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**No. ICC-01/04-01/06 A A 2 A 3**

**Date: 3 March 2015**

**THE APPEALS CHAMBER**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

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

**Public document**

**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**

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

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**Legal Representatives of Victims V01**  
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**Trust Fund for Victims**  
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**Legal Representatives of Victims V02**  
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Women's Initiatives for Gender Justice  
Justice Plus  
Terre des Enfants

**The Office of Public Counsel for victims**  
Ms Paolina Massidda  
Ms Sarah Pellet

Fédération des Jeunes pour la Paix Mondiale  
Avocats Sans Frontières

## **REGISTRY**

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**Registrar**  
Mr Herman von Hebel

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The Appeals Chamber of the International Criminal Court,

In the appeals filed, on 24 August 2012, jointly by the Legal Representatives of Victims V02 and the Office of Public Counsel for victims on behalf of the victims they represent (ICC-01/04-01/06-2909), and, on 3 September 2012, by the Legal Representatives of Victims V01 on behalf of the victims they represent (ICC-01/04-01/06-2914), as well as, on 6 September 2012, by Mr Thomas Lubanga Dyilo (ICC-01/04-01/06-2917), against the decision of Trial Chamber I entitled “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 (ICC-01/04-01/06-2904),

Having before it the “Women’s Initiatives for Gender Justice Request for Leave to Submit Observations” of 8 March 2013 (ICC-01/04-01/06-2993) and the “Application for Leave to Intervene as Amicus Curiae” by the organisations Justice Plus, Terre des Enfants, Fédération des Jeunes pour la Paix Mondiale and Avocats Sans Frontières of 8 March 2013 (ICC-01/04-01/06-2994-tENG),

After deliberation,

By majority, Judge Anita Ušacka dissenting,

*Delivers* the following

## JUDGMENT

1. The “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 is amended.
2. The Trust Fund is ordered to implement the order for reparations as amended in Annex A to this judgment.
3. The above mentioned *amici curiae* requests are rejected.

## REASONS

### I. KEY FINDINGS

1. An order for reparations under article 75 of the Statute must contain, at a minimum, five essential elements: 1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence; 4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.

2. For purposes of awards for reparations made through the Trust Fund, resolutions of the Assembly of States Parties in this respect should be given due regard by Trial Chambers. To the extent that a Trial Chamber issues an order for reparations that impinges on the management of the Trust Fund's finances, resolutions of the Assembly of States Parties in this regard must be taken into account and are to be considered an authoritative source for purposes of interpreting the Regulations of the Trust Fund.

3. The 'principles relating to reparations' of article 75 (1), first sentence, of the Statute must be distinguished from the order for reparations, i.e. the Trial Chamber's holdings, determinations and findings based on those principles. Principles should be general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers.

4. The determination, pursuant to regulation 56 of the Regulations of the Trust Fund, of whether to allocate the Trust Fund's "other resources" for purposes of complementing the resources collected through awards for reparations falls solely within the discretion of the Trust Fund's Board of Directors.

5. In cases where the convicted person is unable to immediately comply with an order for reparations for reasons of indigence, the Trust Fund may advance its “other resources” pursuant to regulation 56 of the Regulations of the Trust Fund, but such intervention does not exonerate the convicted person from liability. The convicted person remains liable and must reimburse the Trust Fund.

6. 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.

7. 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. The determination that it is more appropriate to award collective reparations operates as a decision denying, as a category, individual reparation awards. Such a determination may be challenged on appeal based on the Trial Chamber’s consideration of the factors laid out in rule 98 (3) of the Rules of Procedure and Evidence.

8. Only victims within the meaning of rule 85 (a) of the Rules of Procedure and Evidence and regulation 46 of the Regulations of the Trust Fund, who suffered harm as a result of the crimes for which Mr Lubanga was found guilty, are eligible to claim reparations against Mr Lubanga. Where an award for reparations is made to the benefit of a community, only members of the community meeting the relevant criteria are eligible.

## II. PROCEDURAL BACKGROUND<sup>1</sup>

### A. Proceedings before the Trial Chamber

9. On 14 March 2012, Trial Chamber I delivered the Conviction Decision,<sup>2</sup> in which it, *inter alia*: 1) found Mr Thomas Lubanga Dyilo (hereinafter: “Mr Lubanga”) guilty of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the

<sup>1</sup> A more detailed procedural history is set out in Annex 2 to this judgment.

<sup>2</sup> The full citation, including the Court’s registration reference, of all designations and abbreviations used in this judgment are included in Annex 1.



meaning of articles 8 (2) (e) (vii) and 25 (3) (a) of the Statute;<sup>3</sup> 2) withdrew, by majority, the right of six witnesses to participate in the proceedings as victims;<sup>4</sup> and 3) withdrew the right of three victims to participate in the proceedings.<sup>5</sup>

10. Also on 14 March 2012, the Trial Chamber issued the Sentencing and Reparations Scheduling Order in which it, *inter alia*, 1) ordered the Registrar and the Trust Fund to file public redacted versions of the Registrar's Second Report on Reparations and the Trust Fund's First Report on Reparations<sup>6</sup> and 2) invited the parties and participants, as well as the Trust Fund and the Registrar, to file submissions on the principles to be applied by the Trial Chamber with regard to reparations and the procedure to be followed.<sup>7</sup>

11. On 28 March 2012, the Registrar transmitted the requests for reparations received to date to the Trial Chamber.<sup>8</sup>

12. On 5 April 2012, the Trial Chamber instructed the Registrar to appoint the OPCV as the legal representative for all unrepresented applicants.<sup>9</sup> The Trial Chamber also decided that the OPCV may "represent the interest of victims who have not submitted applications but who may benefit from an award for collective reparations" and instructed the OPCV to file observations on their behalf.<sup>10</sup>

13. On 28 March 2012, five organisations,<sup>11</sup> requested leave to file submissions in the reparation proceedings,<sup>12</sup> which was granted on 20 April 2012.<sup>13</sup>

<sup>3</sup> [Conviction Decision](#), para. 1358.

<sup>4</sup> [Conviction Decision](#), para. 1362.

<sup>5</sup> [Conviction Decision](#), para. 1363.

<sup>6</sup> [Sentencing and Reparations Scheduling Order](#), para. 5. *See also* [Trust Fund's First Report on Reparations](#); [Registrar's Second Report on Reparations](#).

<sup>7</sup> [Sentencing and Reparations Scheduling Order](#), paras 8-9.

<sup>8</sup> [Registrar's First Transmission of Applications for Reparations](#).

<sup>9</sup> [Decision on OPCV's Request for Leave to Participate](#), para. 13. This decision was taken in response to the [OPCV's Request for Leave to Participate](#).

<sup>10</sup> [Decision on OPCV's Request for Leave to Participate](#), paras 12-13.

<sup>11</sup> The organisations are the Women's Initiatives for Gender Justice, the ICTJ, UNICEF, the FOCDP and ASF, the latter also representing four other organisations, namely *Justice-Plus*, *Terre des Enfants*, *Centre Pélican – Training For Peace and Justice*, *Journalistes en action pour la Paix*, *Fédération des Jeunes pour la Paix Mondiale*.

<sup>12</sup> [Women's Initiatives' Request for Leave to Participate](#); [ICTJ's Request for Leave to Participate](#); [UNICEF's Request for Leave to Participate](#); [FOCDP's Request for Leave to Participate](#); [ASF's Request for Leave to Participate](#).

<sup>13</sup> [Decision on Leave to Participate](#), para. 22.

14. On 18 April 2012, the OPCV,<sup>14</sup> the Legal Representatives of Victims V01,<sup>15</sup> the Registrar,<sup>16</sup> Mr Lubanga,<sup>17</sup> the Prosecutor,<sup>18</sup> and the Legal Representatives of Victims V02<sup>19</sup> submitted their respective observations. On 25 April 2012, the Trust Fund submitted its observations.<sup>20</sup> On 10 May 2012, four of the five organisations that had been granted leave submitted their respective observations.<sup>21</sup>

15. On 25 May 2012, Mr Lubanga submitted his response to the submissions of the parties and participants.<sup>22</sup> On the same day, the Legal Representatives of Victims V02 submitted their response to the submissions by the other parties and participants.<sup>23</sup>

16. On 7 August 2012, the Trial Chamber rendered the Impugned Decision.

17. On 13 August 2012, Mr Lubanga requested leave to appeal the Impugned Decision pursuant to article 82 (1) (d) of the Statute.<sup>24</sup> On 29 August 2012, the Trial Chamber rendered the Decision on Mr Lubanga's Request for Leave to Appeal, granting the requested leave to appeal on four of the eight issues raised.<sup>25</sup>

## **B. Proceedings before the Appeals Chamber**

18. On 24 August 2012, the OPCV jointly with the Legal Representatives of Victims V02 filed an appeal pursuant to article 82 (4) of the Statute against the Impugned Decision.<sup>26</sup>

19. On 3 September 2012, the Legal Representatives of Victims V01 filed an appeal pursuant to article 82 (4) of the Statute against the Impugned Decision.<sup>27</sup>

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<sup>14</sup> [OPCV's Observations on Reparations.](#)

<sup>15</sup> [Legal Representatives of Victims V01's Observations on Reparations.](#)

<sup>16</sup> [Registrar's Observations on Reparations.](#)

<sup>17</sup> [Mr Lubanga's Submissions on Reparations.](#)

<sup>18</sup> [Prosecutor's Submissions on Reparations.](#)

<sup>19</sup> [Legal Representatives of Victims V02's Observations on Reparations.](#)

<sup>20</sup> [Trust Fund's Observations on Reparations.](#)

<sup>21</sup> [Women's Initiatives' Observations on Reparations;](#) [NGO's Joint Observations on Reparations;](#) [UNICEF's Submissions on Reparations;](#) [ICTJ's Submissions on Reparations.](#)

<sup>22</sup> [Mr Lubanga's Reply to the Parties and Participants' Observations on Reparations.](#)

<sup>23</sup> [Legal Representatives of Victims V02's Reply to the Parties and Participants' Observations on Reparations.](#)

<sup>24</sup> [Mr Lubanga's Request for Leave to Appeal.](#)

<sup>25</sup> [Decision on Mr Lubanga's Request for Leave to Appeal](#), paras 30, 32-36, 38-40.

<sup>26</sup> [OPCV and Legal Representatives of Victims V02's Notice of Appeal.](#)

<sup>27</sup> [Legal Representatives of Victims V01's Notice of Appeal A2.](#)

20. On 6 September 2012, Mr Lubanga filed an appeal against the Impugned Decision pursuant to article 82 (4) of the Statute.<sup>28</sup>

21. On 10 September 2012, Mr Lubanga filed his Document in Support of the Appeal under article 82 (1) (d) of the Statute.<sup>29</sup>

22. On 17 September 2012, the Appeals Chamber issued the Appeal Proceedings Directions, directing the potential parties and participants to the proceedings to respond to certain questions in relation to “whether the appeals are admissible and who should make submissions or submit observations on the appeals”.<sup>30</sup>

23. On 14 December 2012, the Appeals Chamber delivered its Admissibility Decision. It concluded that the interlocutory appeal filed by Mr Lubanga under article 82 (1) (d) of the Statute was inadmissible, whereas the appeals filed by the OPCV jointly with the Legal Representatives of Victims V02, the Legal Representatives of Victims V01, and Mr Lubanga, respectively, against the Impugned Decision under article 82 (4) of the Statute were admissible.<sup>31</sup>

24. The Appeals Chamber invited the OPCV jointly with the Legal Representatives of Victims V02, the Legal Representatives of Victims V01 and Mr Lubanga to submit their documents in support of the appeals against the Impugned Decision by 5 February 2013, as well as to submit their respective responses thereto by 8 April 2013.<sup>32</sup> The Trust Fund was also invited to submit observations on the appeals by 8 April 2013.<sup>33</sup> The Appeals Chamber further concluded that the Prosecutor was not a party to the appellate proceedings<sup>34</sup> and granted the request for suspensive effect of the Impugned Decision.<sup>35</sup>

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<sup>28</sup> [Mr Lubanga’s Notice of Appeal A3](#).

<sup>29</sup> [Mr Lubanga’s Document in Support of the Appeal OA21](#).

<sup>30</sup> [Appeal Proceedings Directions](#), p. 3. The Appeals Chamber set the time limit for these submissions to 1 October 2012. See [Appeal Proceedings Directions](#), p. 4.

<sup>31</sup> [Admissibility Decision](#), p. 3.

<sup>32</sup> [Admissibility Decision](#), p. 4. Mr Lubanga was invited to submit a consolidated response of no more than 140 pages to the documents in support of the appeals submitted by the Legal Representatives of Victims V01 and the OPCV jointly with the Legal Representatives of Victims V02.

<sup>33</sup> [Admissibility Decision](#), p. 4.

<sup>34</sup> [Admissibility Decision](#), para. 74.

<sup>35</sup> [Admissibility Decision](#), p. 4.

25. On 5 February 2013, the Legal Representatives of Victims V02 jointly with the OPCV,<sup>36</sup> the Legal Representatives of Victims V01,<sup>37</sup> and Mr Lubanga<sup>38</sup> submitted their respective documents in support of their appeals against the Impugned Decision.

26. On 8 March 2013, the Women's Initiatives for Gender Justice,<sup>39</sup> as well as the NGOs *Justice Plus*, *Terre des Enfants*, *Fédération des Jeunes pour la Paix Mondiale* and *ASF*,<sup>40</sup> requested leave under rule 103 of the Rules of Procedure and Evidence to submit observations on issues arising out of the present appeals. On 14 March 2013, Mr Lubanga requested leave to respond to the requests to submit *amici curiae* observations<sup>41</sup> and, on 26 March 2013, the Appeals Chamber invited the parties to file responses to the requests to submit *amici curiae* observations by 9 April 2013.<sup>42</sup> On 8 and 9 April 2013, the Legal Representatives of Victims V01 and Mr Lubanga responded to the requests.<sup>43</sup>

27. On 7 and 8 April 2013, respectively, the Legal Representatives of Victims V01 and the OPCV jointly with the Legal Representatives of Victims V02 submitted their responses to Mr Lubanga's Document in Support of the Appeal A3.<sup>44</sup> Also on 8 April 2013, the Trust Fund filed its observations on the appeals<sup>45</sup> and Mr Lubanga filed his consolidated response to the documents in support of the appeals filed by the Legal Representatives of Victims V01 and the OPCV jointly with the Legal Representatives of Victims V02.<sup>46</sup>

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<sup>36</sup> [OPCV and Legal Representatives of Victims V02's Document in Support of the Appeal.](#)

<sup>37</sup> [Legal Representatives of Victims V01's Document in Support of the Appeal.](#)

<sup>38</sup> [Mr Lubanga's Document in Support of the Appeal A3.](#)

<sup>39</sup> [Women's Initiatives' Request for Leave to Intervene as \*Amicus Curiae\*.](#)

<sup>40</sup> [NGO's Applications for Leave to Intervene as \*Amici Curiae\*.](#)

<sup>41</sup> [Mr Lubanga's Request for Leave to Reply to Applications for Leave to Intervene as \*Amici Curiae\*.](#)

<sup>42</sup> [Order to Submit Observations on Applications for Leave to Intervene as \*Amici Curiae\*.](#)

<sup>43</sup> [Legal Representatives of Victims V01's Response to Applications to Intervene as \*Amici Curiae\*; Mr Lubanga's Observations on the Requests to Intervene as \*Amici Curiae\*.](#)

<sup>44</sup> [Legal Representatives of Victims V01's Response to Mr Lubanga's Document in Support of the Appeal A3; OPCV and Legal Representatives of Victims V02's Joint Response to Mr Lubanga's Document in Support of the Appeal A3.](#)

<sup>45</sup> [Observations of the Trust Fund.](#)

<sup>46</sup> [Mr Lubanga's Response to Legal Representatives of Victims' Documents in Support of the Appeal A A2.](#)

28. On 1 December 2014, the Appeals Chamber confirmed the Conviction Decision and the Sentencing Decision, Judge Ušacka dissenting and Judge Song partly dissenting.<sup>47</sup>

### III. INTRODUCTION

#### A. Nature of the Impugned Decision

29. The Appeals Chamber recalls that, in the Admissibility Decision, it held that

*without prejudice to any final decision on the merits*, the Appeals Chamber concludes that the Impugned Decision *is deemed* to be an order for reparations, which may be appealed pursuant to article 82 (4) of the Statute. [Emphasis added.]<sup>48</sup>

30. The Appeals Chamber further recalls that this above conclusion was made within the context of determining the admissibility of the various appeals against the Impugned Decision pending at that time. This determination was based primarily on two factors, namely that 1) the Impugned Decision “represents [the Trial Chamber’s] final judicial decision in respect of reparations”<sup>49</sup> and 2) the procedures provided for in the Impugned Decision relate also to those activities that are undertaken during the implementation stage, which occurs *after* the issuance of the order for reparations.<sup>50</sup> In the Admissibility Decision, the Appeals Chamber, as noted by the Trust Fund,<sup>51</sup> did not find that the Impugned Decision *was* an order for reparations under article 75 of the Statute based on its content and substance. In this regard, the Appeals Chamber considers that the triggering of the Regulations of the Trust Fund, which according to the statutory legal framework occurs only during the implementation phase after an order for reparations has been issued, does not automatically mean that, by virtue of that triggering alone, an order for reparations under article 75 of the Statute has been issued. What therefore must still be determined is whether the Impugned Decision contains, in substance, an order for reparations under article 75 of the Statute.

31. The Appeals Chamber notes that the Court’s legal texts do not provide a comprehensive definition as such of an “order for reparations”, nor do they specify

<sup>47</sup> [Lubanga Conviction Judgment](#); [Lubanga Sentencing Judgment](#).

<sup>48</sup> [Admissibility Decision](#), para. 64.

<sup>49</sup> [Admissibility Decision](#), para. 63.

<sup>50</sup> See [Admissibility Decision](#), paras 53-64.

<sup>51</sup> [Observations of the Trust Fund](#), para. 46.

the minimum required content and details of such an order. Notwithstanding this, the Appeals Chamber considers that, when read together, the Court's legal texts provide a clear framework as to the minimum elements required for an order for reparations pursuant to article 75 of the Statute. In this regard, the Appeals Chamber recalls that it noted in the Admissibility Decision that

the explanatory note to the Rules of Procedure and Evidence states that they are “an instrument for the application of the Rome Statute”. The Appeals Chamber recalls further that the Assembly of States Parties adopted the Regulations of the Trust Fund in 2005, “wishing to ensure the proper and effective functioning of the Trust Fund”. [Footnotes omitted.]<sup>52</sup>

The Appeals Chamber further notes that the Regulations of the Court, which are to be read subject to the Statute and the Rules of Procedure and Evidence,<sup>53</sup> and the Regulations of the Registry,<sup>54</sup> provide additional information relevant to what information may inform a Trial Chamber's order for reparations.

32. As developed in detail below and following consideration of the relevant provisions of the Court's legal texts, the Appeals Chamber holds that an order for reparations under article 75 of the Statute must contain, at a minimum, five essential elements: 1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence; 4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.

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<sup>52</sup> [Admissibility Decision](#), para. 52.

<sup>53</sup> See [Regulations of the Court](#), reg. 1 (1).

<sup>54</sup> The Regulations of the Registry are to be read subject to the Statute, Rules of Procedure and Evidence, and the Regulations of the Court. See [Regulations of the Registry](#), reg. 1 (1).

33. The Appeals Chamber clarifies that the order in which it has laid out the above elements follows the structure of this judgment, which is based on the parties' grounds of appeal and is specific to the alleged errors in the Impugned Decision. A first-instance Chamber may address these elements in a different sequence for purposes of issuing an order for reparations under article 75 of the Statute.

34. The Appeals Chamber considers that the inclusion of these five elements in an order for reparations is vital to its proper implementation. It also ensures that the critical elements of the order are subject to judicial control, consistent with rule 97 (3) of the Rules of Procedure and Evidence, which requires that "[i]n all cases [when reparations are awarded], the Court shall respect the rights of victims and the convicted person". The inclusion of these elements is also of significance with respect to the right to appeal, provided for in article 82 (4) of the Statute. In the Appeals Chamber's view, if one of the above elements is not subject to judicial determination in the order for reparations, "[a] legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75" will be unable to effectively exercise their right to appeal.

35. At the outset, the Appeals Chamber notes that the Impugned Decision, on its face, does not comply with all of the elements necessary for an order for reparations under article 75 of the Statute. Additionally, the Appeals Chamber notes that the Impugned Decision does not contain a section entitled "order for reparations", but instead contains sections entitled "Principles on Reparations" and "Other Substantive and Procedural Issues".<sup>55</sup> Despite these headings, the Appeals Chamber considers that these two sections contain the Trial Chamber's determination on matters relevant to the required content and details of an order for reparations. Accordingly, in determining whether the Impugned Decision contains, in substance, an order for reparations under article 75 of the Statute, the Appeals Chamber has taken into account the determinations made in both of these sections.

36. Despite the non-compliance with the required elements of an order for reparations (detailed in the sections below), the Appeals Chamber does not consider these deficiencies to be fatal to a determination that the Impugned Decision contains

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<sup>55</sup> See [Impugned Decision](#), pp. 66, 85 III. B-C.



an order for reparations. In this respect, rule 153 (1) of the Rules of Procedure and Evidence provides that “the Appeals Chamber may confirm, reverse or amend a reparation order made under article 75”. In the Appeals Chamber’s view, the deficiencies of the Impugned Decision relevant to the required elements of an order for reparations can be corrected pursuant to its amendment power.

