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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

Public Version of the 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

Source: Legal Representatives of the V01 Group of Victims

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Office of the Prosecutor

Counsel for the Defence

Ms Catherine Mabile

Mr Jean-Marie Biju-Duval

Legal Representatives of V01 Victims

Mr Luc Walley

Mr Franck Mulenda

Legal Representatives of V02 Victims

Ms Carine Bapita Buyangandu

Mr Joseph Keta Orwinyo

Mr Paul Kabongo Tshibangu

Office of Public Counsel for Victims

Ms Paolina Massidda

Trust Fund for Victims

Mr Pieter de Baan

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

I. PROCEDURAL HISTORY

1. On 7 August 2012, Trial Chamber I handed down a decision establishing the principles and procedures to be applied to reparations in the instant case.¹
2. On 3 March 2015, the Appeals Chamber in part affirmed and in part amended that decision.² It also directed the Trust Fund for Victims (“Trust Fund”) to submit a draft implementation plan within six months, and it mandated Trial Chamber II (“Chamber”) to monitor and oversee the implementation of the Amended Order for Reparations and to set the size of the reparations award for which Mr Lubanga is liable. By its decision of 14 August 2015, the Chamber extended the time limit by three months.³
3. On 3 November 2015, the Trust Fund submitted the “Filing on Reparations and Draft Implementation Plan”,⁴ i.e. its proposed collective reparations plan.
4. On 9 February 2016, the Chamber deferred approval of the Draft Implementation Plan and directed the Trust Fund to compile a list of the possible victims, to prepare dossiers describing the harm sustained and to submit the dossiers to the Chamber, for it to determine the size of the award against the convicted person.⁵

¹ Trial Chamber I, “Decision establishing the principles and procedures to be applied to reparations”, 7 August 2012, CC-01/04-01/06-2904.

² Appeals Chamber, “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.

³ Decision of 14 August 2015, ICC-01/04-01/06-3161-tENG.

⁴ “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.

⁵ Order of 9 February 2016, ICC-01/04-01/06-3198-tENG.

5. An application from the Trust Fund for leave to appeal against that order was denied by the Chamber on 4 March 2016.
6. In accordance with the Chamber's instructions, the Trust Fund embarked on a process of identifying the victims, assessing their eligibility for the collective reparations on the basis of the criteria set by the Appeals Chamber. In April 2016, some of the participating victims from the V01 and V02 groups were accordingly interviewed by the Trust Fund and underwent a series of specialist assessments.
7. On 31 May 2016, the Trust Fund suspended the process of identifying and assessing the victims and filed a request, asking the Chamber to reconsider the approach it had taken in the Order of 9 February 2016.
8. On 15 July 2016, the Chamber, in the majority, instructed the Registry to provide the Legal Representatives of the V01 and V02 Victims, the Office of Public Counsel for Victims ("OPCV") and the Trust Fund "with all the necessary and appropriate aid and assistance for the purpose of locating and identifying victims potentially eligible".⁶
9. On the same day, two other orders were issued, one instructing the Trust Fund to submit a proposal for a programme of symbolic reparations,⁷ the other inviting various amici curiae to submit observations as to how

⁶ "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, and dissenting "Opinion of Judge Herrera Carbuccia", ICC-01/04-01/06-3217-Anx-tENG.

⁷ ICC-01/04-01/06-3219.

the collective reparations should be organized and convening three days of hearings to discuss those observations.⁸

10. In the Order of 21 October 2016 – issued soon after the hearings of 11 and 13 October 2016⁹ – the Chamber instructed the Trust Fund to start implementing the programme of symbolic reparations while continuing the process of identifying victims to be included in a “representative sample” for the purpose of determining the amount to be awarded against Mr Lubanga. In the same order, the Chamber authorized the OPCV to proceed – in parallel with the work of the Trust Fund – to identify possible victims and to prepare dossiers and submit them to the Chamber.¹⁰ The applications from participating victims for leave to appeal against that order were denied by the Order of 8 December 2016.¹¹

11. The Trust Fund resumed its interviews with victims participating in the proceedings and submitted the dossiers that it considered complete, whereas the OPCV, for its part, forwarded a series of dossiers of possible victims who had not previously made themselves known to the Court. The Defence had the opportunity to make observations on those dossiers.

