedings intended to compensate victims for the harm they suffered, often years ago, must be as expeditious and cost effective as possible and thus avoid unnecessarily protracted, complex and expensive litigation.[26]

32. The Defence contends that the Chamber was again not stringent enough with regard to the participating victims. While continuing to challenge the merits of the conviction, it has maintained that all of the persons claiming to be victims are imposters and that none of the victims whose dossiers were submitted to the Court could qualify as victims.

33. Like the Defence, the Legal Representatives also consider that the Chamber misapplied the standard of proof, but on other grounds (see Victims' Appeal Brief, third ground).

3) Factors advanced by the Defence that supposedly tip the balance in favour of rejecting all of the victims

34. The Defence maintains that had the Chamber properly applied a balance of probabilities, it would have found that none of the potential victims identified were recruited by the UPC before the age of 15 years and that none should be admitted as beneficiaries of the collective reparations. That position is consistent with the Defence theory that there were never any child soldiers in the UPC.

[26] *Katanga*, Judgment on the Appeals, 8 March 2018, para. 64.

35. The factors put forward by the Defence do not make that hypothesis likely, however. Neither statements uncorroborated by witnesses nor gaps and inconsistencies in relation to the age of the direct victims or to the exact date of their recruitment create a presumption of fraud, no more than does the fact that many dossiers do not contain demobilization papers (12 years after the events) or that the Trust Fund's examiners did not ask for more details about the identities or names of the commanders.

37. In conclusion, the Defence correctly asserts that the Chamber misapplied the balance of probabilities standard, but is wrong to claim that the Chamber should have applied a higher standard of proof.

4) Unidentified potential victims

36. Some of the victims in the V01 group have not yet been assessed by the Trust Fund and therefore come under the category of victims who might be identified at the implementation stage of the reparations, which compels the Legal Representatives of the V01 Group to examine this ground as well.

37. In the Judgment Handing Down Conviction, Trial Chamber I highlighted the scale on which the UPC/FPL recruited and used child soldiers. The Chamber underlined through wording such as "conducted a large-scale recruitment exercise directed at young people"[27] and "recruitment […] of young people, including children under 15, was widespread".[28]

[27] Trial Chamber I, Judgment Handing Down Conviction, ICC-01/04-01/06-2842, para. 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."

[28] Trial Chamber I, Determination of Sentence, ICC-01/04-01/06-2901, para. 49.

38. Further to that finding, Trial Chamber I decided that it was necessary to take a collective approach to the implementation of reparations to ensure that the reparations reach victims whose identities are currently unknown, given "the limited number of individuals who have applied for reparations".[29]

39. It will still be impossible to determine the exact number of victims, however, especially if indirect victims are included. Potential indirect victims comprise not only the relatives of children who died or disappeared during their time in the militia (which was the Chamber's approach). They may also be relatives of children who were abducted – or even of children recruited without coercion – but who now display inappropriate behaviour towards their families as a result of the trauma they suffered or who have become an additional burden for their families as a result of the disruption to their education and their subsequent difficulties integrating into economic life. In any case, the real extent of the harm caused can be determined only approximately and *ex aequo et bono*, as the Chamber did.

40. The Defence criticizes the Chamber for using reports from NGOs and international organizations, the DRC Government's disarmament, demobilization and rehabilitation/integration lists and historical sources to calculate the number of potential victims, but does not say which alternative sources the Chamber should have used to reach its estimate.

41. Compared with the factors which the Chamber considers tip the balance of probabilities in favour of a large number of victims yet to be identified, the Defence does not put forward any factors that could tip the balance towards the theory of a very small number of victims.

[29] Trial Chamber I, Decision on Reparations, ICC-01/04-01/06-2904, para. 219. See also, Appeals Chamber, Judgment on the Appeals, ICC-01/04-01/06-3129, para. 153, referring to the above-mentioned Decision on Reparations.

42. By proceeding in this manner, the Defence in fact confirms that the Chamber did apply the balance of probabilities standard to estimate the as-yet-unknown number of victims.

43. Consequently, this part of the ground is without merit.

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

44. The Defence alleges that the Chamber made an error of law in finding that "[TRANSLATION] the Defence had sufficient information to impugn the evidence brought against it in a process which duly afforded it notice and the opportunity to be heard, and, hence, a fair hearing"[30] despite the extensive redactions to the applications for reparations.

45. Additionally, the Defence points out that, by ordering systematic redactions without an objectively justifiable risk to safety stemming from the communication of specific information to the Defence and without inquiring whether confidential disclosure might suffice to protect the victims, the Chamber made an error of law.[31]

Response

46. Given that the reparations will be collective only, they do not see how it is in the interests of the Defence to have an opportunity to challenge the individual situation of each victim. The Defence argument under this ground contradicts its argument under the fourth ground, where it criticizes the Chamber for having examined the harm of each individual victim when the only criterion should

[30] Defence Appeal Brief, para. 157.
[31] *Ibid*., para. 160.

have been the expected cost of the programme to be implemented by the Trust Fund. That cost is indeed 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. For instance, if the Trust Fund implements a programme of medical assistance and/or psychological support in a particular location for a period of six months, the cost of that programme will not change much if the average number of patients coming for a consultation per day is ten or two. At the very most, the number of participants will have an impact on the amount of time available for each individual.