37. In this regard, the Appeals Chamber notes that its appellate intervention is limited to correcting errors that are properly raised by the parties.<sup>56</sup> Article 82 (4) of the Statute defines which individuals may appeal an order for reparations, which does not include the Trust Fund. As is addressed in the following sections, certain of the Trial Chamber’s determinations that are challenged on appeal by the parties are based on the Trial Chamber’s view of its authority vis-à-vis the Trust Fund. The Appeals Chamber considers that, in order to resolve the parties’ grounds of appeal, it may address those aspects of the Impugned Decision that relate to the Court’s authority over the Trust Fund and that, should it determine that the Trial Chamber erred in this regard, it may also correct these portions pursuant to its amendment powers under rule 153 (1) of the Rules of Procedure and Evidence.

38. In conclusion, the Appeals Chamber now holds that the Impugned Decision contains sufficient elements to be an order for reparations within the meaning of article 75 of the Statute, subject to the amendments detailed in this judgment.

## **B. Standard of review**

39. Article 82 (4) of the Statute provides:

A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

40. The Legal Representatives of Victims V01, the OPCV jointly with the Legal Representatives of Victims V02, and Mr Lubanga allege that the Impugned Decision

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<sup>56</sup> See, in this respect, [Lubanga Conviction Judgment](#), para. 30, regarding the appellant’s burden to set out and substantiate an alleged error, absent which the Appeals Chamber may dismiss the argument without analysing it in substance.



is tainted by errors. With respect to such errors, the standard of review is the same for all appeals raised before the Appeals Chamber.<sup>57</sup>

41. Accordingly, the standard of review for alleged legal errors is:

[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". [Footnotes omitted.]<sup>58</sup>

42. With respect to alleged procedural errors, the Appeals Chamber held that

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.<sup>59</sup>

43. Regarding alleged errors in discretionary decisions, the Appeals Chamber held:

79. The Appeals Chamber will not interfere with the [first-instance] Chamber's exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the [first-instance] Chamber.

80. [...] [T]he Appeals Chamber's functions extend to reviewing the exercise of discretion by the [first-instance] Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the [first-instance] Chamber's exercise of discretion [...], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the

<sup>57</sup> [Lubanga Conviction Judgment](#), para. 17.

<sup>58</sup> [Lubanga Conviction Judgment](#), paras 18-19.

<sup>59</sup> [Lubanga Conviction Judgment](#), para. 20, referring to [Kony et al. OA 3 Judgment](#), paras 46-47.

law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion. [Footnotes omitted.]<sup>60</sup>

### **C. The relevant legal texts for purposes of reparations involving the Trust Fund**

44. The Appeals Chamber notes that article 79 of the Statute, entitled “Trust Fund”, provides:

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

45. In this regard, article 75 (2) of the Statute provides in relevant part that an “award for reparations may be made through the Trust Fund provided for in article 79”. Rule 98 (5) of the Rules of Procedure and Evidence provides that “[o]ther resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79”.

46. The Appeals Chamber recalls that article 21 of the Statute provides a hierarchy of the applicable law for the Court, stating that the Court shall first apply the Statute and the Rules of Procedure and Evidence, and, “in the second place”, applicable treaties and the principles and rules of international law. Article 21 of the Statute does not include official actions taken by the Assembly of States Parties as a source of applicable law. However, article 79 (3) of the Statute stipulates that the Trust Fund is to be managed according to determinations made by the Assembly of States Parties. Thus, this statutory provision is unambiguous that the management of the Trust Fund does not lie with the Court. The Appeals Chamber notes that the Assembly of States Parties establishes the criteria by which the Trust Fund is to be managed by way of adopting resolutions. In this regard, of greatest significance is the ASP Resolution

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<sup>60</sup> [Lubanga Sentencing Judgment](#), para. 41, citing, in the context of interlocutory appeals, [Kony et al. OA 3 Judgment](#), paras 79-80. The Appeals Chamber held that this standard also “applies to sentencing decisions”. See [Lubanga Sentencing Judgment](#), para. 42.

Establishing the Trust Fund, to which the Regulations of the Trust Fund are attached as an annex and which contains numerous provisions related to, *inter alia*, how the finances of the Trust Fund should be managed and under whose authority.

47. The Appeals Chamber also notes that the Assembly of States Parties has issued other resolutions expressing its view regarding awards for reparations made through the Trust Fund pursuant to article 75 (2) of the Statute, most recently the ASP Resolution on Reparations, which was adopted in 20 December 2011, some eight months before the issuance of the Impugned Decision and to which the Trust Fund made reference in its Observations on Reparations before the Trial Chamber.<sup>61</sup>

48. Taking the above into account and noting particularly the reference in article 75 (2) of the Statute and rule 98 of the Rules of Procedure and Evidence to article 79 of the Statute, the Appeals Chamber considers that, for purposes of awards for reparations made through the Trust Fund, resolutions of the Assembly of States Parties in this respect should be given due regard by Trial Chambers. To the extent that a Trial Chamber issues an order for reparations that impinges on the management of the Trust Fund's finances, resolutions of the Assembly of States Parties in this regard must be taken into account and are to be considered an authoritative source for purposes of interpreting the Regulations of the Trust Fund.

#### **D. The relationship between the principles of article 75 (1) of the Statute and the order for reparations**

49. Before turning to the merits of the appeal and the substance of the Impugned Decision, the Appeals Chamber considers it necessary to address the relationship between the principles relating to reparations to, or in respect of, victims pursuant to article 75 (1) and the order for reparations pursuant to article 75 (2) of the Statute and rule 98 of the Rules of Procedure and Evidence.

50. Article 75 of the Statute provides:

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<sup>61</sup> See e.g. [Trust Fund's Observations on Reparations](#), para. 248, wherein the Trust Fund observes that "[a]t its Tenth Session, the Assembly of States Parties stressed that '[...] as liability for reparations is exclusively based on the individual criminal responsibility of a convicted person [...]']". See also [ASP Resolution on Reparations](#).

1. The Court shall establish principles relating to reparations *to, or in respect of, victims, including restitution, compensation and rehabilitation*. On this basis, 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.
2. The Court may make an order directly against a convicted person specifying appropriate reparations *to, or in respect of, victims, including restitution, compensation and rehabilitation*.

Where appropriate, the Court may order that an award for reparations be made through the Trust Fund provided for in article 79. [Emphasis added.]

51. Rule 98 of the Rules of Procedure and Evidence provides in relevant part:

1. Individual awards for reparations shall be made directly against a convicted person.
2. The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is *impossible or impracticable to make individual awards directly to each victim*. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.
3. 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. [Emphasis added.]

52. The Appeals Chamber considers that the requirement to establish principles relating to reparations is mandatory (“shall”). The question that arises, however, is whether these principles are applicable to both individual and collective reparation awards, as well as whether they are applicable to awards made directly against an individual and also to awards made against an individual, but through, or deposited with, the Trust Fund pursuant to article 75 (2) of the Statute and rules 98 (2) and (3) of the Rules of Procedure and Evidence. The second sentence of article 75 (1) of the Statute makes it clear that a decision to award individual reparations pursuant to a request or a *proprio motu* decision under rules 94 or 95 of the Rules of Procedure and Evidence must be based on the article 75 (1) principles and requires the Trial Chamber to “state the principles on which it is acting” in making the individual award. The Appeals Chamber considers that this also applies to individual reparation awards deposited with the Trust Fund pursuant to rule 98 (2) of the Rules of

Procedure and Evidence. This is because, in the Appeals Chamber's view, "deposited with" does not affect the fact that the order is still made *directly against the convicted person*, but rather it is a mechanism to address situations where it is "impossible or impracticable to make individual awards *directly to each victim*" (emphasis added).<sup>62</sup>

53. The Appeals Chamber notes that the Statute and rule 98 of the Rules of Procedure and Evidence do not explicitly state that *collective* reparation awards made against the convicted person, but through the Trust Fund, must be based on the article 75 (1) principles. However, the Appeals Chamber observes that "restitution, compensation and rehabilitation", which are included in the article 75 (1) principles, are various forms and modalities of reparations and that collective reparations may be ordered pursuant to rule 98 (3) of the Rules of Procedure and Evidence because, *inter alia*, the "forms and modalities of reparations makes a collective award more appropriate". Therefore, the Appeals Chamber considers that a collective reparation order made against the convicted person, but through the Trust Fund, must also be based on the relevant article 75 (1) principles.

## **E. Concluding remarks**

54. In conclusion, in the following sections, the Appeals Chamber will assess the order for reparations contained in the Impugned Decision in light of the five required elements laid out above.<sup>63</sup> The Appeals Chamber will address all of the parties' grounds of appeal under the element to which they relate. Furthermore, in conducting this review, the Appeals Chamber will first address the principles in the Impugned Decision relevant to each element and then address the manner in which they were applied in the order for reparations in the specific circumstances of the *Lubanga* case. Given the inter-related nature of the article 75 (1) principles and the order for reparations, the Appeals Chamber considers that, pursuant to rule 153 (1) of the Rules of Procedure and Evidence, it may amend, as necessary, both the principles and the order for reparations that is based upon those principles. In this respect, the

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<sup>62</sup> Rule 98 (2) of the [Rules of Procedure and Evidence](#). See rule 218 (3) (b) of the Rules of Procedure and Evidence, providing that "[i]n order to enable States to give effect to an order for reparations, the order shall specify [...] the identity of the victims to whom individual reparations have been granted, and, where the award for reparations shall be deposited with the Trust Fund, the particulars of the Trust Fund for the deposit of the award".

<sup>63</sup> *Supra* para. 32.

Appeals Chamber considers that amending the principles implies not only addressing those principles already contained in the Impugned Decision, but may also entail articulating principles not yet included therein. In this regard, the Appeals Chamber notes that certain principles contained in the Impugned Decision are actually located in the section entitled “Introductory Remarks”. Despite this, the Appeals Chamber has taken these principles into account in reviewing the Impugned Decision. Finally, certain principles are reformulated to remove extraneous information that is not appropriately labelled a ‘principle relating to reparations’.

55. The Appeals Chamber notes that the Trial Chamber stated that “[a]lthough [...] the Trial Chamber has established certain principles relating to reparations and the approach to be taken to their implementation, these are limited to the circumstances of the present case”.<sup>64</sup> The Appeals Chamber agrees that Trial Chambers should articulate principles within the context of the circumstances of the specific case at hand. However, principles relevant to the circumstances of a case must be distinguished from the order for reparations, i.e. the Trial Chamber’s holdings, determinations and findings based on those principles. Accordingly, principles should be general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers. To the extent that principles in the Impugned Decision also contain their application to the present case, i.e. they are part of the order in this case, the Appeals Chamber has moved these portions from the “Principles on Reparations” section to the section containing the amended order for reparations, and has reformulated the remaining text to reflect general ‘principles on reparations’ in the context of the *Lubanga* case.

56. Finally, for purposes of clarity and to assist the Trust Fund in preparing its draft implementation plan, the Appeals Chamber attaches an annex to this judgment, containing both the principles and their application to the circumstances of this case as reflected in the amended order for reparations (*see* Annex A).

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<sup>64</sup> [Impugned Decision](#), para. 181.

## IV. MERITS

### A. First element: The order for reparations must be made against the convicted person

#### 1. Relevant portions of the Impugned Decision

57. In the Sentencing and Reparations Scheduling Order, the Trial Chamber requested submissions addressing, *inter alia*, “whether it is possible or appropriate to make a reparations order against the convicted person pursuant to Article 75(2) of the Statute” and “whether it would be appropriate to make an award for reparations through the Trust Fund for Victims pursuant to Article 75(2) of the Statute”.<sup>65</sup> In the Impugned Decision, the Trial Chamber discussed the submissions of the parties and participants relevant to those two questions in separate sections.<sup>66</sup>

58. In the “Introductory Remarks” section, the Trial Chamber established the following principle: “Reparations fulfil two main purposes that are enshrined in the Statute: they 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”.<sup>67</sup>

59. Under the heading of “Other Substantive and Procedural Issues”, the Trial Chamber stated:

The convicted person has been declared indigent and no assets or property have been identified that can be used for the purposes of reparations. The Chamber is, therefore, of the view that *Mr Lubanga is only able to contribute to non-monetary reparations*. Any participation on his part in symbolic reparations, such as a public or private apology to the victims, is only appropriate with his agreement. *Accordingly, these measures will not form part of any Court order.* [Emphasis added.]<sup>68</sup>

<sup>65</sup> [Sentencing and Reparations Scheduling Order](#), para. 8, iii)- iv).

<sup>66</sup> See [Impugned Decision](#), paras 125-136 (“Reparations Orders Against the Convicted Person”), 137-146 (“Reparations ‘through the Trust Fund for Victims’”).

<sup>67</sup> [Impugned Decision](#), para. 179, citing E. Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (Martinus Nijhoff Publishers, 2010), p. 43; G. Bitti and G. Gonzales Rivas, *The Reparations Provisions for Victims under the Rome Statute of the International Criminal Court in Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (Oxford University Press, 2006), pp. 300-301.

<sup>68</sup> [Impugned Decision](#), para. 269.



60. The Impugned Decision does not contain an order for reparations against Mr Lubanga, either of a monetary or non-monetary nature.

## 2. *Submissions of the parties and participants*

61. The Legal Representatives of Victims V01 argue that the Trial Chamber erred in law by not directing the order for reparations against Mr Lubanga.<sup>69</sup> They submit that the Trial Chamber erred by considering Mr Lubanga's financial situation and the likelihood of enforcement of an order for reparations, arguing that these are not relevant factors for purposes of an order for reparations.<sup>70</sup>

62. Mr Lubanga submits that article 75 (2) of the Statute does not require that all reparation orders must be directed against the convicted person.<sup>71</sup> He submits that no statutory provision provides that collective reparations must be made against the convicted person<sup>72</sup> and that, in fact, only individual awards must be ordered against a convicted person pursuant to rule 98 (1) of the Rules of Procedure and Evidence.<sup>73</sup>

63. The Trust Fund submits that a reparation order must be directed against the convicted person, irrespective of his or her financial situation.<sup>74</sup> The Trust Fund submits that the French version of article 75 (2) of the Statute makes it clear that it plays only an intermediary role in implementing an order for reparations<sup>75</sup> and that an order "cannot stand without a convicted person" because the "case of acquittal or a process otherwise ending without conviction does not allow for reparations."<sup>76</sup>

## 3. *Determination of the Appeals Chamber*

64. As a preliminary matter, while the Trial Chamber dealt with the issues of who is liable for a reparation award and whether a reparation order must be made against the

<sup>69</sup> [Legal Representatives of Victims V01's Document in Support of the Appeal](#), para. 30.

<sup>70</sup> [Legal Representatives of Victims V01's Document in Support of the Appeal](#), paras 33-35.

<sup>71</sup> [Mr Lubanga's Response to Legal Representatives of Victims' Documents in Support of the Appeal A A2](#), para. 6.

<sup>72</sup> [Mr Lubanga's Response to Legal Representatives of Victims' Documents in Support of the Appeal A A2](#), paras 5, 9.

<sup>73</sup> [Mr Lubanga's Response to Legal Representatives of Victims' Documents in Support of the Appeal A A2](#), para. 5.

<sup>74</sup> [Observations of the Trust Fund](#), paras 104, 107, referring to [Trust Fund's Observations on Reparations](#), paras 85-87.

<sup>75</sup> [Observations of the Trust Fund](#), para. 107.

<sup>76</sup> [Observations of the Trust Fund](#), para. 109, citing E. Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (Martinus Nijhoff Publishers, 2010), pp. 68-71.



convicted person together, the Appeals Chamber addresses only the issue of whether a reparation order must always be directed against the convicted person under this element. The question of liability is discussed under the second element below.<sup>77</sup>

65. The Appeals Chamber recalls the principle established in the Impugned Decision that reparations “ensure that offenders account for their acts”.<sup>78</sup> The Appeals Chamber considers that this principle properly reflects the system of reparations at the Court. In other words, reparations, and more specifically orders for reparations, must reflect the context from which they arise, which, at the Court, is a legal system of establishing *individual* criminal liability for crimes under the Statute. In the view of the Appeals Chamber, this context strongly suggests that reparation orders are intrinsically linked to the *individual* whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence.

66. This conclusion is supported by the Statute’s drafting history, specifically the Zutphen Draft of the Preparatory Committee.<sup>79</sup> Of particular significance is footnote 22 to the draft, which provides, in relevant part, that “for the purposes of defining ‘victims’ and ‘reparations’, reference may be made to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power”. This Declaration provides, *inter alia*, that “[o]ffenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants”.<sup>80</sup>

67. According to a commentator on the drafting of the Rules of Procedure and Evidence, this inter-linkage is also reflected in rule 150 of the Rules of Procedure and Evidence, which governs decisions under article 74 (conviction/acquittal), article 76 (sentence) and orders for reparations under article 75 of the Statute. According to this commentator, this rule reflects the strong views expressed during the drafting of the Rules of Procedure and Evidence that, despite its inclusion in the Statute under “appeal against other decisions”, an order for reparations should be classified as a

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<sup>77</sup> *Infra* IV.B.

<sup>78</sup> *Supra* para. 58.

<sup>79</sup> [Zutphen Draft of the Preparatory Committee](#).

<sup>80</sup> Annex to the [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#), para. 8.

“fundamental” decision, treated in the same manner as a decision of conviction, acquittal or sentence.<sup>81</sup>

68. The Appeals Chamber also considers that the principle that reparations “ensure that offenders account for their acts”<sup>82</sup> is reflected in article 82 (4) of the Statute, which limits the right to appeal an order for reparations to “[a] legal representative of victims, *the convicted person* or a bona fide owner of property adversely affected by an order under article 75” (emphasis added).<sup>83</sup> This article provides no qualification on the convicted person’s right to appeal to the extent that, or in the case that, an order is made against him or her.<sup>84</sup> The Appeals Chamber considers that article 82 (4) of the Statute provides a clear indication of the individuals who represent the totality of those whose rights can be directly affected by an order for reparations under article 75 of the Statute, from which the corresponding right to appeal such an order arises.

69. The Appeals Chamber therefore considers that the principle of accountability for ‘the offender’ and the relevant provisions of the Court’s legal texts make it clear that an order for reparations should be made *against the convicted person*. However, the question arises as to whether this principle must always be reflected in an order for reparations under article 75 of the Statute or whether, based on the circumstances of a specific case, this principle may be deviated from.

70. In this regard, the Appeals Chamber notes that, in the Impugned Decision, the Trial Chamber appears to interpret “through the Trust Fund” as replacing “against the convicted person”,<sup>85</sup> due primarily to the circumstances of Mr Lubanga’s indigence. The Appeals Chamber does not find this interpretation to be persuasive. First, in the view of the Appeals Chamber, issuing an order for reparations “against” the convicted person and acting “through” the Trust Fund are not mutually exclusive concepts. To the contrary, the Appeals Chamber finds that, even if reparations are ordered

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<sup>81</sup> H. Brady, “Appeal”, in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Inc., 2001), p. 575, at p. 582.

<sup>82</sup> *Supra* para. 58.

<sup>83</sup> See [Admissibility Decision](#), para. 67, regarding the Appeals Chamber’s holding that “the right to appeal lies with the victims, not with the legal representatives of victims. In this regard, article 82 (4) of the Statute provides that victims may only appeal with the assistance of a legal representative”.

<sup>84</sup> See [Admissibility Decision](#), para. 66, wherein the Appeals Chamber held that “article 82 (4) of the Statute gives the convicted person the right to appeal orders for reparations. This right is unencumbered.”

<sup>85</sup> *Supra* para. 57.

“through” the Trust Fund in accordance with the second sentence of article 75 (2) of the Statute, the Trial Chamber must still direct the order “against” the convicted person. The Appeals Chamber arrives at this conclusion based on the Court’s legal texts, which do not provide for any deviation from the principle of accountability that is expressed by the order for reparations being directed against the convicted person.

71. The Appeals Chamber considers that the second sentence of article 75 (2) of the Statute, which deals with awarding reparations “through the Trust Fund”, does not provide for an alternative to making an order “against a convicted person” pursuant to the first sentence of this provision. Rather, it is an alternative to making such an order “directly” against the convicted person. Therefore, while these two sentences differ on the directness of the order, what they have in common is that the order is nonetheless made against the convicted person. The Rules of Procedure and Evidence and the Regulations of the Trust Fund further support this interpretation.

72. Rule 98 of the Rules of Procedure and Evidence provides that a Trial Chamber may make a reparation award through the Trust Fund or order that the award be deposited with the Trust Fund in three circumstances: 1) when, at the time of making the order, it is impossible or impracticable to make individual awards directly to each victim, 2) where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate, and 3) when the award is made to an intergovernmental, international or national organisation.<sup>86</sup> The Appeals Chamber notes that, contrary to Mr Lubanga’s argument, rule 98 (3) of the Rules of Procedure and Evidence explicitly states that collective reparations made through the Trust Fund are “*against a convicted person*”.