12. In its Decision of 15 December 2017 (“Decision”),¹² the Chamber determined not only the size of Mr Lubanga’s total liability for reparations, but also, at paragraph 155, which victims might be eligible for the collective reparations procedure to be implemented by the Trust Fund:

⁸ ICC-01/04-01/06-3217-tENG.

⁹ ICC-01/04-01/06-3251.

¹⁰ “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, and dissenting “Opinion of Judge Herrera Carbuccia”, ICC-01/04-01/06-3252-Anx-tENG.

¹¹ ICC-01/04-01/06-3263-tENG, 8 December 2016.

¹² ICC-01/04-01/06-3379.

[TRANSLATION] The Chamber has come to the conclusion that 36 of them have not established that they were conscripted or enlisted into the armed wing of the UPC/FPLC or that Mr Lubanga used them to participate actively in hostilities [...]. Accordingly they are not eligible for the reparations awarded in the case.

Annex II of the Decision contains a list of those victims and the grounds for those individual decisions. The list excludes from the collective reparations a significant number of the victims participating in the proceedings whom the Trust Fund had decided qualified as victims. This implies that the Trust Fund is barred from including those individuals in one of its programmes.

II. ADMISSIBILITY OF THIS APPEAL

13. This appeal has been filed within the requisite time frame and in accordance with article 82(4) of the Statute, rule 153 of the Rules of Procedure and Evidence and regulation 57 of the Regulations of the Court.

III. GROUNDS OF APPEAL

First Ground

By individually assessing the eligibility of the already identified possible victims – in breach of rules 97(1) and 98(3), which apply exclusively to collective reparations – the Trial Chamber did not comply with the Appeals Chamber’s instructions and exceeded the mandate entrusted to it by the latter. The Trial Chamber also considered the reparations forms drawn up by the Trust Fund to be applications for reparations submitted pursuant to rule 98, even though there had been a final ruling that collective reparations were not to be based on individual applications.

a. The mandate entrusted to the Trial Chamber by the Appeals Chamber

14. In its Judgment on the Appeals of 3 March, the Appeals Chamber made a clear distinction between two different reparations procedures. One involves ruling on individual application-based requests, and is essentially governed by rules 94 and 95. The other applies where collective reparations are awarded. The latter procedure, which applies in the instant case, is governed by rules 97(1) and 98(3).¹³ At paragraph 152, the Appeals Chamber specified that

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.

¹³ Judgment on the Appeals, 3 March 2015, ICC-01/04-01/06-3129, para. 149.

In the same judgment, it affirmed Trial Chamber I's decision to proceed exclusively with collective reparations, which are not based on individual applications.

15. The Appeals Chamber defined the role of the Trial Chamber in the procedure thenceforth 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.¹⁴

The Judgment on the Appeals further made 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”.¹⁵

16. The Amended Order for Reparations gave the Trust Fund responsibility for implementing the collective reparations and designing a draft reparations plan, including an estimate of the amount necessary to remedy the harm, “based on information gathered during the consultation period leading up to the submission of the draft implementation plan”.¹⁶ After approval of the plan, the Trust Fund was to contact the victims and ask them for their consent to be included in the programme, and to verify their eligibility.¹⁷

13. The Appeals Chamber's approach is consistent not only with the Rules of Procedure and Evidence, but also with the Regulations of the Trust Fund for Victims. The latter provide, within the framework of collective reparations:

¹⁴ “Order for Reparations”, ICC-01/04-01/06-3129-AnxA, para. 76.

¹⁵ “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012”, para. 234.

¹⁶ “Order for Reparations”, ICC-01/04-01/06-3129-AnxA, para. 78.

¹⁷ *Ibid.*, para. 73.

62. The Secretariat shall verify that any persons who identify themselves to the Trust Fund are in fact members of the beneficiary group, in accordance with any principles set out in the order of the Court.

63. Subject to any stipulations set out in the order of the Court, the Board of Directors shall determine the standard of proof for the verification exercise, having regard to the prevailing circumstances of the beneficiary group and the available evidence.

64. A final list of beneficiaries shall be approved by the Board of Directors.

14. It follows from the foregoing that, within the framework of an exclusively collective reparations programme implemented by the Trust Fund, it is not the Chamber but the Trust Fund that determines the beneficiaries.

b. Implementation by the Trial Chamber

15. The Chamber far overstepped the Appeals Chamber's instructions. This has led to considerable delay (more than three years) in the implementation of the reparations, generated disproportionate costs for the Trust Fund and the Court and created substantial work for counsel. The resulting confusion, which has persisted throughout the proceedings, has caused a loss of trust and even despair among the victims, who have been waiting for reparations since 2006.