47. After all, it was perfectly possible for the Defence to have an idea of the extent of the harm without knowing the full identities of all the victims, leaving aside the fact that giving the Defence a further advantage would not justify the risks that full disclosure would have entailed for the victims.

48. In *Al Mahdi*, the Appeals Chamber provides the following explanation, in relation to individual reparations, however:

> 93. The Appeals Chamber also notes that Mr Al Mahdi's interests at this stage of the proceedings are limited. In this sense, the Trial Chamber has already set Mr Al Mahdi's monetary liability and, as argued by the LRV, the results of the screening process will have no impact on this. 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.

49. This ground is therefore without merit.

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

50. The Defence asserts that rules 97 and 98 of the Rules of Procedure and Evidence clearly state that an award against a convicted person necessarily amounts only to all or part of the actual cost of the reparations ordered and not the quantum of the aggregate individual harm assessed independently of the cost of the reparations actually awarded by the Court.[32]

Response

51. This ground is surprising. The Defence has always contended that, in order to determine the size of the award for reparations, the Chamber had to assess the harm of each individual victim and not the expected cost of implementing a programme of collective reparations, some of which are symbolic reparations. The Defence persists with that logic, which it criticizes here, by claiming further down that the size of the reparations award "cannot evidently be lower than the aggregate individual harm".[33]

52. The Legal Representatives have always maintained that the psychological harm resulting from the enlistment or conscription of a child into a militia or the harm suffered by the parents of a child killed in hostilities can be assessed as a monetary value only if the harm is repaired by the payment of financial compensation, whereas in the case of reparation in kind through a collective reparations programme, the only criterion to be taken into account is the cost of implementing the programme.

[32] Defence Appeal Brief, para. 210.
[33] *Ibid*., para. 222.

53. 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.[34]

54. In any case, the Chamber took the individual harm only partly into account, by ordering an award against Mr Lubanga equivalent to a lump sum per (direct and indirect) victim multiplied by the estimated number of victims.

55. The ground is based on an erroneous interpretation of the Decision and is therefore without merit.

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

56. The Defence maintains that, in holding Mr Lubanga liable for the full award for reparations without taking into account the plurality of co-perpetrators, the degree of his participation in the commission of the crimes, his efforts to promote peace and the specific circumstances of the case, the Chamber made an error of law or, at the very least, clearly misappreciated the facts.[35]

[34] "Submissions on the Evidence Admitted in the Proceedings for the Determination of Mr Thomas Lubanga Dyilo's Liability for Reparations", ICC-01/04-01/06-3359-tENG.
[35] Defence Appeal Brief, para. 228.

Response

1) The issue of the plurality of co-perpetrators

57. When a crime is committed by several perpetrators, only one of whom is prosecuted, an apportionment between the co-perpetrators is impossible. To avoid the same harm being repaired twice if another person is subsequently convicted of the same crimes, the judge can order the subsequent perpetrator to pay the cost of the reparations *in solidum* with the first perpetrator. This does not prevent the perpetrator who has already paid the full cost of the reparations from bringing an action against his or her co-perpetrator for recovery from him or her of the amounts which he or she has paid in excess of his or her share.

58. The Chamber was under no obligation whatsoever to anticipate the future conviction of Mr Bosco Ntaganda or other persons. On the contrary, to do so would have violated the presumption of innocence with regard to those persons.

2) The degree of Mr Lubanga's participation in the commission of the crimes and the contextual circumstances in which the crimes were committed

59. The Defence does not put forward any factor to justify why the Chamber made an error of law or appreciation in holding Mr Lubanga liable for the entire reparations award. Consideration of the specific circumstances of the case is a matter for the Chamber's discretion, and any peace initiatives undertaken by Mr Lubanga is unrelated to the crimes committed.

60. This ground is clearly without merit.

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

61. The Defence contends that the Chamber violated the general legal principle that prohibits *ultra petita* decisions that award more than the amount claimed by the requesting parties.

Response

62. It is important to note that the Chamber did not issue the order against Mr Lubanga on the basis of a request filed by the victims, but on its own motion.

63. At no time did the victims make a claim for a specific amount. At the express behest of the Chamber, they estimated the amounts that might have been awarded to the victims had the Court decided to award them financial compensation instead of ordering collective reparations.

64. Since the rule cited is not applicable, this ground is without merit.

FOR THESE REASONS,

MAY IT PLEASE THE APPEALS CHAMBER:

To rule the first ground to be inadmissible;

To rule the third, fifth and sixth grounds to be without merit;

To rule the second ground to be partly with merit, in that the Chamber misapplied the standard of proof with respect to the already identified potential victims;

To rule the fourth ground to be moot;

AND THEREFORE,

To reverse the part of the Decision of 15 December 2015 that concerns the admission of potential victims as beneficiaries of collective reparations, and to assign to the Trust Fund for Victims the task of deciding on the eligibility of the potential victims who wish to participate in one of its programmes;

After having granted the victims' appeal;

To affirm the remainder of the Decision.

The Legal Representatives of the V01 Victims

Luc Walleyn

[signed]

Franck Mulenda

[signed]

Dated this 15 May 2018

At Brussels, Belgium, and Kinshasa, DRC