73. This conclusion is further supported by regulation 50 of the Regulations of the Trust Fund, which provides that the Trust Fund is only seized when the Trial Chamber “makes an order for reparations *against a convicted person* and orders that the award be deposited with or made through the Trust Fund [...]” (emphasis added). Additionally, regulation 69 of the Regulations of the Trust Fund, which falls under Chapter IV of the Regulations, entitled “Collective Awards to Victims Pursuant to Rule 98 (3)”, provides as follows: “[w]here the Court orders that an award for

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<sup>86</sup> Rule 98 (2)-(4) of the [Rules of Procedure and Evidence](#).

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 make a collective award more appropriate [...]” (emphasis added).

74. The Appeals Chamber also finds that this interpretation is reinforced by the equally authoritative French version of article 75 (2) of the Statute,<sup>87</sup> in which “through the Trust Fund” reads as “par l’intermédiaire du Fonds”, suggesting that the Trust Fund is an intermediary, but does not replace the convicted person.

75. Finally, the Appeals Chamber notes that, while expressed slightly differently, the Assembly of States Parties also does not consider that “through the Trust Fund” serves to replace the convicted person. In this respect, the Appeals Chamber notes that the ASP Resolution on Reparations provides: “Recognizing that, under article 75, paragraph 2, a reparations order may be made directly against a convicted person while the award for reparations may be made through the Trust Fund for Victims”.

76. In light of the above, the Appeals Chamber finds that the legal framework clearly establishes that an order for reparations has to be issued in *all* circumstances against the convicted person. When appropriate, such an order for reparations can – *in addition* – be made through the Trust Fund. The Appeals Chamber therefore finds that the Trial Chamber erred in not making the reparation order against Mr Lubanga *and* through the Trust Fund. Accordingly, the Appeals Chamber amends the Impugned Decision in line with this determination (*see* Annex A).

#### 4. *Consequences of the above holding on other grounds of appeal*

##### (a) **Alleged errors regarding the standards of proof and causation**

##### (i) *Principles related to the standard of causation, as well as the standard and burden of proof, for purposes of reparations*

77. As a preliminary matter, the Appeals Chamber notes that the Trial Chamber addressed the standard of causation and the standard and burden of proof only within the “Principles regarding Reparations” section of the Impugned Decision. In this

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<sup>87</sup> In this respect, the Appeals Chamber recalls that the other official language versions of the Statute are as authoritative as the English version. *See* article 128 of the [Statute](#) and article 33 (3) of the [Vienna Convention](#).

respect, the Appeals Chamber recalls its statement that principles are “general concepts”, which “must be distinguished from the order for reparations, i.e. the holdings, determinations and findings based on those principles”.<sup>88</sup> Accordingly, the Appeals Chamber considers that the applicable standards and burden of proof in the Impugned Decision are not “principles”, but rather the determinations of the Trial Chamber. The Appeals Chamber therefore amends the Impugned Decision by relocating these determinations to the “Order for Reparations Against Mr Lubanga” section of the amended order (*see* Annex A), subject to the Appeals Chamber’s review of the correctness of these determinations, if raised by a party as a ground of appeal.

78. With respect to the principles upon which the determination of the standard of causation is based, the Appeals Chamber notes that the Trial Chamber stated that “the ‘damage, loss and injury’, which form the basis of a reparations claim, must have resulted from the crimes”.<sup>89</sup> The Trial Chamber then went on to conclude that there is no agreed upon standard of causation in international law or specific standard identified in the Court’s legal texts.<sup>90</sup> In order to determine the applicable standard, the Trial Chamber held that the appropriate standard needed to take into account the competing interests and rights of the victims and the convicted person.<sup>91</sup>

79. The Appeals Chamber notes that, pursuant to rule 85 (a) of the Rules of Procedure and Evidence, victims are “natural persons who have suffered harm *as a result of* the commission of any crime within the jurisdiction of the Court” (emphasis added). The Appeals Chamber considers that the relevant principle embodied in this rule is that: Reparation is to be awarded based on the harm suffered as a result of the commission of any crime within the jurisdiction of the Court.

80. The Appeals Chamber further recalls its holding that “[w]hether or not a person has suffered harm as the result of a crime within the jurisdiction of the Court and is therefore a victim before the Court *would have to be determined in light of the*

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<sup>88</sup> *Supra* para. 55.

<sup>89</sup> [Impugned Decision](#), para. 247.

<sup>90</sup> [Impugned Decision](#), para. 248.

<sup>91</sup> [Impugned Decision](#), para. 250.

*particular circumstances*” (emphasis added).<sup>92</sup> The Appeals Chamber considers that the principle which finds expression in this holding is that: The causal link between the crime and the harm for the purposes of reparations is to be determined in light of the specificities of a case.

81. With respect to the standard and burden of proof, the Appeals Chamber considers that the Trial Chamber correctly articulated the principle that reparation proceedings are fundamentally different from proceedings at trial and therefore “a less exacting standard should apply”.<sup>93</sup> The Trial Chamber then went on to state that “several factors are of significance in determining the appropriate standard of proof at this stage” and listed difficulties that victims may face in obtaining necessary evidence as one such factor.<sup>94</sup> The Appeals Chamber agrees with the above statements, but considers that the underlying principle that is further expanded upon by way of the example is not clearly set out. Accordingly, the Appeals Chamber articulates the principle that: In the reparation proceedings, the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case. In this sense, what is the “appropriate” standard of proof and what is “sufficient” for purposes of an applicant meeting the burden of proof will depend upon the circumstances of the specific case. For purposes of determining what is sufficient, Trial Chambers should take into account any difficulties that are present from the circumstances of the case at hand. The Appeals Chamber therefore amends the principles in the Impugned Decision in line with the concepts laid out in the preceding paragraphs (*see* Annex A).

(ii) *Determination of the Appeals Chamber*

82. With respect to the standard of causation, the Trial Chamber applied the “but/for” relationship and the standard of proximate cause “particularly to the extent that [the reparations] are ordered against the convicted person”.<sup>95</sup> Thus, in the light of the above holding, the Impugned Decision is also amended insofar as it states that reparations are ordered against the convicted person to a certain extent. The Appeals

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<sup>92</sup> [Lubanga OA 9 OA 10 Judgment](#), para. 32.

<sup>93</sup> [Impugned Decision](#), para. 251.

<sup>94</sup> [Impugned Decision](#), para. 252.

<sup>95</sup> [Impugned Decision](#), para. 250.

Chamber will proceed with the analysis of the ground of appeal relevant to the standard of causation on this basis, which is addressed under the second element.<sup>96</sup>

83. In the Impugned Decision, the Trial Chamber also established a different standard of proof in cases where reparations are made “through the Trust Fund” (“wholly flexible approach”) versus where reparations are ordered against Mr Lubanga (“balance of probabilities”).<sup>97</sup> Given that the order for reparations must be made against the convicted person, the Trial Chamber’s articulation of two standards of proof is legally incorrect. The Appeals Chamber therefore only considers the correctness of the standard of proof of a “balance of probabilities” and will therefore not further address the standard of a “wholly flexible approach”.

84. In this regard, the Appeals Chamber notes that Mr Lubanga mainly challenges the “wholly flexible approach” standard and argues that a “preponderance of probabilities” is the minimum standard of proof which should be applied in relation to reparations.<sup>98</sup> The Appeals Chamber considers that, while Mr Lubanga argues that the standard of “preponderance of probabilities” should apply, he does not appear to allege that the standard of “balance of probabilities” is an error. The Appeals Chamber therefore considers that Mr Lubanga does not appeal the Impugned Decision in respect of this standard of proof and will not address it further.

**(b) Alleged error related to the status of Mr Lubanga and the Prosecutor as “parties”**

85. The Legal Representatives of Victims V01 argue that the Trial Chamber erred in finding that the Prosecutor and Mr Lubanga are “parties” to the reparations proceedings.<sup>99</sup> They submit that the Prosecutor should not participate in the reparations phase under any circumstances and that Mr Lubanga should be authorised to do so only if the reparations proceedings are directed against him.<sup>100</sup>

86. The Appeals Chamber recalls that, in the Admissibility Decision, it held that the Prosecutor was not a party to the appellate proceedings and therefore was not invited

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<sup>96</sup> *Infra* IV.B.3(d).

<sup>97</sup> [Impugned Decision](#), paras 253-254.

<sup>98</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), paras 79-88, 98.

<sup>99</sup> [Legal Representatives of Victims V01’s Document in Support of the Appeal](#), paras 39-57, referring to [Impugned Decision](#), para. 267.

<sup>100</sup> [Legal Representatives of Victims V01’s Document in Support of the Appeal](#), paras 41-42, 53-55.



to submit a response to the participants' documents in support of the appeals.<sup>101</sup> The Appeals Chamber therefore does not consider it necessary to further address this point. Mr Lubanga's status as a party to the reparation proceedings has been challenged on the basis that the Impugned Decision was not directed against him.<sup>102</sup> As the Appeals Chamber is amending the Impugned Decision so that the order for reparations is directed against Mr Lubanga, the Appeals Chamber finds this aspect of the alleged error moot and will not address it further.

## **B. Second element: The order for reparations must establish and inform the convicted person of his or her liability**

### *1. Background and relevant portions of the Impugned Decision*

87. In December 2011, the ASP Resolution on Reparations was adopted, in which, in relevant part, the Assembly of States Parties stated that

*Concluding* that guidance and clarification from States Parties are essential in order to ensure the effective and efficient implementation of the reparations provisions,

[...]

2. *Stresses* that as liability for reparations is exclusively based on the individual criminal responsibility of a convicted person [...]

3. *Underlines* that as the freezing and identification of any assets of the convicted person, which are indispensable for reparations, is of paramount importance the Court should seek to take all measures to that end, including effective communication with relevant States so that they are in a position to provide timely and effective assistance pursuant to article 93, paragraph 1 (k), where possible, in all cases and at as early a stage of the proceedings as possible, irrespective of the declaration of indigence for the purpose of legal aid [...] [Emphasis in original.]<sup>103</sup>

88. In the Sentencing and Reparations Scheduling Order, the Trial Chamber ordered, *inter alia*, the filing of a public version of the Trust Fund's First Report on Reparations, in which the Trust Fund made extensive submissions related to the potential use of its "other resources" pursuant to regulation 56 of the Regulations of the Trust Fund in the case of an indigent convicted person and regarding who had

<sup>101</sup> [Admissibility Decision](#), para. 74.

<sup>102</sup> [Legal Representatives of Victims V01's Document in Support of the Appeal](#), para. 42.

<sup>103</sup> [ASP Resolution on Reparations](#).



authority over their use for that purpose.<sup>104</sup> Additionally, in their responses to the questions posed in the Sentencing and Reparations Scheduling Order, the parties and participants addressed whether Mr Lubanga should be held liable for any reparations ordered and also made submissions specifically related to whether the issue of Mr Lubanga's state of indigence affected his potential liability.

89. In the Trust Fund's First Report on Reparations, the Trust Fund stated that

[t]o mitigate the effects of insufficient funds (or even the total absence of assets or financial resources) from a convicted person, while maintaining the principle of individual criminal responsibility, the Assembly of States Parties adopted Regulation 56 [of the Regulations of the Trust Fund], which provides the legal basis for the use of the Trust Fund's "other resources" for the purpose of reparations.<sup>105</sup>

90. The Trust Fund's submissions before the Trial Chamber, however, did not suggest that, in "complementing" the resources collected through awards for reparations from the convicted person pursuant to rule 98 of the Rules of Procedure and Evidence, it alleviated the convicted person's liability. In its Observations on Reparations, the Trust Fund further expanded on the interplay between Mr Lubanga's indigence and the Trust Fund complementing the resources collected through awards for reparations, stating:

253. At the inception of implementing the reparation award, the resources available directly from Mr. Lubanga's assets and belongings are unlikely to be of a significant volume. The collection of a fine imposed on Mr. Lubanga could take time and could also be in the form of instalments, as may be decided by the Chamber. [...] Therefore, the financial complement to be decided by the Trust Fund's Board of Directors in accordance with Regulation 56 is most likely to constitute the "starting capital" of a reparations award in the present case.<sup>106</sup>

91. The Legal Representatives of Victims V01 expressed a similar view, stating:

42. [N]othing prevents the Chamber from awarding a lump sum for the harm *against the guilty party* whilst also determining the amount of this sum to be *advanced* by the Trust Fund for Victims.

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<sup>104</sup> [Trust Fund's First Report on Reparations](#), paras 116-148.

<sup>105</sup> [Trust Fund's First Report on Reparations](#), para. 120.

<sup>106</sup> [Trust Fund's Observations on Reparations](#), para. 253.

43. The legal representatives respectfully suggest that the Chamber order the Trust Fund for Victims to advance [...] the reparations awarded *against the guilty party* and thus pay the reparations through the Trust Fund.

44. [...] The Trust Fund will therefore receive the assets and/or income of the guilty party as the States Parties provide them to the Court. [Emphasis added]<sup>107</sup>

92. Finally, in his submissions before the Trial Chamber, Mr Lubanga stated that “in so far as the [Trust Fund] will probably have to stand in for Mr Lubanga on account of his indigence, it cannot be ruled out that *should Mr Lubanga’s financial situation improve in the future, he will be asked to reimburse any amounts paid out by the [Trust Fund]*” (emphasis added, footnotes omitted).<sup>108</sup>

93. As noted above, in the “Introductory Remarks” section of the Impugned Decision, the Trial Chamber established the following principle: “Reparations [...] oblige those responsible for serious crimes to repair the harm they caused to the victims”.<sup>109</sup>

94. However, under the heading of “other substantive and procedural issues”, the Trial Chamber stated:

269. The convicted person has been declared indigent and no assets or property have been identified that can be used for the purposes of reparations. The Chamber is, therefore, of the view that Mr Lubanga is only able to contribute to non-monetary reparations. [...]

270. As regards the concept of “reparations through the Trust Fund”, and applying the Vienna Convention on the Law of Treaties, the Chamber gives the word “through” its ordinary meaning, namely “by means of”. Thus, when Article 75(2) of the Statute provides that an award for reparations may be made “through” the Trust Fund, the Court is able to draw on the logistical and financial resources of the Trust Fund in implementing the award.

271. Moreover, the Chamber is of the view that when the convicted person has no assets, if a reparations award is made “through” the Trust Fund, the award is not limited to the funds and assets seized and deposited with the Trust Fund, but the award can, at least potentially, be supported by the Trust Fund’s own resources. This interpretation is consistent with Rule 98(5) of the Rules and Regulation 56 of the Regulations of the [Trust Fund]. Rule 98(5) of the Rules provides that the Trust Fund may use “other resources” for the benefit of

<sup>107</sup> [Legal Representatives of Victims V01’s Observations on Reparations](#), paras 42-44.

<sup>108</sup> [Mr Lubanga’s Reply to the Parties and Participants’ Observations on Reparations](#), para. 40.

<sup>109</sup> *Supra* para. 58, citing [Impugned Decision](#), para. 179.

victims. Regulation 56 of the Regulations of the [Trust Fund] imposes an obligation on the [Trust Fund]’s Board of Directors to complement the resources collected from a convicted person with “the other resources of the Trust Fund”, providing the Board of Directors make all reasonable efforts to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under Rule 98(3) and (4) of the Rules. In the Chamber’s view, the wording of Regulation 56 of the Regulations of the [Trust Fund] suggests that the “need to provide adequate resources” includes the need to fund reparation awards. In circumstances when the Court orders reparations against an indigent convicted person, the Court may draw upon “other resources” that the [Trust Fund] has made reasonable efforts to set aside.

[...]

273. The Chamber considers that *pursuant to Regulation 56 of the Regulations of the [Trust Fund], the [Trust Fund] shall complement the funding of a reparations award*, albeit within the limitations of its available resources and without prejudice to its assistance mandate. [Emphasis added, footnotes omitted.]<sup>110</sup>

95. The Trial Chamber then went on to state:

276. Pursuant to Article 93(1)(k) of the Statute, States Parties to the Statute should provide assistance to the Court in “the identification, tracing and freezing or seizure of proceeds, property, assets and instrumentalities of crimes for the purpose of eventual forfeiture”.

277. The identification and freezing of any assets of the convicted person are a fundamental element in securing effective reparations, and pursuant to Article 93(1)(k) of the Statute, State Parties should provide the Court with timely and effective assistance at the earliest possible stage of the proceedings. [Footnote omitted]<sup>111</sup>

96. The Trial Chamber did not address any of the submissions received in relation to a monetary advance by the Trust Fund, with liability remaining with Mr Lubanga and enforceable should his financial situation change as provided for by article 93 (1) (k) of the Statute. In this regard, despite referring to article 93 (1) (k) of the Statute and stating that the identification and freezing of assets are “a fundamental element in securing [...] reparations”,<sup>112</sup> the Trial Chamber did not seek the cooperation of States Parties. The Trial Chamber similarly did not acknowledge the relevant provisions of the ASP Resolution on Reparations.

<sup>110</sup> [Impugned Decision](#), paras 269-273.

<sup>111</sup> [Impugned Decision](#), paras 276-277.

<sup>112</sup> [Impugned Decision](#), para. 277.

## 2. *Submissions of the parties and participants*

97. The Legal Representatives of Victims V01 argue that the Trial Chamber erred in law by not making Mr Lubanga liable for the reparation awards by including instructions to him to compensate the Trust Fund.<sup>113</sup> They submit that the Trial Chamber's decision not to order Mr Lubanga to contribute financially to reparations prevents States Parties from enforcing future orders in light of potential changes in the financial situation of the convicted person.<sup>114</sup> The Trust Fund concurs that the Trial Chamber erred in law "by failing to order Mr Lubanga to pay for reparations" and requests that the Appeals Chamber amend the Impugned Decision in this regard.<sup>115</sup>

98. Mr Lubanga argues that, if financial compensation is envisaged as a modality of reparations, the Court is not compelled to order that the convicted person bear the costs.<sup>116</sup> Mr Lubanga further submits that the Trial Chamber's finding that, due to a lack of financial means, he could contribute solely to non-monetary reparations and that his participation in symbolic reparations could be envisaged solely with his consent, is consistent with rule 98 of the Rules of Procedure and Evidence.<sup>117</sup>

## 3. *Determination of the Appeals Chamber*

99. The Appeals Chamber agrees with the Trial Chamber's principle that it is the obligation of the convicted person to remedy the harm caused by the crimes for which he or she was convicted.<sup>118</sup> In this respect, the Appeals Chamber considers that the conclusion that an order for reparations must be made against the convicted person is also indicative of that person's individual liability for the reparations awarded. Indeed, prior to issuing a reparation order, a Trial Chamber must establish that the person is guilty of one or more of the crimes with which he or she was charged.<sup>119</sup> The Appeals Chamber therefore considers that the obligation to repair harm arises from the individual criminal responsibility for the crimes which caused the harm and,

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<sup>113</sup> [Legal Representatives of Victims V01's Document in Support of the Appeal](#), para. 30.

<sup>114</sup> [Legal Representatives of Victims V01's Document in Support of the Appeal](#), para. 37.

<sup>115</sup> [Observations of the Trust Fund](#), para. 111.

<sup>116</sup> [Mr Lubanga's Response to Legal Representatives of Victims' Documents in Support of the Appeal A A2](#), para. 7.

<sup>117</sup> [Mr Lubanga's Response to Legal Representatives of Victims' Documents in Support of the Appeal A A2](#), para. 10. *See also* [Impugned Decision](#), para. 269.

<sup>118</sup> *Supra* para. 93, citing [Impugned Decision](#), para. 179.

<sup>119</sup> *See*, for a similar argument, [Trust Fund's Observations on Reparations](#), paras 12-13.

accordingly, the person found to be criminally responsible for those crimes is the person to be held liable for reparations.

100. The Appeals Chamber notes that the imposition of liability for reparations on the convicted person is also consistent with the UN Basic Principles on Reparation for Victims, pursuant to which “[i]n cases where *a person*, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim [...]” (emphasis added).<sup>120</sup>

101. The Appeals Chamber however recalls that, despite articulating this principle, the Trial Chamber did *not* hold Mr Lubanga liable for the reparations awarded. Rather, having concluded that Mr Lubanga was indigent, the Trial Chamber did not impose liability on Mr Lubanga and instead ordered that awards be paid out of the “other resources” of the Trust Fund. Below, the Appeals Chamber addresses whether the principle of liability to remedy harm can be deviated from on the basis of the circumstances of a specific case, in this case the current indigence of the convicted person and the fact that the reparations are being made “through” the Trust Fund.

**(a) Indigence of the convicted person as a reason not to impose liability for any reparations awarded**

102. For the following reasons, the Appeals Chamber finds that the Trial Chamber erred by considering Mr Lubanga’s indigence to be relevant to whether he should be liable for any reparations awarded. The Appeals Chamber arrives at this conclusion based on the relevant provisions of the Court’s legal texts and the drafting history of the Statute.

103. Article 75 (4) of the Statute provides that “the Court may [...] determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.” The latter article lists various forms of cooperation that the Court may request from States Parties, including “(k) [t]he identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of *eventual* forfeiture, without prejudice to the rights of bona fide third parties” (emphasis added). The Appeals

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<sup>120</sup> [UN Basic Principles and Guidelines](#), para. 15.

Chamber considers that the specific reference in article 75 (4) of the Statute to the possibility of seeking assistance of States Parties in, *inter alia*, the identification and freezing of property and assets indicates that indigence is not an obstacle to the imposition of liability for reparations on the convicted person. In this respect, the Appeals Chamber notes that the provision provides that the Trial Chamber may seek assistance from States Parties “in order to *give effect* to” the reparation order.