16. From the outset of the proceedings, the Chamber linked the approval and implementation of the Trust Fund's plan for the collective reparations to the determination of the size of the convicted person's liability, considering that it should be equal not to the cost of the reparations programme to be implemented but to the "aggregate harm suffered by the potential victims".¹⁸ Before approving the plan submitted by the Trust Fund, the Chamber first instructed it to identify all of the possible victims and submit "an evaluation

¹⁸ Order of 9 February 2016, ICC-01/04-01/06-3198-tENG, para. 25.

of the extent of the harm caused to the victims”.¹⁹ It subsequently reduced that requirement to the preparation of a representative sample of dossiers of possible victims.²⁰

17. In accordance with the Chamber’s instructions, the Trust Fund asked the participating victims to take part in the evaluation of their harm and they agreed to be interviewed by the Trust Fund and then assessed by medical and socio-economic professionals. They also gave the Trust Fund permission to inspect their applications for participation in the proceedings as well as any requests for reparations they may have filed, as well as any annexes and supplementary documents.

18. For the purpose of those interviews, the Trust Fund designed a “reparations form”, containing the victim’s identity details and a questionnaire about his or her experience and the harm sustained. The admissibility of the victims to participate in the collective reparations programme was assessed by the Trust Fund staff on the basis of an interview, reports by several specialists (a doctor, a psychologist and a social worker), applications for participation and/or reparations submitted at the beginning of the proceedings and documents forwarded to the Trust Fund by the victims. The Trust Fund asked them whether they wished to be included in the collective reparations and whether they consented to the disclosure of their dossiers to the Trust Fund and to the Defence. Regarding the V01 group of victims, the Trust Fund’s team of experts found that all of the victims they assessed qualified as victims eligible for the future programme of collective reparations.

¹⁹ Order of 9 February 2016, ICC-01/04-01/06-3198-tENG, para. 25.

²⁰ Order of 15 July 2016.

19. Once it had received the dossiers and the Trust Fund's assessments, the Chamber ordered the Registry to forward redacted versions to the Defence so that the latter could make submissions on the Trust Fund's methodology and on the assessment of the dossiers communicated to it by the Registry. The Defence impugned the work of the Trust Fund's experts and contended that none of the participating victims assessed by the Trust Fund qualified as victims of the crimes of which Mr Lubanga had been convicted. The Defence reached the same conclusion for the possible victims whose dossiers were prepared by the OPCV.
20. When the Legal Representatives of the Victims and the OPCV filed responses to those Defence submissions, the Chamber declared them inadmissible on the grounds that the interview forms drafted by the Trust Fund were "applications" and that the Defence submissions were in fact a "response" to those "applications" and, consequently, that the Legal Representatives' response was a "reply", which had not been authorized by the Chamber.²¹
21. In the Decision of 15 December, the Chamber used the expression "applications for reparations"²² and referred explicitly to rule 94(1), as though the Trust Fund's forms were individual applications for reparations filed by the victims with the Registrar. Yet those forms contain no claims against the convicted person for compensation, rehabilitation or other forms of remedy, even if, in the "consent" section, the victim answered "yes" to the

²¹ Decision of 19 May 2017, ICC-01/04-01/06.

²² Order for Reparations, paras. 33, 61, 63, 86, 161 *et seq.*

question on whether he or she wished “[TRANSLATION] to be included in the reparations that will be implemented in the instant case”.²³

22. By doing so, the Chamber ignored the fundamental difference between a procedure based on individual applications for reparations, as provided for by rule 94(3), and a collective reparations procedure, as provided for by rule 98.

c. The illegal and abusive nature of the Chamber’s approach

23. In its Judgment of 9 March 2018 in *Katanga*, the Appeals Chamber recalled:

2. 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.

3. There may be circumstances where a trial chamber finds it necessary to individually set out findings in respect of all applications in order to identify the harms in question (for example, if there is a very small number of victims to whom the chamber intends to award individual and personalised reparations). However, when there are more than a very small number of victims, this is neither necessary nor desirable.²⁴

24. In *Al Mahdi*, the Trial Chamber mandated the Trust Fund to select not only the beneficiaries of a programme of collective reparations, but also even the victims who satisfied the criteria for individual awards:

123 [...] When the Court does not identify the beneficiaries, it falls to the TFV to establish a verification procedure to determine that any persons

²³ It should be noted that a different form was used for the victims interviewed after 15 July 2015, entitled *Formulaire de demande de réparation* [TRANSLATION: Reparations application form]; the wording of the question on consent was also changed to: *Je confirme mon souhait de bénéficier des réparations qui seront accordées dans la présente affaire* [TRANSLATION: I confirm that I wish to be included in the reparations that will be awarded in the instant case].