104. The Appeals Chamber further notes that pursuant to regulation 117 of the Regulations of the Court, “[t]he Presidency shall, if necessary, and with the assistance of the Registrar as appropriate, monitor the financial situation of the sentenced person on an ongoing basis, even following completion of a sentence of imprisonment, in order to enforce fines, forfeiture orders or reparation orders [...]”. This regulation therefore confirms that indigence at the time when the Trial Chamber issues an order for reparations is not an obstacle to imposing liability because the order may be implemented when the monitoring of the financial situation of the person sentenced reveals that he or she has the means to comply with the order.

105. Finally, the conclusion that indigence is of no relevance to the imposition of liability for reparations is supported by the drafting history of the Statute and in particular the Preparatory Committee Draft Statute.<sup>121</sup> The draft included a provision empowering the Court to make an order or recommend “that an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation, be made by a State”.<sup>122</sup> According to that draft, the Court might make such an order or recommendation “[i]f the convicted person is unable to do so himself/herself”.<sup>123</sup> The provision was eventually not included in the Statute and no other provision which provides for the possibility of replacing the convicted person’s liability for reparations with the liability of a State or an entity was enacted.

#### **(b) The Trial Chamber’s control of the “other resources” of the Trust Fund**

106. The Appeals Chamber notes that the Impugned Decision appears to adopt a reparations scheme which provides that when the convicted person is indigent, the

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<sup>121</sup> [Preparatory Committee Draft Statute](#).

<sup>122</sup> [Preparatory Committee Draft Statute](#), p. 61.

<sup>123</sup> [Preparatory Committee Draft Statute](#), p. 61.

Trial Chamber may assume control of the Trust Fund's resources collected through, *inter alia*, voluntary contributions, namely the "other resources" referred to in rule 98 (5) of the Rules of Procedure and Evidence, for the purposes of providing reparation awards to victims, without establishing any liability of the convicted person to pay for these awards. For the reasons that follow and in view of its finding that the convicted person shall be held liable regardless of indigence, the Appeals Chamber finds the Trial Chamber's conclusion to be erroneous, based on the plain language of the Court's legal texts, most particularly the Regulations of the Trust Fund.

107. First, the Appeals Chamber considers it important to address the limits of the Court's authority over the Trust Fund. The Appeals Chamber recalls that the Trust Fund has a dual mandate: 1) to provide assistance to victims within the Court's jurisdiction and 2) to implement Court ordered reparations. This dual mandate is reflected in the two ways in which the Trust Fund can become seized pursuant to regulation 50 of the Regulations of the Trust Fund, which provides:

(a) (i) the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families; and

(ii) the Board has formally notified the Court of its conclusion to undertake specified activities under (i) and the relevant Chamber of the Court has responded and has not, within a period of 45 days of receiving such notification, informed the Board in writing that a specific activity or project, pursuant to rule 98, sub-rule 5 of the Rules of Procedure and Evidence, would pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to article 19, admissibility pursuant to articles 17 and 18, or violate the presumption of innocence pursuant to article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

(b) When the Court makes an order for reparations against a convicted person and orders that the award be deposited with or made through the Trust Fund in accordance with rule 98, sub-rules 2 to 4 of the Rules of Procedure and Evidence.

108. This first mandate is not contingent on a Court order and is not funded by Court-ordered reparations, but solely by "other resources", mainly voluntary



contributions.<sup>124</sup> “Other resources” are defined in regulation 47 of the Regulations of the Trust Fund as “resources other than those collected from awards for reparations, fines and forfeitures.”

109. Rule 98 (5) of the Rules of Procedure and Evidence provides that “[o]ther resources of the Trust Fund *may* be used for the benefit of victims subject to the provisions of article 79” (emphasis added).

110. With respect to orders for reparations, the first sentence of regulation 56 of the Regulations of the Trust Fund provides that “[t]he Board of Directors shall determine whether to complement the resources collected through awards for reparations with ‘other resources of the Trust Fund’ and shall advise the Court accordingly” (emphasis added). The second sentence of regulation 56 provides that “[w]ithout prejudice to its activities under paragraph 50, sub-paragraph (a), the Board of Directors shall make all reasonable endeavors to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under rule 98, sub-rules 3 and 4 of the Rules of Procedure and Evidence *and taking particular account of ongoing legal proceedings that may give rise to such awards*” (emphasis added).

111. The Appeals Chamber considers that the word “may” in rule 98 (5) of the Rules of Procedure and Evidence means that a decision to use “other resources” is a discretionary decision and not mandatory. Regarding who is to make the decision to use these “other resources”, the Appeals Chamber considers that the wording of regulations 50 and 56 of the Regulations of the Trust Fund makes it clear that this decision is to be made by the Board of Directors, not by the Court.<sup>125</sup> This is supported by the drafting history of rule 98 (5) of the Rules of Procedure and Evidence, which a commentator summarised as follows:

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<sup>124</sup> The [Trust Fund’s First Report on Reparations](#) states that “[o]ther resources (legally defined in Regulation 47), include in particular those collected through voluntary contributions” (emphasis omitted) and that “[t]hese ‘other resources’ have two purposes: firstly, they are the sole source of funding for the Trust Fund’s general assistance mandate under which the Trust Fund provides, in accordance with Regulation 48 and 50 (a) of the [Regulations of the Trust Fund], assistance for the benefit of victims and their families in form of physical and psychological rehabilitation and material support; and secondly, they may be used for complementing reparation awards against convicted persons”. See [Trust Fund’s First Report on Reparations](#), paras 117, 121.

<sup>125</sup> See, in this regard, [Trust Fund’s First Report on Reparations](#), para. 123.



Some delegations wanted a specific rule to allow the Court to order the Trust Fund to make funds available for specific reparations. It was pointed out however that the Court did not have complete control or authority over the Trust Fund. To begin with, monies may be given to the Trust Fund for specific purposes (e.g., in respect of a specific war crime or a specific set of victims), and the Court would not be able to use those funds for other purposes. *But more fundamentally, the operation of the Trust Fund is a matter for the Assembly of States Parties and not for the Preparatory Commission dealing with the Rules.* Nevertheless, many delegations thought that it was important to have some reference in the rules that the Trust Fund may be a source of additional money for compensation. For this reason sub-rule 5 was drafted to make it clear that the resources of the Trust Fund *may* be used for the benefit of victims. [Emphasis added.]<sup>126</sup>

112. The Appeals Chamber notes that article 79 (2) of the Statute provides that “[t]he Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund”. Notably, this provision does not contain any corresponding power to order the Trust Fund to make its other resources available to the Court.

113. The Appeals Chamber also considers that the factors laid out in regulation 56 of the Regulations of the Trust Fund relevant to whether to complement a specific reparation award are not ones that an individual Trial Chamber has the requisite competence to appropriately balance. In this regard, the Trust Fund’s Board of Directors must consider not only its activities undertaken pursuant to its assistance mandate under regulation 50 (a) of the Regulations of the Trust Fund,<sup>127</sup> but also all of the other ongoing legal proceedings at the Court that may give rise to an order for reparations.<sup>128</sup> Furthermore, the Board of Directors is much better placed than an individual Trial Chamber to evaluate the effectiveness of any potential fundraising from donors that could also be used to support a reparation award, which could be

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<sup>126</sup> 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* (Transnational Publishers, Inc., 2001), p. 474, at pp. 487-488.

<sup>127</sup> See [Trust Fund’s First Report on Reparations](#), para. 134, wherein the Trust Fund states that “[r]esources allocated to the general assistance projects need to be managed with a timeframe of several years in mind [...]. Such planning by the Board may be jeopardized if Chambers could unilaterally decide on the use of the Trust Fund’s ‘other resources’ for the purpose of the reparation orders without the agreement by the Trust Fund Board of Directors”.

<sup>128</sup> See [Trust Fund’s First Report on Reparations](#), para. 132, wherein the Trust Fund notes that it “monitors all cases pending before the Court, assesses the scope of charges, number of victims, and potential needs for reparations on an ongoing basis. The Trust Fund thus has a centralised overview over the availability of the funds it can dedicate to each reparation proceeding”.

potentially relevant to the above factors.<sup>129</sup> The Appeals Chamber is therefore of the view that, in addition to the clear text of the provision at issue, the decision by the Assembly of States Parties to place the authority to determine whether to complement the resources collected for an award for reparations with the Board of Directors, as opposed to an individual Trial Chamber, is clearly preferable from a policy and practical perspective, given the competing financial considerations that must be balanced in deciding whether to complement an award for reparations that is ordered in a specific case.

114. In view of the foregoing, the Appeals Chamber finds that the Trial Chamber erred by assuming authority over the “other resources” of the Trust Fund. The determination, pursuant to regulation 56 of the Regulations of the Trust Fund, of whether to allocate the Trust Fund’s “other resources” for purposes of complementing the resources collected through awards for reparations falls solely within the discretion of the Trust Fund’s Board of Directors.

115. The Appeals Chamber does not deem it appropriate to address the use of regulation 56 of the Regulations of the Trust Fund with respect to other situations not involving an indigent convicted person and limits itself to the specific circumstances of this case. In cases where the convicted person is unable to immediately comply with an order for reparations for reasons of indigence, the Appeals Chamber agrees with the parties and participants’ submissions that were made before the Trial Chamber, namely that the Trust Fund may advance its “other resources” pursuant to regulation 56 of the Regulations of the Trust Fund, but such intervention does not exonerate the convicted person from liability. The convicted person remains liable and must reimburse the Trust Fund.

116. Based on the above, the Appeals Chamber finds that the Trial Chamber erred in assuming control of the Trust Fund’s “other resources” instead of imposing liability on Mr Lubanga. The Impugned Decision is accordingly amended to reflect that, upon

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<sup>129</sup> See [Trust Fund’s First Report on Reparations](#), para. 136, wherein the Trust Fund also highlights that “[i]f the Trust Fund is not seen to be able to control and manage the use of voluntary contributions as discussed and detailed in legal agreements with donors, this might negatively impact on whether and how much donors will give in terms of voluntary contributions and might ultimately affect the availability of funds for complementing reparation awards under Regulation 56 of the [Regulations of the Trust Fund]”.

being seized of the amended order for reparations, the Trust Fund's Board of Directors may decide whether to advance its resources in order to enable the implementation of the order for reparations. If the Board of Directors decides to do so, the Trust Fund will be able to claim the advanced resources from Mr Lubanga. Should Mr Lubanga be found indigent, despite efforts to identify his property and assets, including through, *inter alia*, requests for assistance from States Parties, his financial situation shall be monitored pursuant to regulation 117 of the Regulations of the Court.

117. Accordingly, as a result of the amendments set out in this section, Mr Lubanga is liable for the awards for reparations.

**(c) The scope of a convicted person's liability for reparations**

118. Following from the above conclusion, the Appeals Chamber considers that the "principles relating to reparations" must also address the scope of the convicted person's liability. In this regard, the Appeals Chamber notes 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 a principle not previously articulated by the Trial Chamber, namely that: 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.

119. The Appeals Chamber addresses the consequences of imposing liability for awards for reparations on Mr Lubanga and of setting the scope of his liability at the end of the appellate proceedings in the section of this judgment regarding matters relevant to the implementation stage.<sup>130</sup>

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<sup>130</sup> *Infra* IV.F.2.

**(d) Alleged error in relation to the standard of causation**

*(i) Relevant portions of the Impugned Decision*

120. In the Impugned Decision, the Trial Chamber adopted the standard of “proximate cause” and required the “but/for” relationship between the crime and the harm suffered by the victims.<sup>131</sup> In this regard, the Trial Chamber held that

247. [t]he “damage, loss and injury”, which form the basis of a reparations claim, *must have resulted from* the crimes of enlisting and conscripting children under the age of [fifteen] and using them to participate actively in the hostilities.

248. It is to be observed in this general context that neither the Statute nor the Rules define the precise requirements of the causal link between the crime and the relevant harm for the purposes of reparations. Moreover, there is no settled view in international law on the approach to be taken to causation.

249. Reparations should not be limited to “direct” harm or the “immediate effects” of the crimes of enlisting and conscripting children under the age of [fifteen] and using them to participate actively in the hostilities, but instead the Court should apply *the standard of “proximate cause”*.

250. In reaching this conclusion as to the relevant standard of causation to be applied to reparations, and particularly to the extent that they are ordered against the convicted person, the Chamber needs to reflect the divergent interests and rights of the victims and the convicted person. Balancing those competing factors, at a minimum the Court must be satisfied that there exists a “*but/for*” relationship between the crime and the harm and, moreover, the crimes for which Mr Lubanga was convicted were the “proximate cause” of the harm for which reparations are sought. [Emphasis added, footnotes omitted.]<sup>132</sup>

*(ii) Submissions of the parties and participants*

121. Mr Lubanga argues that the proximate cause standard and the ‘but/for’ test are inadequate to assess the existence of a causal link between the harm suffered and the crime for which he was convicted,<sup>133</sup> submitting that the proximate cause standard is vague and relies on “a purely subjective appraisal of the person applying it”.<sup>134</sup> Furthermore, Mr Lubanga submits that, contrary to the Trial Chamber’s conclusion, international courts and other international bodies apply a common standard,

<sup>131</sup> See *infra* para. 82, wherein the Appeals Chamber amended this standard to remove any reference to this standard applying “to the extent that the reparations are ordered against the convicted person”.

<sup>132</sup> [Impugned Decision](#), paras 247-250.

<sup>133</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), paras 172-173.

<sup>134</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), para. 173.

according to which they require that the causal link between the crimes committed and the harm alleged by a victim be direct and immediate.<sup>135</sup>

122. The Legal Representatives of Victims V02 and the OPCV submit that the decisions relied on by Mr Lubanga are not directly transposable to this case. They also argue that, in any event, there are other examples from the cited jurisprudence that show that the standard of “proximate cause” has been used in similar cases.<sup>136</sup>

123. The Trust Fund emphasises that neither “directness” nor “proximate cause” have a precise definition and that under either standard such definition will depend on the interpretation of the individual or body applying it.<sup>137</sup> According to the Trust Fund, the settled criteria of the standard of causation are “proximity, directness and reasonable foreseeability of the harm”.<sup>138</sup>

*(iii) Determination of the Appeals Chamber*

124. The Appeals Chamber notes that one of Mr Lubanga’s arguments is that the “proximate cause” standard is vague and relies on “a purely subjective appraisal of the person applying it”.<sup>139</sup> However, Mr Lubanga does not explain how this alleged vagueness renders the standard inadequate or how the standard of a direct and/or immediate causal link differs in this regard. In particular, Mr Lubanga fails to demonstrate that the application of the direct and/or immediate standard does not also rely on “a purely subjective appraisal of the person applying it”.

125. Regarding Mr Lubanga’s argument that the standard of causation applied by the Trial Chamber does not reflect the “definite trend” in international courts and bodies,<sup>140</sup> the Appeals Chamber notes that the Court’s legal framework determines only in general terms the required causal link between the harm and the crime for which the person was convicted, as pointed out by the Trial Chamber.<sup>141</sup> As stated above, the principles upon which the applicable standard of causation should be based

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<sup>135</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), paras 173-179.

<sup>136</sup> [OPCV and Legal Representatives of Victims V02’s Joint Response to Mr Lubanga’s Document in Support of the Appeal A3](#), paras 89-102.

<sup>137</sup> [Observations of the Trust Fund](#), paras 185-186.

<sup>138</sup> [Observations of the Trust Fund](#), para. 204.

<sup>139</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), para. 173.

<sup>140</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), para. 174.

<sup>141</sup> [Impugned Decision](#), para. 248. *See also* [Observations of the Trust Fund](#), para. 184.

are that “[r]eparation is to be awarded based on the harm suffered as a result of the commission of any crime within the jurisdiction of the Court” and that “the causal link between the crime and the harm for the purposes of reparations is to be determined in light of the specificities of the case”.<sup>142</sup>

126. Turning to the authorities on which Mr Lubanga relies to demonstrate that it is commonly accepted that a direct and immediate link is required, the Appeals Chamber notes that the ruling of the Extraordinary Chambers in the Court of Cambodia (hereinafter: “ECCC”) cited by Mr Lubanga does not support his proposition, given that the requirement of directness was set out in Cambodia’s Code of Criminal Procedure<sup>143</sup> and is thus not indicative of a “definite trend” in international law. Furthermore, in the same judgment, the Trial Chamber expressed its preference for collective reparations in cases of mass crimes, “which, by their very nature, directly and indirectly affected, albeit to varying degrees, a large number of victims”.<sup>144</sup> In another ruling, a Pre-Trial Chamber found it appropriate to use a “presumption of collective injury” in cases where the applicants for reparations were not able to show a close relationship with the victim.<sup>145</sup> In the Appeals Chamber’s view, the adoption of such a presumption suggests that the requirement of a “direct and immediate link” is not necessarily as strict at the ECCC as Mr Lubanga suggests.

127. Mr Lubanga also refers to a number of rulings of the ECtHR, where a “clear causal connection” between the harm and the crime was required. However, Mr Lubanga does not explain how this requirement differs from the standard of “proximate cause”. Furthermore, the Appeals Chamber notes that the rulings of the ECtHR are only of limited guidance to the present case, as that court does not adjudicate reparation claims with respect to convicted persons. Rather, it deals with the responsibility of a State for violations of the human rights guaranteed in the Convention for the Protection of Human Rights and Fundamental Freedoms.

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<sup>142</sup> *Supra* paras 79-80.

<sup>143</sup> [Duch Trial Judgment](#), para. 642.

<sup>144</sup> [Duch Trial Judgment](#), para. 659.

<sup>145</sup> [Jeng Sary Pre-Trial Decision](#), para. 93. See also [OPCV and Legal Representatives of Victims V02’s Joint Response to Mr Lubanga’s Document in Support of the Appeal A3](#), paras 90-91.

128. With respect to the IACtHR cases cited, in the Appeals Chamber's view, similar considerations regarding the different mandate of human rights courts apply. Furthermore, the ruling on which Mr Lubanga relies does not support the view that the IACtHR adopted a restrictive approach to causation. In that decision, the IACtHR stated that "[t]he obligation to make reparation for damages caused is sometimes, and within the limits imposed by the legal system, extended to cover persons who, though not successors of the victims, have suffered some consequence of the unlawful act".<sup>146</sup> The Appeals Chamber notes that, contrary to Mr Lubanga's argument, the standard of causation in this ruling allows for some flexibility and that the IACtHR has favoured a flexible approach to causation in other cases.<sup>147</sup>

129. In conclusion, the Appeals Chamber finds that Mr Lubanga has not demonstrated that there is a "definite trend" in international courts and bodies towards adopting a restrictive approach with regard to causation. He does not demonstrate how the application of the "but/for" relationship and the "proximate cause" standard would infringe on his rights, nor how the application of the "direct and immediate link" would remedy the alleged vagueness of the standard in the Impugned Decision. The Appeals Chamber finds that Mr Lubanga has not demonstrated that the Trial Chamber erred and, accordingly, rejects this ground of appeal.

### **C. Third element: The order for reparations must specify the type of reparations, either individual, collective or both**

#### *1. Background and relevant portions of the Impugned Decision*

130. Rule 97 (1) of the Rules of Procedure and Evidence provides that "[t]aking into account the scope and extent of any 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".

<sup>146</sup> See [Aloeboetoe et al. v. Suriname](#), para. 67.

<sup>147</sup> See e.g. [Bulacio v. Argentina](#), paras 99, 101, where the IACtHR awarded reparations to family members of a young victim of police brutality, not only in respect of "the deep depression of the parents and the loss of the possibility of caring for their children" but also in respect of "impunity [...], which has caused and continues to cause suffering to the next of kin, who feel vulnerable and defenseless vis-à-vis the State". See also D. Contreras-Garduño and J. Fraser, "The identification of victims before the Inter-American Court of Human Rights and the International Criminal Court and its Impact on Participation and Reparation: a Domino Effect?", *Inter-American and European Human Rights Journal* (forthcoming), available at: <http://ssrn.com/abstract=2545000>.



131. Rule 98 (3) of the Rules of Procedure and Evidence provides that a Trial Chamber “may order that an award for reparations against a convicted person be made through the Trust Fund where the number of victims and the scope, forms and modalities of reparations make a collective award more appropriate”.

132. In the Sentencing and Reparations Scheduling Order, the Trial Chamber requested submissions addressing, *inter alia*, “whether reparations should be awarded on a collective or an individual basis”.<sup>148</sup> In the Impugned Decision, the Trial Chamber rehearsed the parties’ and participants’ submissions, in which they all supported awarding reparations on either both a collective and individual basis or, in the case of the Trust Fund, only on a collective basis.<sup>149</sup> In the “Principles on Reparations” section, the Trial Chamber established the following:

## 7. Scope of reparations

217. [...] Pursuant to Rule 97(1) of the Rules, “the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both”. In consequence, and in accordance with Article 21(3) of the Statute and Rule 85 of the Rules, reparations may be awarded to: a) individual victims; or b) groups of victims, if in either case they suffered personal harm.

[...]