²⁴ Appeals Chamber, *The Prosecutor v. Germain Katanga*, 9 March 2018, ICC-01/04-01/07-3778-Red, [para].

who identify themselves to the TFV are in fact members of the beneficiary group.

124. The Chamber considers that proceeding in this manner is an alternative to an application-based process, whereby the Chamber assesses the reparation requests of identifiable beneficiaries filed pursuant to Rule 94 of the Rules.

[...]

144. For the reasons above, the Chamber considers that the impracticability of identifying all those meeting its individual reparations parameters justifies an eligibility screening during the implementation phase. The Chamber therefore considers it best that individual reparations be awarded on the basis of an administrative screening by the TFV.²⁵

25. That practice was endorsed by the Appeals Chamber:

The Appeals Chamber notes that, as relevant to the present sub-ground of appeal, the Trial Chamber delegated a relatively limited task to the TFV, namely the determination of whether the 139 current applicants as well as any future applicants fall within the group of individuals that are, according to the Trial Chamber's determination, entitled to individual reparations. In so doing, the Trial Chamber maintained a high level of control over the activities of the TFV, while the TFV could seek further guidance from the Trial Chamber, if required.

26. In the above-mentioned *Katanga* Judgment, the Appeals Chamber found the Trial Chamber's approach to have been inappropriate but not to have amounted to an error of law or an abuse of discretion. It should be noted, however, that in *Katanga* the award of reparations was based on individual applications for reparations filed pursuant to rule 94, whereas in the instant case, Trial Chamber I and the Appeals Chamber had already opted for a procedure based on rule 98(3) and decided that the harm would be remedied exclusively by collective reparations implemented by the Trust Fund.

27. The Chamber presented the submission of a sample of individual dossiers and the exchange of observations on those dossiers as the method for determining Mr Lubanga's financial liability. In the decision of 21 July on the OPCV's application for an extension of the time limit set by the above-mentioned order, the Chamber reiterated that purpose:

²⁵ Appeals Chamber, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, 9 March 2018, para. 44.

The task in the instant case is solely for the purpose of determining the amount of the collective reparations for which Mr Lubanga is liable. [...] [I]t is within this more restricted framework that the parties were instructed to file submissions on the various factors to be taken into account and on the method they consider to be the most appropriate and equitable for the determination of the amount of Mr Lubanga's liability for reparations.²⁶

28. Despite this, the Chamber chiefly examined the eligibility of the possible victims already known to it and ruled on the individual dossiers.
29. The Chamber did not examine the types of harm described in the dossiers in the sample in order to differentiate between them, but determined the same amount for every victim. Accordingly, the harm suffered by a 9-year-old child who was forcibly abducted was evaluated at the same amount as that suffered by a 14-year-old who enlisted voluntarily or by a parent whose child was killed in combat. A child who attended a few weeks of military training was considered to have sustained the same harm as a child who fought in the militia for several years, was seriously injured and/or continues to suffer from post-traumatic stress disorder.
30. The Chamber made no attempt to calculate the aggregate of the harm sustained by each of the victims, as it had initially announced, but instead determined the size of the award against the convicted person on the basis of 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. While there is nothing wrong with this method per se, it implies that the whole process of assessing the individual dossiers mattered little for the determination of the amount awarded against Mr Lubanga.
31. While ostensibly preparing a decision on Mr Lubanga's civil liability, the Chamber in fact conducted an assessment of the eligibility of the possible

²⁶ "Decision on the Application of the Office of Public Counsel for Victims for an extension of the time limit set by the Order of 13 July 2017", 21 July 2017, ICC-01/04-01/06-3345-tENG.

victims already known to it, even overturning many of the decisions on eligibility that had already been taken by the Trust Fund, and thus interfering in the way in which the Trust Fund discharges its mandate. There is no guarantee, however, that the selection of the beneficiaries performed by the Chamber was more efficient or fairer than that made by the Trust Fund, which is considered to have extensive experience in this area.