219. Given 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 [...].

220. Individual and collective reparations are not mutually exclusive, and they may be awarded concurrently. [...] [Footnotes omitted.]<sup>150</sup>

133. In the section entitled “Other Substantive and Procedural Issues”, the Trial Chamber made the following determinations:

<sup>148</sup> [Sentencing and Reparations Scheduling Order](#), para. 8 (i).

<sup>149</sup> See [Impugned Decision](#), paras 41-67, citing [Legal Representatives of Victims V01’s Observations on Reparations](#), paras 15, 17; [Legal Representatives of Victims V02’s Observations on Reparations](#), paras 12-19, 24-25, 34(a); [OPCV’s Observations on Reparations](#), paras 12-18, 31-32, 45, 96-98; [Trust Fund’s Observations on Reparations](#), paras 17-19, 43-44, 65-77, 102-107, 136-142, 145, 149-168, 170-171, 177-178; [Registrar’s Observations on Reparations](#), para. 29; [Prosecutor’s Submissions on Reparations](#), paras 2(b), 8-9, 14-15; [Mr Lubanga’s Submissions on Reparations](#), paras 52-57; [Women’s Initiatives’ Observations on Reparations](#), paras 10-15, 17, 27-30; [NGO’s Joint Observations on Reparations](#), paras 25, 27, 35-48; [UNICEF’s Submissions on Reparations](#), paras 7, 22, 24-25, 28, 32, 34-35; [ICTJ’s Submissions on Reparations](#), paras 4, 15-17, 50, 58.

<sup>150</sup> [Impugned Decision](#), paras 217-221.



274. [...] [T]he [Trust Fund] has indicated that reparations to be funded by the [Trust Fund] with its own resources will tend to be *collective in nature* or they will be made to an organisation pursuant to Regulation 56 of the Regulations of the [Trust Fund]. The Chamber *endorses this suggestion of the [Trust Fund] that a community-based approach*, using the [Trust Fund]'s voluntary contributions, *would be more beneficial and have greater utility than individual awards*, given the limited funds available and the fact that this approach does not require costly and resource-intensive verification procedures.

281. The Chamber *endorses* the five-step implementation plan suggested by the [Trust Fund] [...].

282. [...] The final step is the collection of proposals *for collective reparations* that are to be developed in each locality, which are then to be presented to the Chamber for its approval. [Emphasis added, footnotes omitted.]<sup>151</sup>

134. With respect to the individual applications for reparations already received, the Trial Chamber held that

283. The Chamber agrees that the assessment of harm is to be carried out by the [Trust Fund] during a consultative phase in different localities. Moreover, the Chamber is satisfied that, in the circumstances of this case, the identification of the victims and beneficiaries (Regulations 60 to 65 of the Regulations of the [Trust Fund]) should be carried out by the [Trust Fund].

284. In light of the above, the Chamber considers that the individual application forms for reparations received thus far by the Registry should be transmitted to the [Trust Fund]. If the [Trust Fund] considers it appropriate, victims who have applied for reparations could be included in any reparations programme that is to be implemented by the [Trust Fund]. [Footnotes omitted.]<sup>152</sup>

135. Finally, the "Conclusions" section of the Impugned Decision states that

289. The Chamber accordingly:

[...]

c. Remains seized of the reparations proceedings, in order to exercise any necessary monitoring and oversight functions in accordance with Article 64(2) and (3)(a) of the Statute (including considering the proposals for *collective reparations* that are to be developed in each locality, which are to be presented to the Chamber for its approval); and

<sup>151</sup> [Impugned Decision](#), paras 274, 281-282.

<sup>152</sup> [Impugned Decision](#), paras 283-284.

d. Otherwise declines to issue specific orders to the [Trust Fund] on the implementation of reparations that are to be funded using voluntary contributions. [Emphasis added.]<sup>153</sup>

## 2. Discussion

136. As a preliminary matter, the Appeals Chamber notes that the parties and participants have varied understandings of the type of reparations ordered by the Trial Chamber. Indeed, some of the parties' and participants' submissions appear to be based on the understanding that the Trial Chamber ordered reparations on a collective *and individual basis* pursuant to rule 97 (1) of the Rules of Procedure and Evidence, with the individual reparation requests filed pursuant to rule 94 of the Rules of Procedure and Evidence to be decided upon by the Trust Fund, as opposed to the Trial Chamber. However, other portions of the submissions appear to be premised on the view that the Trial Chamber did *not* order reparations on an individual basis, but that this was an error because the Trial Chamber was required to decide upon the individual requests that were filed. The Appeals Chamber first addresses whether the Trial Chamber ordered reparations on both an individual and collective basis pursuant to rule 97 (1) of the Rules of Procedure and Evidence.

### (a) The type of reparations ordered in the Impugned Decision

#### (i) Submissions of the parties and participants

137. The Legal Representatives of Victims V01 argue that the Trial Chamber ordered reparations on an individual and collective basis, but delegated to the Trust Fund its decision on the individual requests for reparations filed pursuant to rule 94 of the Rules of Procedure and Evidence. They submit that the Trial Chamber could seek the Trust Fund's opinion on the individual requests, but that the Trial Chamber should have remained seized in the same manner that it remained seized in relation to the collective reparations.<sup>154</sup> They argue that the Trial Chamber violated the right of the victims to have their individual requests examined and adjudged by the Trial Chamber when it delegated this decision to the "unfettered discretion" of the Trust Fund.<sup>155</sup>

<sup>153</sup> [Impugned Decision](#), para. 289.

<sup>154</sup> [Legal Representatives of Victims V01's Notice of Appeal](#), para. 14.

<sup>155</sup> [Legal Representatives of Victims V01's Document in Support of the Appeal](#), paras 19-20.

138. Mr Lubanga also appears to understand that the Trial Chamber awarded reparations on an individual basis, but delegated its decision on the individual reparations requests to the Trust Fund.<sup>156</sup> He submits that the Trial Chamber's decision contravenes the procedure established under article 75 of the Statute and rule 94 of the Rules of Procedure and Evidence, which does not envisage the transfer of the requests to the Trust Fund.<sup>157</sup>

139. The Trust Fund argues that the Trial Chamber decided to give priority to collective reparations "*without excluding*" the awarding of individual reparations claims by the Trust Fund in specific circumstances (emphasis added).<sup>158</sup> Taking into account the nature of the Impugned Decision and the parameters given to it therein, the Trust Fund considers that the Impugned Decision is also a decision "on the individual applications" (emphasis omitted).<sup>159</sup>

(ii) *Determination of the Appeals Chamber*

140. Based on the relevant portions of the Impugned Decision cited above, the Appeals Chamber considers that the Trial Chamber decided to award reparations only on a *collective* basis pursuant to rule 98 (3) of the Rules of Procedure and Evidence and did not award reparations on an individual basis pursuant to rule 98 (2) of the Rules of Procedure and Evidence. The Appeals Chamber notes in particular paragraph 274 of the Impugned Decision, wherein the Trial Chamber held that it "*endorses* this suggestion of the [Trust Fund] that a *community-based approach* [...] would be more beneficial and have greater utility than *individual awards*" (emphasis added). The Appeals Chamber considers that the interpretation of this holding is necessarily informed by references to the Trust Fund's submissions that are "endorsed" therein,<sup>160</sup> which, the Appeals Chamber highlights, relate exclusively to an order for reparations on a collective basis.<sup>161</sup> The Appeals Chamber also notes that, at paragraphs 281 and

<sup>156</sup> See [Mr Lubanga's Document in Support of the Appeal A3](#), paras 33-41.

<sup>157</sup> [Mr Lubanga's Document in Support of the Appeal A3](#), paras 33-41.

<sup>158</sup> [Observations of the Trust Fund](#), para. 127.

<sup>159</sup> [Observations of the Trust Fund](#), para. 124.

<sup>160</sup> See [Impugned Decision](#), para. 274, citing the [Trust Fund's Observations on Reparations](#), paras 16, 153-180, 244.

<sup>161</sup> See e.g. [Trust Fund's Observations on Reparations](#), paras 151-152, where the Trust Fund begins its submissions on this point by suggesting that "[t]o mitigate these risks, the Trust Fund advises against an individual approach towards reparations and respectfully requests the Chamber to consider a collective approach targeting communities"; para. 244, where the Trust Fund states that "[i]n this

282 of the Impugned Decision, the Trial Chamber “endorsed” the five-part plan proposed by the Trust Fund in the Trust Fund’s Observations on Reparations, which is based on the case where the Trial Chamber issues an order for collective reparations to victims pursuant to rule 98 (3) of the Rules of Procedure and Evidence and the corresponding Regulations of the Trust Fund that apply in the case of an order for collective reparations.<sup>162</sup>

141. The Appeals Chamber notes that the Impugned Decision refers to regulations 60 to 65 of the Regulations of the Trust Fund,<sup>163</sup> which apply when a Trial Chamber orders “individual awards to victims pursuant to rule 98 (2)”.<sup>164</sup> The Appeals Chamber acknowledges that this reference may cause a degree of uncertainty as to the type of reparations that were ordered in the Impugned Decision. However, the Appeals Chamber considers that, when the Impugned Decision is read as a whole and particularly in light of the Trust Fund’s Observations on Reparations upon which the Impugned Decision is based, this reference was not intended to order reparations on both a collective and individual basis.

142. In this regard, with respect to the individual reparation requests filed in this case, the Appeals Chamber notes that, in its Observations on Reparations, the Trust Fund discusses these regulations under two separate headings within the context of an award for individual reparations, namely “[i]dentifying victims through an applications-based process” versus “[i]dentifying eligible victims under Rules [*sic*] 60 and 61 of the Regulations of the Trust Fund”.<sup>165</sup> Indeed, the Appeals Chamber notes that the paragraph beginning this second section states: “[T]he Court could use the option to task the Trust Fund with identifying victims under Regulations 60-61 of the

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regard, the Trust Fund wishes to note that Board of Directors [*sic*] [...] increased the amount reserved [...] to complement payments for reparation awards [...]. In addition, the Trust Fund wishes to note that the above reference to rule 98, sub-rules 3 and 4 indicates that the use of the Trust Fund’s ‘other resources’ should be primarily destined to *collective* awards or to an award to an organisation” (emphasis added).

<sup>162</sup> See [Impugned Decision](#), paras 281-282, citing [Trust Fund’s Observations on Reparations](#), paras 181-217. See in this respect, [Trust Fund’s Observations on Reparations](#), paras 182: “in the case of collective reparations pursuant to Rule 98 (3)”, 183: “in the case that the Chamber decides on collective reparations, the following steps may be envisaged: [...]”, 184-231, under the heading of “i. Observations on the development of a draft implementation plan in the case of a collective award”.

<sup>163</sup> See [Impugned Decision](#), para. 283.

<sup>164</sup> See [Regulations of the Trust Fund](#), Chapter III. INDIVIDUAL AWARDS TO VICTIMS PURSUANT TO RULE 98 (2), regs 59-68.

<sup>165</sup> See [Trust Fund’s Observations on Reparations](#), pp. 39-40.

Regulations of the Trust Fund [...] with a view to awarding *individual* reparations *as an alternative* to an *applications based process*” (emphasis added, footnote omitted).<sup>166</sup> The Appeals Chamber therefore considers that, irrespective of what exactly the Trial Chamber intended by referring to these regulations, the reference cannot be understood to refer to the reparation requests filed under rule 94 of the Rules of Procedure and Evidence, which are in any case relevant to an “applications based process”.<sup>167</sup>

143. The Appeals Chamber therefore considers that the Trial Chamber ordered reparations on a collective basis pursuant to rules 97 (1) and 98 (3) of the Rules of Procedure and Evidence. Below, the Appeals Chamber will address the parties’ arguments regarding whether it was an error *not* to order reparations on both a collective and individual basis.

**(b) Alleged error in *not* ordering both collective and individual reparations on the basis of the individual reparation requests filed**

*(i) Submissions of the parties and participants*

144. The Legal Representatives of Victims V01 submit that the Trial Chamber failed to comply with article 75 of the Statute when it decided to dismiss the individual applications for reparations without entertaining them.<sup>168</sup> They further submit that the fact that victims have the right to file requests for reparations before the Court implies the right to their due consideration and adjudication.<sup>169</sup> They argue that it is the Trial Chamber that must rule on the reparations requests or award reparations on its own motion in exceptional circumstances only.<sup>170</sup>

145. The OPCV and the Legal Representatives of Victims V02 argue that the Trial Chamber erred in law by dismissing the individual requests for reparations without considering them on their merits.<sup>171</sup> They argue that ruling on the requests

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<sup>166</sup> See [Trust Fund’s Observations on Reparations](#), para. 108.

<sup>167</sup> [Trust Fund’s Observations on Reparations](#), para. 108.

<sup>168</sup> [Legal Representatives of Victims V01’s Notice of Appeal](#), paras 11, 15.

<sup>169</sup> [Legal Representatives of Victims V01’s Notice of Appeal](#), paras 12-15; [Legal Representatives of Victims V01’s Document in Support of the Appeal](#), para. 12.

<sup>170</sup> [Legal Representatives of Victims V01’s Document in Support of the Appeal](#), paras 13-16.

<sup>171</sup> [OPCV and Legal Representatives of Victims V02’s Document in Support of the Appeal](#), para. 23.

was required in order to give full effect to the victims' right to reparations.<sup>172</sup> They further argue that the Court's legal texts do not provide for not ruling on the individual requests for reparations and instead transmitting them directly to the Trust Fund.<sup>173</sup> They submit that the international human rights jurisprudence of the ECtHR and the IACtHR has established the obligation of a court to determine all applications before it as a requirement of a fair trial.<sup>174</sup> They further argue that the individual victims were deprived of the possibility to participate in the reparations proceedings, thereby undermining the actual objective of the reparations proceedings.<sup>175</sup>

146. The Trust Fund submits that "the legal framework takes into account the possibility of collective reparations" and that "it lies in the discretion of the Court to order collective or individual or both forms of reparations".<sup>176</sup> The Trust Fund points to the Trial Chamber's determination that, in this case, a collective award for the victims is more appropriate than examining the individual requests and that requiring that individual applications be nonetheless ruled upon in a case where collective reparations are found to be more appropriate would be costly and "significantly prolong the time until victims who have waited already long enough can ultimately benefit from reparations".<sup>177</sup>

(ii) *Determination of the Appeals Chamber*

147. The Appeals Chamber considers that the following provisions of the Court's legal texts are relevant to resolving this ground of appeal:

- a. Article 75 (1) of the Statute, second sentence, provides that "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 [...]" (emphasis added).

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<sup>172</sup> [OPCV and Legal Representatives of Victims V02's Notice of Appeal](#), paras 18-19.

<sup>173</sup> [OPCV and Legal Representatives of Victims V02's Document in Support of the Appeal](#), para. 25.

<sup>174</sup> [OPCV and Legal Representatives of Victims V02's Document in Support of the Appeal](#), para. 26.

<sup>175</sup> [OPCV and Legal Representatives of Victims V02's Document in Support of the Appeal](#), paras 27, 29.

<sup>176</sup> [Observations of the Trust Fund](#), para. 118.

<sup>177</sup> [Observations of the Trust Fund](#), para. 119.

- b. Rule 95 (2) (a) of the Rules of Procedure and Evidence provides that, when the Court has provided notification to victims of its intention to proceed on its own motion and as a result of that notification, “[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” (emphasis added).
- c. Rule 98 (3) of the Rules of Procedure and Evidence provides that a Trial Chamber may order *collective* reparations “where the number of the victims and the scope, forms and modalities of reparations make a collective award *more appropriate*” (emphasis added).
- d. The Regulations of the Trust Fund provide for: 1) the possibility for it to be seized of an order for reparations where it would determine whether a particular individual was eligible to receive an award for reparations or to participate in a collective award and 2) if the individual is eligible, in order to determine the nature and size of the reparation to be awarded, for the Trust Fund to determine the *extent* of any damage, loss and injury to, or in respect of, victims, subject to the criteria set out by the Trial Chamber in the order for reparations.<sup>178</sup>
- e. Rule 145 (1) (c) of the Rules of Procedure and Evidence provides in relevant part that, in determining the sentence, the Court *shall* “give consideration, *inter alia*, to *the extent of the damage caused*, in particular the harm caused to *the victims and their families*” (emphasis added).

148. In relation to the above provisions, the Appeals Chamber makes the following observations:

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<sup>178</sup> See [Regulations of the Trust Fund](#), regs 55 (where the Trust Fund’s activities are triggered by an order for reparations, it may determine the nature and/or size of the award based on, *inter alia*, “the particular injuries to the victims and the nature of the evidence to support such injuries”), 60-65 (for individual awards to unidentified victims pursuant to rule 98 (2) of the Rules of Procedure and Evidence, the Trust Fund may conduct outreach to “*potential* members of the [beneficiary] group” (emphasis added) and the Secretariat “shall verify that any persons who identify themselves to the Trust Fund *are in fact* members of the beneficiary group” (emphasis added)).



- a. The Appeals Chamber has recognised that the Regulations of the Trust Fund are an instrument to the Rome Statute for purposes of interpreting provisions related to reparations awarded through the Trust Fund.<sup>179</sup>
- b. The Trial Chamber is not required in all circumstances (the Court “may”) to decide upon the scope and extent of any damage, loss or injury in relation to individual requests filed under rule 94 or those commenced on its own motion pursuant to rule 95 of the Rules of Procedure and Evidence.
- c. The threshold for a Trial Chamber proceeding in accordance with rule 95 of the Rules of Procedure and Evidence (“in exceptional circumstances”) differs from that applicable to awarding collective reparations pursuant to rule 98 (3) of the Rules of Procedure and Evidence (“more appropriate”).
- d. Rule 98 (3) of the Rules of Procedure and Evidence provides the factors to be taken into account when determining whether it is more appropriate to award reparations on a collective basis (“the number of victims and the scope, forms and modalities of reparations”), factors which cannot be classified as “exceptional circumstances” within the meaning of rule 95 of the Rules of Procedure and Evidence.
- e. The factors of rule 98 (3) of the Rules of Procedure and Evidence are relevant to a determination that it is *more* appropriate to award *collective* reparations.
- f. The factor of the number of “victims” under rule 98 (3) of the Rules of Procedure and Evidence is not limited to the number of individuals who have requested reparations or to the number of victims approved to participate as victims in the trial proceedings pursuant to rule 89 of the Rules of Procedure and Evidence, but rather encompasses the

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<sup>179</sup> *Supra* paras 44-48. See also [Admissibility Decision](#), paras 51-52.



findings thereon in the decisions on conviction and sentence. In this respect, the Appeals Chamber notes that, pursuant to rule 145 (1) (c) of the Rules of Procedure and Evidence, a convicted person's sentence is based, *inter alia*, on the extent of the damage and the harm caused to *victims* and their families, which is determined by reference to the evidence presented at trial and the factual findings made thereon.

149. Based on the above, the Appeals Chamber considers that the Court's legal texts provide for two distinct procedures for awards for reparations. The first, which relates to individual reparation awards, is primarily application ("request") based and is mainly regulated by rules 94 and 95 of the Rules of Procedure and Evidence. The second relates to collective reparation awards and is regulated in relevant part by rules 97 (1) and 98 (3) of the Rules of Procedure and Evidence.

150. The Appeals Chamber considers that the drafting history of the Court's legal texts provides additional support for this distinction. The Appeals Chamber notes that, during the Rome Conference, there were conflicting opinions on the concept of "reparations". In particular, the main issue of contention surrounded to what extent the Court should engage in determining individual cases of damage, loss or injury in relation to a crime.<sup>180</sup> In this respect, the Appeals Chamber finds particularly instructive the explanatory note in relation to the interpretation of article 75 (1) of the Statute, adopted by the Committee of the Whole, which provides that some delegates held the view that

[t]his provision intends that where there are only a few victims the Trial Chamber may make findings about their damage, loss and injury. Where there are more than a few victims, however, the Trial Chamber will not attempt to take evidence from or enter orders identifying separate victims or concerning their individual claims for reparations. Instead, the Trial Chamber may make findings as to whether reparations are due because of the crimes and will not undertake to consider and decide claims of individual victims.<sup>181</sup>

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<sup>180</sup> 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* (Transnational Publishers, Inc., 2001), p. 474, at p. 479.

<sup>181</sup> 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* (Transnational Publishers, Inc., 2001), p. 474, at p. 478.

151. The Appeals Chamber also considers that this second procedure, relevant to collective reparations, corresponds with the principles discussed above, namely 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”.<sup>182</sup> In this respect, the Appeals Chamber recalls that it has already held above that “reparation orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence”,<sup>183</sup> decisions which are based on the evidence and factual findings relevant to the entire trial proceedings. The Appeals Chamber considers that it would contravene this principle to require that collective reparations can only be awarded on the basis of the individual requests for reparations received.

152. The Appeals Chamber therefore holds 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. Such a determination may be challenged on appeal based on the Trial Chamber’s consideration of the factors laid out in rule 98 (3) of the Rules of Procedure and Evidence. In so holding, the Appeals Chamber limits itself to the circumstances of the Impugned Decision and clarifies that this holding is without prejudice to the question of whether a Trial Chamber would be required to rule on each individual reparations request received if it decides to award reparations on an individual basis pursuant to rule 98 (2) of the Rules of Procedure and Evidence or to award reparations on both an individual and collective basis.