32. The Legal Representatives are of the view that, in the specific circumstances of *Lubanga* and in the context of a programme of reparations awarded on an exclusively collective basis, the Chamber's failure to comply with rule 98(3), regulations 62-64 of the Regulations of the Trust Fund and the instructions of the Appeals Chamber amounts to an error of law. In the alternative only, the Legal Representatives believe that the method used by the Chamber amounts to an abuse of discretion, in view of the impact on the victims' right to fair, meaningful and timely reparations.

Second Ground

The Trial Chamber committed an error of law by assessing the admissibility of the victims for collective reparations on the basis of different procedures, depending on the group to which they belonged and on the section mandated to prepare their dossiers, which *de facto* discriminated against the participating victims.

33. The victims in the V01 group were all recognized as such by the Pre-Trial Chamber or by Trial Chamber I after the Defence and the Prosecution had an opportunity to inspect their dossiers and make observations. They were unaware of the Chamber's intention to conduct a new examination of their individual dossiers for the collective reparations procedure. In *Al Mahdi*,

the Chamber did not re-examine the status of the participating victims even when ruling on the individual applications for reparations:

In its “Decision on Victim Participation at Trial and on Common Legal Representation of Victims”, the Chamber ruled on the criteria to be met for individuals and organisations to be considered as victims. The Chamber sees no reason to deviate from its own jurisprudence at the reparations phase, noting however the different standard of proof to be met²⁷

34. In the instant case, the Chamber not only revised the decisions of the Pre-Trial Chamber and the Trial Chamber on the admissibility of the participating victims, but subjected those victims to a more onerous verification procedure than that decided for the possible victims who have yet to be identified. The victims participating in the proceedings who agreed to cooperate with the Trust Fund were thus discriminated against compared with the other victims.
35. 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 procedure, which resulted in the exclusion of almost half of those victims from the Trust Fund’s programme.
36. The effect of the Chamber’s successive orders was that they established different procedures for determining the eligibility of three groups of possible victims: (1) the participating victims whose dossiers were prepared by the Trust Fund; (2) new possible victims whose dossiers were prepared by the OPCV; and (3) possible victims who may come forward in the future, who will be assessed by the Trust Fund during the implementation phase of the reparations only.

²⁷ *Al Mahdi*, Reparations Order of 17 August 2017, ICC-01/12-01/15, para. 39.

(a) The victims whose dossiers were prepared by the Trust Fund

37. The admissibility for reparations of the victims who were already taking part in the procedure was decided on the basis of the following:

- a summary, by a member of the Trust Fund's staff, of the answers given during a questionnaire-based interview that lasted several hours;
- a cross-check between the Trust Fund's notes and the information stated in the application for participation and/or the application for reparations; and
- the documents contained in the dossier or produced at the behest of the Trust Fund.

38. It can be seen from the table in Annex II that the Chamber disregarded the reports of the doctors, psychologists and social workers who assisted the Trust Fund staff, and the Trust Fund's own conclusions.

(b) The possible victims whose dossiers were prepared by the OPCV

39. The eligibility of the possible victims who had not applied to participate in the proceedings was determined on the basis of a dossier prepared by a counsel from the OPCV, acting as their "legal representative", and documents produced on that occasion.

(c) The victims whose eligibility will be determined during the implementation phase

40. In the future, the Trust Fund and its partners will decide whether a possible victim is eligible for reparations; that assessment will not be subject to oversight by the Defence or the Chamber.

41. These different procedures led to discrimination against the participating victims:

- Most of the applications for participation in the proceedings were completed and filed between 2006 and 2009 by intermediaries, on the basis of the information provided by family members of the direct victims, who were still minors at the time. Most of those family members were illiterate and some signed the document with a fingerprint. Those applications could therefore easily contain errors or misunderstandings, some of which were corrected by the victims at the interview with the Trust Fund. While the Trust Fund took this into consideration in its assessment, it did not always make note of it on the form. By contrast, the new possible victims were interviewed for the first time as adults. Since no earlier application had been filed, by definition there were no discrepancies attributable to the amount of time that had elapsed.
- The participating victims' forms were filled out by a member of the Trust Fund's staff, on the basis of the questions which were asked depending on the information which that staff member considered important or sufficient. By contrast, the new victims' forms were prepared by the OPCV counsel, acting as legal representative.
- The participating victims were not informed that their interview with the Trust Fund would be considered an application for reparations – with the

ensuing obligations under rule 94(1) – for the simple reason that the Appeals Chamber had decided that the reparations would not be awarded on the basis of individual applications and that the decision was not challenged by the Chamber. They did not prepare for their interviews and merely answered the questions put to them by the Trust Fund’s representatives. For the possible victims who came forward after 15 July 2016, the OPCV counsel was able to take the Chamber’s decisions into consideration and draw up the reparations forms as though they were applications for reparations – i.e. allowing for the most detailed accounts possible – accompanied by supporting documents. In addition, the title of those forms and some of their contents were amended.