153. The Appeals Chamber notes that none of the parties allege errors with respect to the Trial Chamber’s decision to award reparations on a collective basis. As such, the Appeals Chamber will not *proprio motu* review the Trial Chamber’s assessment of the factors under rule 98 (3) of the Rules of Procedure and Evidence. The Appeals Chamber nonetheless notes that the Trial Chamber determined that reparations on a collective basis were more appropriate due to, *inter alia*, the “*considerable number of*

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<sup>182</sup> *Supra* paras 58, 93.

<sup>183</sup> *Supra* para. 65.

people” affected by the crimes for which Mr Lubanga was convicted versus the “*limited number* of individuals who have applied for reparations” (emphasis added).<sup>184</sup> In this respect, the Appeals Chamber also notes the finding, established beyond reasonable doubt, in the Conviction Decision, which was also relied upon in the Sentencing Decision, that the crime of recruitment of individuals under the age of fifteen was “widespread” and that “a significant number of [individuals below the age of fifteen]” were used to participate actively in hostilities.<sup>185</sup> In this context, the Appeals Chamber notes that the finding relevant to the widespread nature of the involvement of individuals under the age of fifteen was challenged on appeal and confirmed by the Appeals Chamber in that judgment.<sup>186</sup>

154. Regarding the argument of the OPCV and the Legal Representatives of Victims V02 that international human rights jurisprudence demonstrates the obligation of a court to determine all applications before it, the Appeals Chamber finds it necessary to distinguish the context in which this jurisprudence arises from that of this Court. In this respect, the Appeals Chamber recalls the hierarchy of applicable law for the Court provided for in article 21 of the Statute and that, pursuant to article 21 (3) of the Statute, the application and interpretation of the Statute must be consistent with internationally recognised human rights.

155. With respect to article 21 (3) of the Statute, the Appeals Chamber notes that the Legal Representatives of Victims V01, as well as the Legal Representatives of Victims V02 with the OPCV, do not demonstrate that there is an internationally recognized human right to a consideration of *individual* applications for reparations, in cases where the applicable law provides for both individual and collective awards for reparations and a collective award is made. In this regard and as is further explained below, the decision not to award reparations on an individual basis does not prejudice the individuals who filed individual reparations requests with respect to their eligibility to participate in any collective reparations programme. The Appeals Chamber therefore finds that the Legal Representatives of Victims V01, as well as the Legal Representatives V02 with the OPCV, have not demonstrated that an award for

<sup>184</sup> [Impugned Decision](#), para. 219.

<sup>185</sup> [Conviction Decision](#), para. 911; [Sentencing Decision](#), para. 49.

<sup>186</sup> See [Lubanga Sentencing Judgment](#), paras 99-104.

collective reparations, without deciding upon the merits of each individual request for reparations, is not consistent with internationally recognized human rights.

156. Finally, with respect to the submissions of the OPCV and the Legal Representatives of Victims V02 that not ruling on the merits of the individual requests undermines the actual objective of the reparations proceedings,<sup>187</sup> the Appeals Chamber finds that this statement does not accurately reflect the involvement in the reparations proceedings of the victims that they represent. In this regard, the Appeals Chamber recalls that every individual who applied for reparations was represented in the reparations proceedings by the Legal Representatives of Victims V01, the Legal Representatives of Victims V02, or the OPCV.<sup>188</sup> Their views were directly solicited in the Sentencing and Reparations Scheduling Order on matters relevant to all aspects of reparations.<sup>189</sup> The Appeals Chamber again recalls that, through their Legal Representatives, the victims who had filed requests for individual reparations also supported reparations being awarded on a collective basis and made submissions relevant to the design and nature of any eventual collective reparation award.<sup>190</sup> The Appeals Chamber therefore finds that the Trial Chamber's decision to award reparations on a collective basis and not to rule on the merits of the individual reparation requests did not undermine the objectives of the reparations proceedings.

157. For the above reasons, the Appeals Chamber rejects the grounds of appeal alleging that the Trial Chamber erred in not ordering both collective and individual reparations on the basis of the individual reparations requests filed.

**(c) The transmission of the individual applications to the Trust Fund**

*(i) Background*

158. The Appeals Chamber recalls that, in the Impugned Decision, the Trial Chamber held that

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<sup>187</sup> [OPCV and Legal Representatives of Victims V02's Document in Support of the Appeal](#), paras 27, 29.

<sup>188</sup> See [Decision on OPCV's Request for Leave to Participate](#); [OPCV's Observations on Reparations](#); [Legal Representatives of Victims V01's Observations on Reparations](#); [Legal Representatives of Victims V02's Observations on Reparations](#).

<sup>189</sup> See [Sentencing and Reparations Scheduling Order](#).

<sup>190</sup> See [Legal Representatives of Victims V01's Observations on Reparations](#), paras 17-22; [Legal Representatives of Victims V02's Observations on Reparations](#), paras 34, 36.

The Chamber considers that the individual application forms for reparations received thus far by the Registry should be transmitted to the [Trust Fund]. If the [Trust Fund] considers it appropriate, victims who have applied for reparations could be included in any reparations programme that is to be implemented by the [Trust Fund].<sup>191</sup>

159. The Appeals Chamber also recalls that, in the Impugned Decision, the Trial Chamber established the following principle: “Reparations are entirely voluntary and the informed consent of the recipient is necessary prior to any award of reparations, *including participation in any reparations programme*” (emphasis added, footnote omitted).<sup>192</sup> The Appeals Chamber notes that this principle is reflected in the Regulations of the Registry, namely regulation 118, which provides:

### **Cooperation with the Trust Fund for Victims**

[...]

2. Where an order is issued by the Chamber for an award of reparations through the Trust Fund for Victims, the Registrar shall, *having regard to confidentiality*, provide the Secretariat of the Trust Fund for Victims with such information received in the applications sent by victims and such further information and documents as are necessary for the implementation of the order. [Emphasis added.]

#### *(ii) Determination of the Appeals Chamber*

160. The Appeals Chamber notes that, despite correctly recognising the voluntary nature of victims’ participation in the reparation programmes, the Trial Chamber made their participation in such programmes dependent on whether the *Trust Fund* “considers it appropriate”. The Appeals Chamber notes that, at the time of making applications for reparations, the victims either applied for individual awards or applied for a collective award, without knowledge of the kind of a collective programme that would be ultimately adopted. The Appeals Chamber therefore finds that it is necessary to seek the victims’ consent when a collective award is made, consistent with the principle, identified by the Trial Chamber, that “[r]eparations are entirely voluntary”.<sup>193</sup>

<sup>191</sup> [Impugned Decision](#), para. 284.

<sup>192</sup> [Impugned Decision](#), para. 204.

<sup>193</sup> [Impugned Decision](#), para. 204.

161. Furthermore, in its direction to the Registrar to transmit all applications to the Trust Fund, the Trial Chamber did not include any clause regarding confidentiality, which is contrary to regulation 118 (2) of the Regulations of the Registry.

162. The Appeals Chamber therefore considers it appropriate to include in the order for reparations an instruction to the Registrar to consult, through their Legal Representatives, with the victims who submitted requests 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. The Trust Fund is instructed to refrain from further reviewing these requests until such consent is received and to permanently remove any confidential information it may have stored electronically or elsewhere in the event that consent is not granted. When the collective reparation awards contained in the draft implementation plan have been approved, the Trust Fund is directed to seek consent to participate therein from the victims whose applications are forwarded to it.

**(d) Consequences of the above holding on other grounds of appeal**

163. Mr Lubanga raises other grounds of appeal wherein he submits that the Trial Chamber denied him the opportunity to challenge the individual requests for reparations. Mr Lubanga first submits that, by concluding that a written request for reparations pursuant to rule 94 of the Rules of Procedure and Evidence was not necessary, the Trial Chamber denied him the opportunity to make submissions.<sup>194</sup> Furthermore, he submits that the reparations requests were affected by extensive redactions which essentially concealed the identity of the victims or individuals acting on their behalf and therefore violated his rights to verify the facts submitted.<sup>195</sup>

164. The Appeals Chamber determined above that the Trial Chamber's decision had been to order reparations on a collective basis under rule 98 (3) of the Rules of Procedure and Evidence, rather than to rule on the merits of the individual reparation requests, and found that the Trial Chamber had not made any error in this respect.<sup>196</sup> The Appeals Chamber further recalls its holding above that the determination that it

<sup>194</sup> [Mr Lubanga's Document in Support of the Appeal A3](#), paras 39-40.

<sup>195</sup> [Mr Lubanga's Document in Support of the Appeal A3](#), paras 49-50, 54-59, 61-69.

<sup>196</sup> *Supra* paras 143, 152, 157.

was more appropriate to award collective reparations operated as a decision denying, as a category, individual reparation awards.<sup>197</sup> Accordingly, the Appeals Chamber considers that the issue of Mr Lubanga's ability to challenge individual reparation *requests* as such is moot.

165. However, the Appeals Chamber understands 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.

166. In this regard, the Appeals Chamber notes that Mr Lubanga has been able to challenge, and indeed has challenged in the present appeals, the criteria established in the Impugned Decision that are applicable to the standards of proof and causation for determining an individual's eligibility in a collective award. The Appeals Chamber also notes that, as pointed out by the Trust Fund, other human rights courts, such as the IACtHR, have ordered reparations on a collective basis when dealing with mass crimes and mass victimisation and that such orders "only determined the framework for the implementing [entity]".<sup>198</sup>

167. The Appeals Chamber also notes 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,<sup>199</sup> without providing for a specific role for the convicted person at this stage. However, the Appeals Chamber notes that the Trust Fund expressly stated that it would not be opposed to Mr Lubanga having the opportunity to review the screening process of victims at the

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<sup>197</sup> *Supra* para. 152.

<sup>198</sup> See [Observations of the Trust Fund](#), paras 52-59, referring, *inter alia*, to [Plan de Sanchez Massacre v. Guatemala](#). The Appeals Chamber notes that the Trust Fund provided an incorrect citation in its Observations, referring to the judgment of 29 April 2004, when the correct reference is to the judgment on reparations, rendered on 19 November 2004. The correct citation is contained in the List of Authorities and Designations attached as an annex to this judgment.

<sup>199</sup> See [Regulations of the Trust Fund](#), reg. 55 (where the Trust Fund's activities are triggered by an order for reparations, it may determine the nature and/or size of the award based on, *inter alia*, "the particular injuries to the victims and the nature of the evidence to support such injuries").

implementation stage, subject to any protective measures, and to comment on the draft implementation plan and have his observations considered.<sup>200</sup> The Appeals Chamber considers it appropriate to include the Trust Fund's suggestion in this respect in the amended order for reparations.

168. The Appeals Chamber therefore considers 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 and that any concerns thereto are adequately addressed by the further instructions included in the amended order for reparations identified in the paragraph above.

**D. Fourth element: The order for reparations must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the appropriate modalities of reparations based on the circumstances of the case**

*1. Background and relevant portion of the Impugned Decision*

169. In the Scheduling Order, the Trial Chamber requested submissions from the parties and participants on, *inter alia*, “depending on whether there should be individual or collective reparations (or both), to whom are they to be directed; how harm is to be assessed; and the criteria to be applied to the awards”,<sup>201</sup> as well as “whether the parties or participants seek to call expert evidence pursuant to Rule 97 of the Rules”.<sup>202</sup> The parties and participants made submissions on these points with several suggesting that the Trial Chamber should call expert evidence pursuant to rule 97 of the Rules of Procedure and Evidence, in order to assist the Trial Chamber with respect to the content of the order for reparations, which was yet to be issued.<sup>203</sup>

170. In its Observations on Reparations, the Trust Fund suggested that: 1) experts could be called by the Trial Chamber in order to assist the Trial Chamber *in preparing*

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<sup>200</sup> [Observations of the Trust Fund](#), paras 178-179.

<sup>201</sup> [Sentencing and Reparations Scheduling Order](#), para. 8 (ii).

<sup>202</sup> [Sentencing and Reparations Scheduling Order](#), para. 8 (v).

<sup>203</sup> See [Registrar's Observations on Reparations](#), para. 28; [Legal Representatives of Victims V02's Observations on Reparations](#), paras 43-44: “The experts could be appointed by the Chamber upon proposal of the Legal Representatives of Victims for individual reparations and upon proposal of local NGOs for collective reparations”; [Legal Representatives of Victims V01's Observations on Reparations](#), para. 47.



the order for reparations<sup>204</sup> and 2) *after the order for reparations had been issued*, experts could also be useful to the Trust Fund for “tasks related to implementation of [the order for reparations]”.<sup>205</sup> Under the heading of “Observations on the development of a draft implementation plan in the case of a collective award”,<sup>206</sup> the Trust Fund proposed that “an assessment of harm could also be carried out during the Trust Fund’s consultative phase with victims and affected communities in accordance with Regulation 55 of the Regulations of the Trust Fund”.<sup>207</sup> With respect to these experts, the Trust Fund proposed that “an interdisciplinary team of experts [...] would be needed to assess the harm suffered by the victims and communities”.<sup>208</sup> With respect to the implementation stage, namely *after* it had been seized of an order for reparations,<sup>209</sup> the Trust Fund laid a five part proposal of how it would proceed for purposes of preparing the draft implementation plan of the order for reparations, if the order was indeed for collective reparations.<sup>210</sup>

171. In the Impugned Decision, the Trial Chamber held:

## 2. Experts pursuant to Rule 97 of the Rules

263. The Chamber strongly recommends that a multidisciplinary team of experts is retained to provide assistance to the Court in the following areas: a) an assessment of the harm suffered by the victims in this case; b) the effect that the crimes of enlisting and conscripting children under the age of [fifteen] and using them to participate actively in hostilities had on their families and communities; c) identifying the most appropriate form of reparations in this case, in close consultation with the victims and their communities; d) establishing those individuals, bodies, groups or communities who should be awarded reparations; and d [*sic*]) accessing funds for these purposes. [...]

264. The Chamber therefore endorses the Registry’s proposal that there should be a team of experts [...]. The Chamber accepts the [Trust Fund]’s suggestion that there should be a preliminary consultative phase involving the victims and the affected communities, to be carried out by the team of experts, with the support of the Registry, the OPCV and any local partners. [...]

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<sup>204</sup> See [Trust Fund’s Observations on Reparations](#), paras 257-258, 262.

<sup>205</sup> See [Trust Fund’s Observations on Reparations](#), paras 259-260, 262.

<sup>206</sup> [Trust Fund’s Observations on Reparations](#), p. 65.

<sup>207</sup> [Trust Fund’s Observations on Reparations](#), para. 202.

<sup>208</sup> [Trust Fund’s Observations on Reparations](#), para. 204.

<sup>209</sup> See regulation 50 (b) of the [Regulations of the Trust Fund](#).

<sup>210</sup> See [Trust Fund’s Observations on Reparations](#), paras 181-231.

265. The Chamber, in discharging its powers under Rule 97(2) of the Rules, delegates to the [Trust Fund] the task of selecting and appointing appropriate multidisciplinary experts, and the [Trust Fund] is to oversee their work. [...]

266. The Chamber is of the view that the [Trust Fund] is well placed to determine the appropriate forms of reparations and to implement them. [...]

[...]

## **6. Implementation of the reparations plan and role of the Judiciary**

281. The Chamber endorses the five-step implementation plan suggested by the Trust Fund, which is to be executed in conjunction with the Registry, the OPCV and the experts.

282. First, the Trust Fund, the Registry, the OPCV and the experts, should establish which localities ought to be involved in the reparations process in the present case [...]. [...] Second, there should be a process of consultation in the localities that are identified. Third, an assessment of harm should be carried out during this consultation phase by the team of experts. Fourth, public debates should be held in each locality in order to explain the reparations principles and procedures, and to address the victims' expectations. The final step is the collection of proposals for collective reparations that are to be developed in each locality, which are then to be presented to the Chamber for its approval.

283. The Chamber agrees that the assessment of harm is to be carried out by the [Trust Fund] during a consultative phase in the different localities. [Footnotes omitted.]<sup>211</sup>

### *2. Submissions of the parties and participants*

172. Mr Lubanga, as well as the OPCV jointly with the Legal Representatives of Victims V02 argue that the Trial Chamber erred in law by delegating its judicial powers to non-judicial organs, namely to the Trust Fund and the Registrar.<sup>212</sup>

173. According to Mr Lubanga, the Trust Fund's mandate does not include the determination of the scope, the nature or the beneficiaries of Court ordered reparations.<sup>213</sup> He also argues that rule 97 (2) of the Rules of Procedure and Evidence

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<sup>211</sup> [Impugned Decision](#), paras 263-266, 281-283.

<sup>212</sup> [Mr Lubanga's Document in Support of the Appeal A3](#), paras 10-11, 20; [OPCV and Legal Representatives of Victims V02's Document in Support of the Appeal](#), para. 44. *See also* [OPCV and Legal Representatives of Victims V02's Joint Response to Mr Lubanga's Document in Support of the Appeal A3](#), para. 30.

<sup>213</sup> [Mr Lubanga's Document in Support of the Appeal A3](#), para. 14.

does not entitle the Trial Chamber to delegate its powers thereunder to a non-judicial body such as the Trust Fund.<sup>214</sup>

174. The OPCV and the Legal Representatives of Victims V02 submit that the role of the Trust Fund is executory, it being an “intermediary” tasked with the implementation of the orders for reparations,<sup>215</sup> and that the Registry, which is an administrative body, cannot exercise judicial functions in relation to reparations.<sup>216</sup>

175. The Trust Fund submits that the Trial Chamber’s delegation to it of the tasks of identifying victims and beneficiaries, assessing the harm and determining the appropriate forms of reparations, is lawful as they constitute the Trust Fund’s core tasks and duties, which are regulated by the Regulations of the Trust Fund.<sup>217</sup> The Trust Fund also argues that, while a Trial Chamber *may* appoint experts to assist in the assessment of reparations before an order for reparations is issued,<sup>218</sup> it may itself also appoint experts *after* it is seized of an order for reparations pursuant to regulation 70 of the Regulations of the Trust Fund.<sup>219</sup> The Trust Fund submits that, because the Impugned Decision is an order for reparations, the Trial Chamber can no longer delegate its powers under rule 97 (2) of the Rules of Procedure and Evidence in any case<sup>220</sup> and accordingly these grounds of appeal should be dismissed.<sup>221</sup>

### 3. Discussion

176. The Appeals Chamber recalls that rules 97 (2) and (3) of the Rules of Procedure and Evidence provide:

2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, *the Court may appoint appropriate experts* to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well

<sup>214</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), para. 14.

<sup>215</sup> [OPCV and Legal Representatives of Victims V02’s Document in Support of the Appeal](#), paras 48-50.

<sup>216</sup> [OPCV and Legal Representatives of Victims V02’s Document in Support of the Appeal](#), para. 52; [OPCV and Legal Representatives of Victims V02’s Joint Response to Mr Lubanga’s Document in Support of the Appeal A3](#), para. 32.

<sup>217</sup> [Observations of the Trust Fund](#), paras 79-84.

<sup>218</sup> [Observations of the Trust Fund](#), paras 75-77.

<sup>219</sup> [Observations of the Trust Fund](#), para. 85.

<sup>220</sup> [Observations of the Trust Fund](#), para. 78.

<sup>221</sup> [Observations of the Trust Fund](#), para. 88.

as interested persons and interested States to make observations on the reports of the experts.

3. In all cases, the Court shall respect the rights of victims and the convicted person. [Emphasis added.]

177. Regulations 55 (located under Section III, entitled “If the activities and projects of the Trust Fund are triggered by a decision of the Court”), 69 and 70 (located in Chapter IV, entitled “Collective Awards to Victims pursuant to Rule 98(3)”) of the Regulations of the Trust Fund provide:

55. Subject to the order of the Court, the Trust Fund shall take into account the following factors in determining the nature and/or size of awards, inter alia: the nature of the crimes, the particular injuries to the victims and the nature of the evidence to support such injuries, as well as the size and location of the beneficiary group.

69. Where the Court orders 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, in accordance with rule 98, sub-rule 3, of the Rules of Procedure and Evidence, the draft implementation plan shall set out the precise nature of the collective award(s), where not already specified by the Court, as well as the methods for its/their implementation. Determinations made in this regard should be approved by the Court.

70. The Board of Directors may consult victims as defined in rule 85 of the Rules of Procedure and Evidence and, where natural persons are concerned, their families, as well as their legal representatives, *and may consult any competent expert or expert organization on the nature of the collective award(s) and the methods for its/their implementation.* [Emphasis added.]

178. The Appeals Chamber notes that the statutory framework relevant to reparations envisages the possibility of expert assistance at two distinct phases: 1) *before* an order for reparations is issued as regulated by rule 97 (2) of the Rules of Procedure and Evidence and 2) *after* the order for reparations has been issued, which is regulated by the Regulations of the Trust Fund.

179. In the present case, the Trial Chamber did not avail itself of expert assistance prior to issuing the Impugned Decision, which the Appeals Chamber has held is an order for reparations under article 75 of the Statute.<sup>222</sup> Accordingly, as submitted by

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<sup>222</sup> *Supra* para. 38.

the Trust Fund,<sup>223</sup> the Appeals Chamber considers that the issue of the delegation of the Trial Chamber's rule 97 (2) powers to a non-judicial entity, here the Trust Fund, is moot. However, the Appeals Chamber does not consider that, in so holding, the question of whether it was an error to delegate these *tasks* to the Trust Fund has been resolved. In this regard, the Appeals Chamber recalls that, as set out in the introduction, it is reviewing the Impugned Decision's "content and substance" in light of the five elements required for an order for reparations pursuant to article 75 of the Statute.<sup>224</sup> Thus, the question to be addressed is whether it was necessary for the Trial Chamber to reach its own determinations on the delegated tasks and include those determinations in the order for reparations, or whether an order for reparations may be issued without these determinations being specified and only determined during the implementation stage under the authority of the Trust Fund.

180. Below, the Appeals Chamber analyses the delegated tasks to determine whether the absence of a judicial determination thereon in the order for reparations renders the order insufficiently detailed and lacking in required content. In this respect, the Appeals Chamber emphasises the principle, as codified in rule 97 (3) of the Rules of Procedure and Evidence, that, in awarding reparations, "the Court shall respect the rights of victims and the convicted person", which includes the right to meaningfully challenge an order for reparations pursuant to article 82 (4) of the Statute. The Appeals Chamber addresses the relevant delegated tasks listed in paragraph 263 of the Impugned Decision<sup>225</sup> under two headings and in the following order: 1) assessing the harm suffered by the victims in this case and identifying the effect that the crimes of enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities had on their families and communities and 2) identifying the most appropriate modalities of reparations in this case. Mr Lubanga's arguments relevant to whom or to which groups reparations should be awarded are addressed under the fifth element below.

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<sup>223</sup> *Supra* para. 175.

<sup>224</sup> *Supra* paras 32, 54.

<sup>225</sup> *Supra* para. 171.

(a) **Assessing the harm suffered by the victims and identifying the effect that the crimes for which Mr Lubanga was convicted had on the victims' families and communities**

(i) *Determination of the Appeals Chamber*

181. At the outset, the Appeals Chamber highlights the critical distinction between *identifying* the harms to direct and indirect victims caused by the crimes for which the person was convicted and *assessing the extent* of that harm for purposes of determining the nature and/or size of reparation awards. In the Appeals Chamber's view, the former must be done by the Trial Chamber and must be contained in the order for reparations. The Appeals Chamber considers that the victims, through their legal representatives, and the convicted person must be informed of this critical aspect of an order for reparations and further considers that the absence of this determination infringes on the rights of the victims and the convicted person to meaningfully appeal an order for reparations under article 82 (4) of the Statute.

182. Additionally, absent such a determination, the Appeals Chamber considers that there is a real risk that the different mandates of the Trust Fund, namely its assistance mandate,<sup>226</sup> which is *not* linked to or limited by the parameters of a conviction in a specific case before the Court, and its role in implementing court orders for reparations<sup>227</sup> may be blurred in a manner prejudicial to the rights of the convicted person. The Appeals Chamber notes that the Trust Fund itself has acknowledged this critical distinction in its mandates when it stated that its Observations take into account that "[the Trust Fund's] mandate to implement Court-ordered reparations by definition is more limited in scope than its assistance mandate"<sup>228</sup> and that "judicial reparations within criminal proceedings, which are necessarily and genuinely linked to a conviction, have their limitations".<sup>229</sup>

183. With respect to assessing the extent of the harms, the Appeals Chamber considers that the above considerations do not apply. The Appeals Chamber notes that rule 97 (2) of the Rules of Procedure and Evidence provides that a Trial Chamber "*may* appoint experts to assist it in determining the scope, extent of any damage, loss

<sup>226</sup> Pursuant to regulation 50 (a) of the [Regulations of the Trust Fund](#).

<sup>227</sup> Pursuant to regulation 50 (b) of the [Regulations of the Trust Fund](#).

<sup>228</sup> [Observations of the Trust Fund](#), para. 141.

<sup>229</sup> [Observations of the Trust Fund](#), para. 10.

and injury to, or in respect of victims” (emphasis added) and that the Regulations of the Trust Fund provide that this assessment may instead be carried out at the implementation stage.<sup>230</sup> In the Appeals Chamber’s view, when read together, it becomes clear from these provisions that there are two options available to a Trial Chamber with respect to the assessment of the extent of the harm. First, the Trial Chamber may, with or without the assistance of experts pursuant to rule 97 (2) of the Rules of Procedure and Evidence, determine the scope, extent of any damage, loss and injury to, or in respect of, victims in the order for reparations. Secondly, the Trial Chamber may define the harms caused to direct and indirect victims and set the criteria that are to be applied by the Trust Fund for purposes of assessing the extent of the harms, either on a collective or individual basis, depending on the order for reparations. On that basis, the Trust Fund would subsequently determine the appropriate size and nature of the reparation awards to be proposed in its draft implementation plan.<sup>231</sup>

184. The Appeals Chamber therefore holds that, in order to protect the rights of the convicted person and ensure that reparations are not awarded to remedy harms that are not the result of the crimes for which he or she was convicted and to also protect the right of the victims to appeal the exclusion of any harms that they consider have been shown to be caused by these crimes, 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. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in delegating to the Trust Fund the task of defining the harms caused to direct and indirect victims as a result of the crimes for which Mr Lubanga was convicted. This error renders the Impugned Decision insufficiently detailed and it therefore must be amended.

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<sup>230</sup> *Supra* para. 177.

<sup>231</sup> The Appeals Chamber notes that it is also open to a Trial Chamber to specify the size and nature of the reparation awards in its order for reparations and that, depending on the circumstances of a case, this does not need to be left to the discretion of the Trust Fund. However, for purposes of resolving this ground of appeal, the Appeals Chamber need only address the minimum required detail and content with respect to the harm caused to direct and indirect victims of the crimes for which the person was convicted.

185. In amending the Impugned Decision, the Appeals Chamber stresses that it limits itself to the circumstances of this case. In this regard, the limitations set in the present judgment with respect to the harm caused to direct and indirect victims as a result of the crimes for which Mr Lubanga was convicted for purposes of reparations is without prejudice to other potential scenarios, such as where a Trial Chamber makes a finding in the order for reparations of a harm for which reparations may be awarded: 1) that is based on evidence presented under regulation 56 of the Regulations of the Court during the trial only for the purposes of reparations and which was not relied upon for factual findings relevant to the conviction and sentence of the person; 2) is based on evidence received at a reparation hearing, in written submissions from the parties and participants, or from experts who were engaged for the purpose of providing such evidence; or 3) is based on evidence contained in a request for reparations pursuant to rule 94 of the Rules of Procedure and Evidence that identifies a harm that is not mentioned in the decisions on conviction and sentence. The Appeals Chamber notes that the above scenarios are relevant to the time frame prior to the issuance of an order for reparations and that the Court's statutory framework provides for the convicted person to be able to challenge any such evidence that could potentially be relied upon in the eventual order for reparations.

186. In the present case, the Trial Chamber did not elicit any evidence specific to harm caused by the crimes for which Mr Lubanga was convicted specifically for the purpose of reparations.<sup>232</sup> Accordingly, the Appeals Chamber considers that, in amending the Impugned Decision, the Appeals Chamber is limited by the Trial Chamber's findings regarding the harm to direct and indirect victims caused by the crimes for which Mr Lubanga was convicted that were made in the context of the trial proceedings. Thus, the Appeals Chamber takes into account decisions relevant to victim participation and findings in the Conviction Decision insofar as they relate to defining the harm caused by the crimes for which Mr Lubanga was convicted.

187. Furthermore, the Appeals Chamber again recalls that rule 145 (1) (c) of the Rules of Procedure and Evidence, which contains mandatory factors that must be

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<sup>232</sup> See [Sentencing and Reparations Scheduling Order](#), para. 12, wherein the Trial Chamber stated that, after receiving the requested reports and observations, it would "decide thereafter whether to hold a reparations hearing". No such hearing was held.



taken into account in determining a convicted person's sentence,<sup>233</sup> provides that one of those mandatory factors is "the extent of the damage caused, and in particular 'the harm caused to the victims and their families'".<sup>234</sup> The Appeals Chamber therefore considers that the Sentencing Decision is also of relevance in terms of defining the harm caused by the crimes for which Mr Lubanga was convicted. In so doing, the Appeals Chamber clarifies that its evaluation of the Sentencing Decision in this manner is without prejudice to a future Trial Chamber addressing certain harms to direct and indirect victims for purposes of sentencing and other harms for purposes of reparations. Finally, the Appeals Chamber notes that Mr Lubanga appealed the Conviction and Sentencing Decisions and that it confirmed both decisions.<sup>235</sup>

188. The Appeals Chamber recalls that, in the Conviction Decision, the Trial Chamber summarised the rationale of the relevant international humanitarian law provisions upon which article 8 (2) (e) (vii) of the Statute is based as:

The principal objective underlying these prohibitions historically is to protect children under the age of [fifteen] from the risks associated with armed conflict, and first and foremost they are directed at securing their physical and psychological well-being. This includes not only protection from violence and fatal or non-fatal injuries during fighting, *but also the potentially serious trauma that can accompany recruitment (including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear)*. [Emphasis added, footnote omitted.]<sup>236</sup>

189. In the Sentencing Decision, the Trial Chamber stated that it determined the gravity of the crimes for which Mr Lubanga was convicted against the "general background" of the harms associated with the recruitment and use to participate actively in hostilities of individuals below the age of fifteen as identified in the relevant international humanitarian law provisions,<sup>237</sup> as well as evidence presented by the expert witness Schauer that further elaborated on these harms, namely that

40. [T]he response to war-related trauma by ex-combatants and child soldiers in countries directly affected by war and violence is complex and frequently leads to severe forms of multiple psychological disorders.

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<sup>233</sup> [Lubanga Sentencing Judgment](#), para. 42.

<sup>234</sup> [Sentencing Decision](#), para. 44.

<sup>235</sup> See [Lubanga Conviction Judgment](#); [Lubanga Sentencing Judgment](#).

<sup>236</sup> See [Conviction Decision](#), para. 605.

<sup>237</sup> See [Sentencing Decision](#), para. 38.

41. A significant percentage of the former child soldiers who were the subject of the study had abused drugs or alcohol; they suffered from depression and dissociation; and some demonstrated suicidal behaviour. According to the report, “[r]esearch shows that former child soldiers have difficulties in controlling aggressive impulses and have little skills to handle life without violence. These children show ongoing aggressiveness within their families and communities even after relocation to their home villages.” [...]

42. [C]hildren who have been child soldiers for a significant period of time usually do not demonstrate “civilian life skills” as they have difficulties socialising, they missed schooling, and as a result they are at a disadvantage, particularly as regards employment.

190. In its 2009 Decision on Indirect Victims, the Trial Chamber held that

50. Furthermore, the Appeals Chamber has determined that close personal relationships, such as those between parents and children, are a precondition of participation by indirect victims. In the view of the Trial Chamber, *the harm suffered by these indirect victims may include the psychological suffering experienced as a result of the sudden loss of a family member or the material deprivation that accompanies the loss of his or her contributions.*

51. Another situation which can serve as a basis for an application of an indirect victim to participate in the proceedings is when a person intervenes to prevent one of the crimes alleged against the accused. [...] [D]epending on the individual facts, psychological harm to a direct victim may be inflicted once they become aware that an attempt is being made to conscript, enlist or to use them actively to participate in hostilities. *In these circumstances, the loss, injury or damage suffered by the person intervening may be sufficiently linked to the direct victim’s harm by the attempt to prevent the child from being further harmed as a result of a relevant crime.*

52. Excluded from the category of “indirect victims”, however, are those who *suffered harm as a result of the (later) conduct of direct victims.* [Emphasis added.]

191. On the basis of the above, the Appeals Chamber accordingly amends the Impugned Decision to define the harm to direct and indirect victims caused by the crimes for which Mr Lubanga was convicted as follows:

- a. With respect to direct victims:
  - i. Physical injury and trauma;
  - ii. Psychological trauma and the development of psychological disorders, such as, *inter alia*, suicidal tendencies, depression, and dissociative behaviour;
  - iii. Interruption and loss of schooling;

- iv. Separation from families;
- v. Exposure to an environment of violence and fear;
- vi. Difficulties socialising within their families and communities;
- vii. Difficulties in controlling aggressive impulses; and
- viii. The non-development of “civilian life skills” resulting in the victim being at a disadvantage, particularly as regards employment.

b. With respect to indirect victims:

- i. Psychological suffering experienced as a result of the sudden loss of a family member;
- ii. Material deprivation that accompanies the loss of the family members’ contributions;
- iii. Loss, injury or damage suffered by the intervening person from attempting to prevent the child from being further harmed as a result of a relevant crime; and
- iv. Psychological and/or material sufferings as a result of aggressiveness on the part of former child soldiers relocated to their families and communities.

*(ii) Consequences of the above holding on Mr Lubanga’s ground of appeal relevant to victims of sexual and gender-based violence*

**(a) Background**

192. In the Impugned Decision the Trial Chamber stated that “[t]he Court should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence”.<sup>238</sup>

193. Mr Lubanga submits that the Prosecutor limited the scope of the case to enlistment, conscription and use of child soldiers under the age of fifteen years to participate actively in hostilities<sup>239</sup> and that the Trial Chamber dismissed the Prosecutor’s submission that the commission of those crimes would necessarily lead

<sup>238</sup> [Impugned Decision](#), para. 207.

<sup>239</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), para. 130.

to the perpetration of sexual violence.<sup>240</sup> Furthermore, Mr Lubanga submits that Articles 8 (2) (e) (vi) and (vii) of the Statute and the Elements of Crimes do not link the commission of sexual violence to the status of child soldiers.<sup>241</sup>

194. In the view of the Legal Representatives of Victims V01, the Impugned Decision only stipulates that individuals who suffered gender-based violence can be regarded as victims in the reparations proceedings, but not that all of them should receive reparations.<sup>242</sup> They submit that, in order for such victims to benefit from reparations, a causal link between the harm the victims suffered and the crimes for which Mr Lubanga was convicted needs to be established.<sup>243</sup> The OPCV and the Legal Representatives of Victims V02 submit that gender-based crimes and inhumane treatment are an inherent component of enlistment, recruitment and use of children in hostilities and that in order to be awarded reparations, applicants only need to prove that their harm resulted from the crimes for which Mr Lubanga was convicted.<sup>244</sup>

195. The Trust Fund submits that as long as the harm resulting from “acts of sexuali[s]ed violence is inherently connected to underlying facts of the charges”, the criteria of rule 85 of the Rules of Procedure and Evidence are met, regardless of whether sexualised violence is specifically charged.<sup>245</sup>

#### **(b) Determination of the Appeals Chamber**

196. The Appeals Chamber recalls that the definition of “victims” is provided in rule 85 (a) of the Rules of Procedure and Evidence, pursuant to which “‘victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”. In this regard, what is at issue is whether sexual and gender-based violence can be defined as a *harm* resulting from the crimes for which Mr Lubanga was convicted. The Appeals Chamber considers that, in the circumstances of this case, it cannot.

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<sup>240</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), para. 134.

<sup>241</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), para. 135.

<sup>242</sup> [Legal Representatives of Victims V01’s Response to Mr Lubanga’s Document in Support of the Appeal A3](#), para. 56.

<sup>243</sup> [Legal Representatives of Victims V01’s Response to Mr Lubanga’s Document in Support of the Appeal A3](#), paras 57-58.

<sup>244</sup> [OPCV and Legal Representatives of Victims V02’s Joint Response to Mr Lubanga’s Document in Support of the Appeal A3](#), paras 83, 85-86.

<sup>245</sup> [Observations of the Trust Fund](#), paras 151-154.

197. The Appeals Chamber notes that, in the Sentencing Decision, the Trial Chamber did not include sexual and gender-based violence as being part of the gravity of the crime, which is based, *inter alia*, on the harm to victims and their families, or as an aggravating factor of the crimes for which Mr Lubanga was convicted. In declining to include sexual violence as an aggravating factor of the crimes, the Trial Chamber found that “nothing suggests that Mr Lubanga ordered or encouraged sexual violence, that he was aware of it or that it could otherwise be attributed to him in a way that reflects his culpability”.<sup>246</sup> The Trial Chamber concluded that: “the link between Mr Lubanga and sexual violence, in the context of the charges, has not been established beyond reasonable doubt”.<sup>247</sup> In the *Lubanga* Sentencing Judgment, the Appeals Chamber noted that this finding was understood to cover “a broad range of possibilities from objective foreseeability to intent”.<sup>248</sup>

198. In the particular circumstances of the present case, the Appeals Chamber considers that the Trial Chamber’s finding that the acts of sexual violence could not be attributed to Mr Lubanga amounts to concluding that the Trial Chamber did not establish that harm from sexual and gender-based violence resulted from the crimes for which Mr Lubanga was convicted, within the meaning of rule 85 (a) of the Rules of Procedure and Evidence. The Appeals Chamber is of the view that, having made the above-mentioned finding in the Sentencing Decision, the Trial Chamber was required to explain in the Impugned Decision how it nonetheless considered that Mr Lubanga should be liable for reparations in respect of the harm of sexual and gender-based violence. It did not do so. The Appeals Chamber therefore considers that Mr Lubanga cannot be held liable for reparations in respect of such harm and accordingly amends the Impugned Decision in this respect.

199. The above finding in relation to Mr Lubanga’s liability for reparations in respect of harm resulting from sexual and gender-based violence should not be viewed as precluding such victims from being able to benefit from assistance activities that the Trust Fund may undertake. The Appeals Chamber notes that the Trial Chamber did

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<sup>246</sup> [Sentencing Decision](#), para. 74.

<sup>247</sup> [Sentencing Decision](#), para. 75.

<sup>248</sup> [Lubanga Sentencing Judgment](#), para. 90.

review evidence of sexual violence,<sup>249</sup> but held, by majority, that it was “unable to conclude that sexual violence against the children who were recruited was *sufficiently widespread* that it could be characterised as occurring in the ordinary course of the implementation of the common plan for which Mr Lubanga is responsible (emphasis added).”<sup>250</sup> The Appeals Chamber is therefore of the view that it is appropriate for the Board of Directors of the Trust Fund to consider, in its discretion, the possibility of including such victims in the assistance activities undertaken according to its mandate under regulation 50 (a) of the Regulations of the Trust Fund. The Appeals Chamber also considers that it is appropriate for the draft implementation plan to include a referral process to other competent NGOs in the affected areas that offer services to victims of sexual and gender-based violence.

**(b) Identifying the most appropriate modalities of reparations in this case**

200. The Appeals Chamber also considers that a Trial Chamber must identify the most appropriate modalities of reparations, based on the specific circumstances of the case at hand, in the order for reparations. Indeed, the Appeals Chamber considers that identifying the harm caused to direct and indirect victims as a result of the crimes for which a person was convicted, which was addressed above, is inter-linked with identifying the appropriate modalities of reparations in that specific case. In this sense, the appropriateness of a modality of reparations can only be determined by reference to the harms that were caused and which the reparations seek to remedy. However, the Appeals Chamber notes that a modality of reparations is not an award for reparations, as meant by the Regulations of the Trust Fund. Rather, awards for reparations are designed based on the modalities of reparations identified by the Trial Chamber. Thus, in the view of the Appeals Chamber, if a Trial Chamber does not specify the nature and size of an award for reparations in the order itself, it must identify the modalities of reparations that are appropriate for the circumstances of that case, based upon which the Trust Fund then designs the award for reparations. Accordingly, the Appeals Chamber holds that, in the order for reparations, at a minimum, the Trial Chamber must identify those modalities of reparations which it considers appropriate based on the circumstances of the specific case before it. The

<sup>249</sup> [Sentencing Decision](#), paras 70-73.

<sup>250</sup> [Sentencing Decision](#), para. 74.

Trust Fund shall design awards for reparations on the basis of all or some of those modalities and should link the relevant modalities to the award for reparations in its draft implementation plan, in order for the Chamber to review the determinations made in this respect.<sup>251</sup>

201. The Appeals Chamber notes that the Trial Chamber identified numerous modalities that it considered to be appropriate in the circumstances of the *Lubanga* case. The Appeals Chamber considers that, in designing the awards for reparations, the Trust Fund should endeavour to design awards on the basis of all the identified modalities of reparations. However, the Appeals Chamber notes that the design of the awards will also be informed by the views received during the consultation stage with victims, members of the affected communities, as well as potentially experts, which the Trust Fund will undertake prior to submitting its draft implementation plan. Thus, the Appeals Chamber considers that it is possible that not all the modalities will ultimately be reflected in the awards for reparations. In this respect, should any particular modality not be the basis of any of the awards for reparations proposed by the Trust Fund in its draft implementation plan, the Trust Fund is instructed to include an explanation regarding the reasons why that modality is not reflected in the proposed awards for reparations.