- Some of the victims already identified were excluded from reparations by the Chamber after judicial proceedings in which the Defence was afforded notice and the opportunity to be heard, and against the advice of the Trust Fund, whereas the victims who come forward in the future can be approved by the Trust Fund after a purely administrative procedure. The Chamber itself decided that “[TRANSLATION] persons who had not been in a position to submit a dossier by 31 March 2017 would, at the implementation stage of the reparations, be screened by the TFV for eligibility”.²⁸

42. Non-discrimination is a key principle in international law, not least in reparations matters. The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*²⁹ set forth that “[t]he application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and

²⁸ Decision, para. 293.

²⁹ United Nations, General Assembly, *Resolution 60/147*, 16 December 2005.

international humanitarian law and be without discrimination of any kind or on any ground, without exception".

43. This principle was, moreover, reiterated by the Appeals Chamber in the Amended Order for Reparations: "12. All victims are treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings leading to the decision under article 74 of the Statute".³⁰ In this reparations procedure, the victims who participated in the main proceedings were treated unfairly in relation to the others, which constitutes discrimination.

Third Ground

The Trial Chamber did not apply the principles that it laid down in its decision to the individual dossiers and committed an error of law by failing to provide adequate reasons for rejecting dossiers and disregarding the assessment made by the Trust Fund and its experts.

44. In its Decision of 15 December 2017, the Chamber states that it applied a balance of probabilities as the standard of proof for eligibility,³¹ considering that

[TRANSLATION] the mere fact that an application for reparations contains slight discrepancies does not, on the face of it, cast doubt on its credibility³²

and that

[TRANSLATION] contradictions between the dates of birth of Victims Who May Be Eligible [...] have no bearing on the determination of the age of a Victim Who May Be Eligible, 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.³³

³⁰ "Order for Reparations", ICC-01/04-01-06-3219-AnxA, para. 12.

³¹ Decision, para. 43.

³² *Ibid.*, para. 64.

³³ *Ibid.*, para. 88.

45. Yet, when ruling on the individual dossiers, the Chamber disregarded the above-mentioned rules and disqualified a large number of victims from reparations, citing formulaic reasons based on those very slight discrepancies in accounts or contradictions between dates of birth. In particular, the Chamber gave considerable weight to the dates cited by the victims, even though they were relating events that took place 13 or 14 years earlier and when they were still children.
46. As the table in Annex II shows, the Chamber denied victim status to – and *de facto* withdrew it from – several participating victims on the grounds that their accounts contained “[TRANSLATION] insufficient detail”. As criteria, the Chamber established a set of items which it considered should have been included in each “application”. However, seven of the eleven items which the Chamber decided that the victim should have provided – namely, “training centres”, “battlefields”, “names of commanders”, “location of and/or organizations responsible for demobilization”, “details of recruitment”, “living conditions in the UPC” and “details on separation from the UPC” – were not included in the questionnaire drawn up and filled out by the Trust Fund. The fact that some victims provided this information while others did not was therefore completely random (in part attributable to the questions asked by the assessor from the Trust Fund).
47. Despite the fact that the Chamber had asked the Trust Fund to assess the harm sustained by each victim – a process that involved considerable energy and costs – it utterly disregarded that assessment. The Trust Fund’s staff, who had been working with victims in the field for years, were, however, better placed to assess the honesty of the victims, whom they interviewed personally, than the Chamber’s assistants, who were confined to reading a

form. The Trust Fund staff had access to a much more detailed account than the summarized version, and based their decisions not on documents alone but on a number of sources, including an interview lasting several hours.

48. In their submissions of 8 September 2017, the Legal Representatives emphasized the value of personal interviews for assessment purposes:

39. A personal interview conducted by a qualified official – once the interviewee’s confidence has been gained – is a precious tool for assessing the person’s credibility on the basis of the precision of certain details, or the explanations given about any gaps or contradictions in the chronology, or concerning anything that might have been omitted in the interview record – such as the interviewee’s attitude during the interview, his or her emotion (or lack of) when recalling anything traumatic or his or her body language. Any of these might help to detect an impostor. Conducting a personal interview is often recommended for the assessment of vulnerable people whose accounts are not corroborated by written evidence or testimony, e.g. in asylum proceedings.³⁴

49. The Chamber responded neither to that argument nor to those concerning the experts’ reports in the same submissions:

The main objective of the experts’ reports was to inform the Chamber of the kind of harm suffered by a representative sample of victims, but they also helped to boost the credibility of those victims who were assessed. The examinations revealed symptoms in most of the victims of the V01 group which they could not have simulated without special training. The expert reports helped the Trust Fund to decide on the admissibility of victims in the reparations programme.³⁵

50. The Trust Fund staff had the opportunity to take other factors into account, in addition to signs of injury and/or post-traumatic stress disorder certified by experts and corresponding to the victim’s account, such as:

- the victim’s attitude during the interview and the ease with which he or she was able to answer the questions and/or provide details;

³⁴ Submissions of the Legal Representatives of Victims, 8 September 2017, ICC-01/04-01/06-3359-tENG, para. 39.

³⁵ *Ibid.*, para. 27.

- the probability of recruitment by the UPC given the victim's ethnic group, age and gender at the material time, as well as his or her place of residence and family's socio-economic status;
- the nature of the collective reparations envisaged (the risk of fraud is greater when there is an expectation of monetary compensation than when the prospect is receiving psychological support);
- the motivation of a victim who has participated for a decade in a process initiated by members of his or her family, with everything that entails in terms of travel, loss of time and income, stress and the risk of retaliation and rejection by the family and social environment; and
- the fact that some accounts were corroborated explicitly or implicitly by the family members who helped prepare the applications for participation or by other household members who filed applications for participation at the same time.

51. The Chamber rejected a number of victims on the ground of “[TRANSLATION] no witness statement”. The Chamber did not respond to the submissions of the victims on that point either:

When the Chamber instructed the Trust Fund to “prepare files”, it did not specify how those “file[s]” were to be put together, leaving it to the Trust Fund’s discretion. The Trust Fund put together files that comprised an interview form, expert reports, a copy of the request for participation (if available) with its annexes, the identity documents of the victims contacted, and a final assessment by the Trust Fund team. The Trust Fund rightly considered that it did not need to interview witnesses about the facts referred to by the victims, or request the potentially eligible victims to corroborate the facts with “testimonials” whose value, by definition, is all relative.³⁶

52. The victims in the V01 group were all granted victim status on the basis of applications filed a decade earlier, usually by parents or guardians. They continued to participate despite the extraordinary length of the proceedings

³⁶ Submissions of the Legal Representatives of Victims, 8/9/17, ICC-01/04-01/06-3359-tENG, para. 34.

and a number of disappointing decisions for the victims (including two stays of proceedings; the Chamber's decision not to take abuse and rape in the camps into account; and the rejection of their individual requests). They withstood pressure from their families and entourage and took risks for their safety (at one time several participating victims in the V01 group had to be taken into the protection programme). At the behest of the Chamber, the 24 individuals in the group agreed to undergo an extremely thorough assessment by the Trust Fund and were all recognized by the Trust Fund as victims in accordance with the Appeals Chamber criteria.

53. Accepting the Defence theory and finding that it was "probable" that half of those people were in fact impostors, the Chamber applied a balance of probabilities in breach of the standard of proof rules which it had itself recommended and which are consistent with the Court's case law. It *de facto* overturned a series of independent decisions taken by the Trust Fund. This has caused victims to lose faith in and resent the Court because they feel they are being victimized again after so many years of waiting. It is even a possibility that the decision played a role in the renewed tension in the region; for several weeks ethnic conflict has resurfaced there, resulting in massacres of civilians and the displacement of thousands of people.
54. The Chamber ignored information in some of the victims' dossiers, misinterpreted phrases taken out of context and committed other abuses of discretion. The Legal Representatives give several examples below. This part of the brief is considered confidential and will not appear in the redacted version.
55. Lastly, several victims were rejected because they did not provide proof of their enlistment (a witness statement). While the production of such proof was justified for establishing the identity of the victim, the Court has never required witnesses' statements to confirm presence in the militia for persons

who do not wish their participation in the proceedings to be known. Since witnesses would necessarily be other members of the militia or at least from the community that supported the militia, asking for such witness statements could endanger the victims. During its evaluation of the possible victims, the Trust Fund never asked for witness statements to corroborate their accounts.

Comments on individual dossiers

56. The Legal Representatives are not asking the Appeals Chamber to re-examine the dossiers of all the victims that the Decision excluded from the reparations programme. That would be contrary to their position on the respective functions of the Court and the Trust Fund in the context of the implementation of a programme of collective reparations under rule 98(3). The comments on the individual dossiers only highlight the non-compliance of the Chamber's approach with the principles on the identification of the beneficiaries of the collective reparations laid down by the Appeals Chamber and reaffirmed in the Decision.

57. [REDACTED]

58. [REDACTED]

59. [REDACTED]

a/0003/06

_[REDACTED]

a/0149/08

60. [REDACTED]

61. [REDACTED]

a/155/07, a/156/07 and a/0441/09 [REDACTED]

62. [REDACTED]

a/0249/09

63. According to the Annex, the victim provided information about his location of deployment and several locations of service, the date and reason for his enlistment in the militia, and his demobilization. He was nevertheless denied victim status on the sole ground of “[TRANSLATION] insufficient detail”. The Chamber gives no explanation as to why the information provided was not sufficient. Manifestly, it is the reasoning of the decision that has insufficient detail.

a/405/08 and a/0406/08 [REDACTED]

64. [REDACTED]

65. [REDACTED]

66. The participation form (drawn up by an intermediary who is also a translator) says that the child was “enlisted” in October 2003, but in the same document the period in the militia is given as between May and October 2003. The Chamber took only the first date into account. [REDACTED] form (also filled out by an intermediary) states that he was forcibly recruited [REDACTED] in about December 2002.³⁷ In either case, the recruitment appears to have taken place within the time frame of the charges.

67. According to his application for participation, the victim was born [REDACTED]. His voter’s card was issued with the date of [REDACTED]. That can be explained by a practice among youths not yet old enough to vote at the time of the first free elections, of obtaining voter’s cards with a false date of birth in order to have a valid identity document. As a result, [REDACTED] became the victim’s official date of birth but, whether he was born in [REDACTED] or in [REDACTED], he was aged 11 or 12 years at the material time and only 14 or 15 years when the application was filed. In the application, information about the events is detailed (which can be seen even in the summary in the Annex) and the names of several witnesses are given.

68. The ground for rejecting the mother – “[TRANSLATION] no witness statement” – is not linked to the ground for rejecting the son, the direct victim, which indicates that the Chamber does not even appear to have made the connection between the two dossiers.

a/2901/11

³⁷ ICC-01/04-01/06-1501-Conf-Exp-Anx14, 21 November 2008

69. This victim was also rejected on the sole ground of “[TRANSLATION] no witness statement”. In the order, however, the Chamber did not rule that the production of such a document was necessary for victim status to be approved, and many other victims received a favourable outcome without having produced such an affidavit. This decision is incomprehensible.

Conclusion

70. The procedure is vitiated to the point of undermining its reliability, and the Impugned Decision is seriously marred by various errors of law and abuses of discretion.

IV. APPLICATION FOR THE TRUST FUND TO INTERVENE

71. The issues raised go directly to the Trust Fund’s general mandate – as defined by the Assembly of States Parties when they established the regulations of the Trust Fund – and to the Trust Fund’s discharge of the specific mandate entrusted to it by the Chamber, the conclusions of which were invalidated by the Impugned Decision. Moreover, the Trust Fund participated in the trial proceedings. The Legal Representatives therefore submit that the Appeals Chamber should also know the Trust Fund’s position on these issues.

72. The Legal Representatives call upon the Appeals Chamber to invite the Trust Fund to submit observations on the appeals should the Trust Fund not file an application for leave to intervene.

For these reasons, the Legal Representatives respectfully ask the Appeals Chamber:

Before ruling, to invite the Trust Fund to make observations on the appeal;

And subsequently:

to amend the part of the Decision containing the ruling on the eligibility for collective reparations of the possible victims included in the sample of dossiers submitted to the Chamber;

to set aside Annex II of the Decision; and

to assign the Trust Fund the task of determining the eligibility of any possible victims expressing a desire to be included in one of its programmes.

On behalf of the V01 victims, the Legal Representatives

Luc Walleyen

Franck Mulenda

[signed]

[signed]

Dated this 19 March 2018 at Brussels, Belgium, and Kinshasa, DRC.