202. Regarding Mr Lubanga's arguments with respect to the Trial Chamber's alleged delegation of determining the appropriate modalities of reparations to the Trust Fund, the Appeals Chamber considers that Mr Lubanga has misinterpreted the Impugned Decision. The Appeals Chamber notes that this confusion may stem from the fact that the portion of the Impugned Decision wherein the Trial Chamber established which modalities were included in its order for reparations is contained in the section dealing with the principles of reparations. Despite this, the Appeals Chamber considers that the Impugned Decision contains a determination on the appropriate modalities of reparations, based upon which the Trust Fund will design awards for reparations,

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<sup>251</sup> See regulation 69 of the [Regulations of the Trust Fund](#), which provides that "where the Court orders 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, [...] the draft implementation plan shall set out the precise nature of the collective award(s), where not already specified by the Court [...]. Determinations in this regard should be approved by the Court."

which will be included in its draft implementation plan. In this regard, the Appeals Chamber considers that the Trial Chamber decided that the appropriate modalities of reparation awards in the circumstances of the *Lubanga* case are: restitution, compensation, rehabilitation, as well as others with a symbolic, transformative and preventative value.<sup>252</sup> With respect to modalities of reparations apart from restitution, compensation and rehabilitation, the Appeals Chamber finds that the Trial Chamber defined these other modalities of reparations (subject to having been amended in line with the above harms that resulted from the crimes for which Mr Lubanga was convicted) as “measures to address the shame felt by some former child soldiers” and held that reparations programmes should “be directed at preventing future conflicts and raising awareness that the effective reintegration of these children requires eradicating the victimisation, discrimination and stigmatisation of young people in these circumstances”.<sup>253</sup>

203. The Appeals Chamber finds no error in the Trial Chamber’s determinations in this respect and recalls that determining the nature and/or size of the reparation award is an appropriate task of the Trust Fund pursuant to regulation 55 of the Regulations of the Trust Fund. The Appeals Chamber therefore does not consider it necessary to amend the Impugned Decision in substance, but does consider, for purposes of clarity, that the Trial Chamber’s determinations should be set out separately from the principles section and amends the Impugned Decision in this regard.

204. Furthermore, the Appeals Chamber notes that, with respect to restitution, the Trial Chamber stated that restitution “will often be unachievable for victims of the crimes [for which Mr Lubanga was convicted]”.<sup>254</sup> The Appeals Chamber does not consider this statement to mean that restitution as a potential modality upon which a reparation award could be based was excluded by the Trial Chamber. However, should the Trust Fund determine that restitution is in fact achievable for victims of the crimes for which Mr Lubanga was convicted, the Appeals Chamber instructs the Trust Fund to provide full reasons as to how it arrived at this conclusion in its draft implementation plan. Finally, the Appeals Chamber notes that the victims

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<sup>252</sup> [Impugned Decision](#), paras 222-241.

<sup>253</sup> [Impugned Decision](#), para. 240.

<sup>254</sup> [Impugned Decision](#), para. 223.



in the present case submitted their views regarding the appropriate modalities of reparations and proposed potential awards and programmes for reparations awarded on a collective basis.<sup>255</sup> While the views of these victims are not to be prioritised over the views of other victims that the Trust Fund will communicate with during the consultation stage prior to it submitting its draft implementation plan, the Appeals Chamber considers it appropriate to include in the amended order for reparations an instruction to the Trust Fund that it should also take these proposals into account with respect to the nature of the awards for reparations that it will determine pursuant to regulation 55 of the Regulations of the Trust Fund.

**E. Fifth element: The order for reparations must identify the victims eligible to benefit from reparations or set out the criteria of eligibility**

205. The Appeals Chamber recalls that, as a fifth element, the reparation order must either identify the victims eligible to benefit from reparations, or set out the criteria of their eligibility for reparations. The Trial Chamber did not identify eligible victims. It did, however, indicate certain characteristics of groups of eligible victims, in order to enable their identification by the Trust Fund. Mr Lubanga challenges some of the Trial Chamber's findings in this regard. In particular, Mr Lubanga alleges errors in the Trial Chamber's awards of reparations with respect to entire communities and the inclusion of localities that were not specifically mentioned in the Conviction Decision.

*1. Alleged error related to the inclusion of broader communities*

**(a) Relevant parts of the Impugned Decision**

206. In the Impugned Decision, the Trial Chamber held as follows:

The measures put in place for awarding compensation should take into account the gender and age-specific impact that the crimes of enlisting and conscripting children under the age of [fifteen] and using them to participate actively in the hostilities can have on direct victims, their families and communities. The Court should assess whether it is appropriate to provide compensation for any of the

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<sup>255</sup> See [Legal Representatives of Victims V01's Observations on Reparations](#), paras 17-23; [Legal Representatives of Victims V02's Observations on Reparations](#), paras 28-37.

detrimental consequences of child recruitment for the individuals directly affected, along with their families and communities. [Footnotes omitted.]<sup>256</sup>

**(b) Submissions of the parties and participants**

207. Mr Lubanga submits that the Trial Chamber confused the notions of collective reparations and community reparations by allowing the inclusion of broader communities within the meaning of article 75 of the Statute.<sup>257</sup> He also argues that the group of victims and/or beneficiaries must be linked to the conviction<sup>258</sup> and submits that both individual and collective reparations require the identification of each individual as a victim, in accordance with rule 85 of the Rules of Procedure and Evidence.<sup>259</sup> In this regard, he argues that “community” does not fall under the definition provided in rule 85 of the Rules of Procedure and Evidence.<sup>260</sup> Finally, Mr Lubanga states that he is not against the Trust Fund implementing additional victims’ support programmes as long as they are not a part of the reparations ordered against him.<sup>261</sup>

208. The Legal Representatives of Victims V01 argue that only individual reparations require the identification of each individual as a victim.<sup>262</sup> The OPCV and the Legal Representatives for Victims V02 submit that Mr Lubanga misinterprets the term “communities” referred to by the Trial Chamber.<sup>263</sup> They further argue that the submission of an application for reparations is not a pre-condition for awarding “community-based” reparations.<sup>264</sup>

209. The Trust Fund submits that “extending the eligibility for collective reparations to beneficiaries, namely broader communities, [...] is the only way by which collective reparations may become meaningful for cases of mass atrocities [...]

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<sup>256</sup> [Impugned Decision](#), para. 231.

<sup>257</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), paras 138-152.

<sup>258</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), paras 142-143.

<sup>259</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), paras 144-145.

<sup>260</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), para. 146.

<sup>261</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), para. 148.

<sup>262</sup> [Legal Representatives of Victims V01’s Response to Mr Lubanga’s Document in Support of the Appeal A3](#), para. 66.

<sup>263</sup> [OPCV and Legal Representatives of Victims V02’s Joint Response to Mr Lubanga’s Document in Support of the Appeal A3](#), paras 108-111.

<sup>264</sup> [OPCV and Legal Representatives of Victims V02’s Joint Response to Mr Lubanga’s Document in Support of the Appeal A3](#), para. 112.

fall[ing] under the jurisdiction of the Court”.<sup>265</sup> The Trust Fund further submits that such an extension would not violate Mr Lubanga’s rights as he should only bear the costs of reparations for those individuals who fall under the definition of victim within the meaning of rule 85 of the Rules of Procedure and Evidence.<sup>266</sup>

### (c) Determination of the Appeals Chamber

210. The Appeals Chamber notes that the relevant provisions of the Court’s legal texts do not refer to awards for reparations to a community. The plain meaning of the term “community” is “a group of people living together in one place, especially one practising common ownership”, or “a group of people having a religion, race, profession, or other characteristic in common”.<sup>267</sup> A community does not need to be organised or have a representative. Rather, it is a group of people sharing a certain characteristic. Accordingly, the Appeals Chamber understands the Trial Chamber’s reference to a community to mean reparations to victims who are members of that community.

211. The Appeals Chamber recalls that only victims within the meaning of rule 85 (a) of the Rules of Procedure and Evidence and regulation 46 of the Regulations of the Trust Fund, who suffered harm as a result of the commission of the crimes of which Mr Lubanga was found guilty, may claim reparations against Mr Lubanga. It follows that where an award for reparations is made to the benefit of a community, only members of the community meeting the relevant criteria are eligible.

212. The Appeals Chamber notes that certain crimes may have an effect on a community as a whole. The Appeals Chamber considers that, if there is a sufficient causal link between the harm suffered by members of that community and the crimes of which Mr Lubanga was found guilty, it is appropriate to award collective reparations to that community, understood as a group of victims. Therefore, an award of collective reparations to a community is not necessarily an error. However, the Appeals Chamber considers that the scope of the convicted person’s liability for reparations in respect of a community must be specified. The Appeals Chamber notes

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<sup>265</sup> [Observations of the Trust Fund](#), para. 171.

<sup>266</sup> [Observations of the Trust Fund](#), para. 172.

<sup>267</sup> C. Soanes and A. Stevenson (eds.), *Concise Oxford English Dictionary* (Oxford University Press, 11<sup>th</sup> Edition, 2004), p. 289.

in this respect that the Impugned Decision provides that reparations can “contribut[e] more broadly to the communities”<sup>268</sup> and refers to the “impact that the crimes of enlisting and conscripting children under the age of [fifteen] and using them to participate actively in the hostilities can have on direct victims, their families and communities”.<sup>269</sup> The Appeals Chamber considers that such broad formulations may lead to the inclusion of persons who do not meet the above-mentioned criteria and would be inconsistent with rule 85 (a) of the Rules of Procedure and Evidence and regulation 46 of the Regulations of the Trust Fund.

213. The Appeals Chamber recalls that the Trial Chamber noted that “a community-based approach, using the [Trust Fund]’s voluntary contributions, would be more beneficial and have greater utility than individual awards, given the limited funds available and the fact that this approach does not require costly and resource-intensive verification procedures” (footnote omitted).<sup>270</sup> As addressed above, the Trial Chamber’s reference to a “community-based approach” meant in fact a collective award of reparations under rule 98 (3) of the Rules of Procedure and Evidence.<sup>271</sup>

214. The Appeals Chamber, however, notes that some aspects of the “community-based approach” are inconsistent with the applicable provisions regarding reparations. In particular, by adopting the “community-based approach”, the Trial Chamber granted an award for reparations to communities without setting out any criteria for distinction between those members of the communities who meet the above-mentioned eligibility criteria and other members of the communities. As a result, such an award of reparations may lead to imposing liability on Mr Lubanga for reparations with respect to persons who, despite being members of the communities identified by the Trial Chamber, suffered harm that did not result from the crimes for which Mr Lubanga was found guilty, within the meaning of rule 85 (a) of the Rules of Procedure and Evidence and regulation 46 of the Regulations of the Trust Fund. The Appeals Chamber considers that the Impugned Decision is erroneous in this respect and must be amended to clarify that members of communities are entitled to

<sup>268</sup> [Impugned Decision](#), para. 179.

<sup>269</sup> [Impugned Decision](#), para. 231.

<sup>270</sup> [Impugned Decision](#), para. 274.

<sup>271</sup> *Supra* para. 140.

an award for reparations in so far as the harm they suffered meets the criterion of eligibility in relation to the crimes of which Mr Lubanga was found guilty.

215. The Appeals Chamber points out that the above amendment should not be seen as precluding other members of the affected communities from being able to benefit from activities undertaken by the Trust Fund in relation to its assistance mandate. The Appeals Chamber takes note of the Trust Fund's submission that "[p]rinciples of non-discrimination, doing no/less harm and aiming at reconciliation, measures that include education on the root and underlying causes of the conflict, background of crimes and conflict, as well as measures that aim at guaranteeing non-repetition of the crimes, necessarily and genuinely need to include broader communities".<sup>272</sup> The meaningfulness of reparation programmes with respect to a community may depend on inclusion of all its members, irrespective of their link with the crimes for which Mr Lubanga was found guilty. It is therefore appropriate for the Board of Directors of the Trust Fund to consider, in the exercise of its mandate under regulation 50 (a) of the Regulations of the Trust Fund, the possibility of including members of the affected communities in the assistance programmes operating in the situation area in the DRC, where such persons do not meet the above-mentioned criteria.

2. *Alleged error related to the inclusion of localities not mentioned in the Conviction Decision*

**(a) Relevant parts of the Impugned Decision**

216. In the Impugned Decision the Trial Chamber held as follows:

First, the [Trust Fund], the Registry, the OPCV and the experts, should establish which localities ought to be involved in the reparations process in the present case (focusing particularly on the places referred to in the Judgment and especially where the crimes [*sic*] committed). Although the Chamber referred in the Article 74 Decision to several particular localities, the reparations programme is not limited to those that were mentioned. [Footnotes omitted.]<sup>273</sup>

**(b) Submissions of the parties and participants**

217. Mr Lubanga submits that the Trial Chamber erred in allowing non-judicial organs, namely the Trust Fund, the Registry, the OPCV and the experts, to determine

<sup>272</sup> [Observations of the Trust Fund](#), para. 168.

<sup>273</sup> [Impugned Decision](#), para. 282.

which localities ought to be involved in the reparations process.<sup>274</sup> Mr Lubanga submits that he may be held responsible, without having had the opportunity to make submissions at the trial stage, for additional facts, which exceed the factual framework set out by the Trial Chamber in the Conviction Decision.<sup>275</sup>

218. The OPCV and the Legal Representatives of Victims V02 submit that the places specifically referred to in the Conviction Decision were relied upon only to establish Mr Lubanga's criminal responsibility and, for the purpose of reparations proceedings, victims should be entitled to submit applications for the harm they suffered from any locality of the Ituri region, as long as such harm was the result of the crimes committed by Mr Lubanga.<sup>276</sup>

219. The Trust Fund and the OPCV and the Legal Representatives of Victims V02 submit that the language used by the Trial Chamber in the Conviction Decision, such as "widespread", "elsewhere" and "including", supports the view that the Trial Chamber did not intend to limit the geographical scope of reparations to the places specifically referred to in the Conviction Decision.<sup>277</sup>

### (c) Determination of the Appeals Chamber

220. The Appeals Chamber notes that the Trial Chamber did not limit the localities which are to be included in the reparations programmes to those mentioned in the Conviction Decision. The Trial Chamber also authorised an award for reparations in relation to localities that were not mentioned.

221. In the Conviction Decision, the Trial Chamber made the following conclusions regarding localities:

912. P-0014, P-0016, P-0017, P-0024, P-0030, P-0038, P-0041, P-0046 and P-0055 testified credibly and reliably that children under [fifteen] were "voluntarily" or forcibly recruited into the UPC/FPLC and sent to either the

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<sup>274</sup> [Mr Lubanga's Document in Support of the Appeal A3](#), para. 180.

<sup>275</sup> [Mr Lubanga's Document in Support of the Appeal A3](#), paras 180-184.

<sup>276</sup> [OPCV and Legal Representatives of Victims V02's Joint Response to Mr Lubanga's Document in Support of the Appeal A3](#), paras 114, 117.

<sup>277</sup> [Observations of the Trust Fund](#), paras 173-174.

headquarters of the UPC/FPLC in Bunia or its training camps, *including* at Rwampara, Mandro, and Mongbwalu.<sup>278</sup>

915. The testimony of P-0002, P-0016, P-0017, P-0024, P-0030, P-0038, P-0046, P-0055, D-0019 and D-0037 and the documentary evidence has demonstrated that children under the age of [fifteen] were within the ranks of the UPC/FPLC between 1 September 2002 and 13 August 2003. The evidence of P-0038, P-0016, P-0012, P-0046, P-0014, D-0019 and D-0037 proves that children were deployed as soldiers in Bunia, Tchomia, Kasenyi, Bogoro *and elsewhere*, and they took part in fighting, *including* at Kobu, Songolo and Mongbwalu. [Emphasis added, footnotes omitted.]<sup>279</sup>

222. The Appeals Chamber notes that the lists of localities in the above excerpts of the Conviction Decision contain the words “including”<sup>280</sup> and “elsewhere”<sup>281</sup>, indicating that the lists are not exhaustive. Furthermore, the Trial Chamber stated that these localities were mentioned in the testimony of the listed witnesses. The localities of the headquarters of the UPC/FPLC in Bunia and of its training camps at Rwampara, Mandro and Mongbwalu are *some* of the localities which witnesses P-0014, P-0016, P-0017, P-0024, P-0030, P-0038, P-0041, P-0046 and P-0055 mentioned in their testimony as places where children under the age of fifteen years were recruited into the UPC/FPLC.<sup>282</sup> Similarly, Bunia, Tchomia, Kasenyi and Bogoro are *some* of the localities where, in the evidence of witnesses P-0038, P-0016, P-0012, P-0046, P-0014, D-0019 and D-0037, children were deployed as soldiers, and Kobu, Songolo and Mongbwalu are *some* of the localities where, in the evidence of those witnesses, the children took part in fighting.<sup>283</sup>

223. The Appeals Chamber finds significant that the Trial Chamber exhaustively enumerated the witnesses who gave evidence in relation to the above-mentioned localities. Therefore, even though the Trial Chamber did not mention all localities in the Conviction Decision, it clearly indicated that the localities which do not appear in the above-quoted parts of the Conviction Decision were mentioned by the listed witnesses in their testimony. Similarly, in the section of the Conviction Decision

<sup>278</sup> [Conviction Decision](#), para. 912.

<sup>279</sup> [Conviction Decision](#), para. 915.

<sup>280</sup> [Conviction Decision](#), paras 912, 915.

<sup>281</sup> [Conviction Decision](#), para. 915.

<sup>282</sup> [Conviction Decision](#), para. 912.

<sup>283</sup> [Conviction Decision](#), para. 915.



concerning “Participation in battles and presence on the battlefield”,<sup>284</sup> the Trial Chamber concluded that “children under the age of [fifteen] were used by the UPC/FPLC between September 2002 and 13 August 2003, in order to participate in combat in Bunia, Kobu and Mongbwalu, *amongst other places*” (emphasis added).<sup>285</sup>

224. The Appeals Chamber, however, notes that in the section of the Conviction Decision regarding “UPC/FPLC training centres”,<sup>286</sup> the Trial Chamber formulated its findings in a different way with respect to the evidence concerning training centres in Bunia, Rwampara, Mandro, Mongbwalu and Kilo. The Trial Chamber concluded that “between September 2002 and 13 August 2003 children under the age of [fifteen] were recruited into the UPC/FPLC, and they were taken either to the UPC headquarters in Bunia or to the military camps at Rwampara, Mandro, and Mongbwalu for training”.<sup>287</sup> The Trial Chamber was “unable to conclude [...] that children under the age of [fifteen] were trained at Kilo”.<sup>288</sup> The Trial Chamber also noted that “[t]he submission of the prosecution that the UPC had 20 training camps ha[d] not been substantiated.”<sup>289</sup> The conclusion at paragraph 912 of the Conviction Decision, quoted above, must thus be regarded as *not* extending beyond the localities specifically mentioned.

225. The Appeals Chamber further notes that the Trial Chamber’s directions regarding localities not mentioned in the Conviction Decision make reference to the Trust Fund’s submissions, where the inclusion of such additional localities had been recommended.<sup>290</sup> The Appeals Chamber notes that in the submissions to which the Trial Chamber referred, the Trust Fund recommended that “[t]o do so [to ‘add localities where such crimes could have happened’], the Chamber could issue criteria to be applied for identifying localities for the purposes of reparations. Should documentation be required to be submitted to show that the criteria are fulfilled, the Chamber could consider holding a hearing in order to review and decide on the

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<sup>284</sup> [Conviction Decision](#), p. 364.

<sup>285</sup> [Conviction Decision](#), para. 834.

<sup>286</sup> [Conviction Decision](#), p. 351.

<sup>287</sup> [Conviction Decision](#), para. 819.

<sup>288</sup> [Conviction Decision](#), para. 818.

<sup>289</sup> [Conviction Decision](#), para. 819.

<sup>290</sup> See [Impugned Decision](#), footnotes 454-455, referring to [Trust Fund’s Observations on Reparations](#), paras 181-201.



issue”.<sup>291</sup> The Trust Fund’s submission was thus that if the Trial Chamber were to add localities other than those specifically mentioned in the Conviction Decision, it could set out criteria for identification of such localities and possibly hold a hearing. The Trial Chamber did not follow that recommendation.

226. In view of the foregoing, the Appeals Chamber considers that for purposes of reparations, the Trial Chamber did not intend to extend the scope of localities beyond those specifically mentioned either in the Conviction Decision or in the testimony of the witnesses listed in the second sentence of paragraph 915 of the Conviction Decision. Its direction to include localities not mentioned in the Conviction Decision appears to refer to localities mentioned in the evidence of the witnesses who are relied upon for the conclusion in the second sentence of paragraph 915 of the Conviction Decision. Without prejudice to the issue of whether the inclusion of localities not mentioned either in the Conviction Decision or in the testimony of the listed witnesses would be permissible for the purposes of reparations, the Appeals Chamber notes that the Trial Chamber’s choice not to adopt the safeguards recommended by the Trust Fund and not even to address the utility of their adoption is a further indication that the Trial Chamber did not intend to extend the scope of localities beyond those referred to in the testimony of the listed witnesses.

227. The Appeals Chamber considers that, in the particular circumstances of the present case, the provision of an exhaustive list of witnesses who in their testimony referred to localities not mentioned in the Conviction Decision is sufficiently clear for the purposes of defining the scope of Mr Lubanga’s liability for reparations. Given the limited number of the listed witnesses and the fact that they all gave evidence at trial, the Appeals Chamber finds that Mr Lubanga received sufficient information about the localities of the crimes in respect of which he may be held liable for reparations. The scope of his liability for reparations does not exceed the scope of the crimes for which he was found guilty.

228. For these reasons, the Appeals Chamber concludes that the Trial Chamber did not err by extending Mr Lubanga’s liability for reparations to localities not mentioned in the Conviction Decision, but mentioned in the evidence of the witnesses listed in

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<sup>291</sup> [Trust Fund’s Observations on Reparations](#), para. 194.

the second sentence of paragraph 915 of the Conviction Decision. The argument of Mr Lubanga is accordingly rejected.

## **F. Matters relevant to the implementation stage**

1. *Alleged error in the composition of a new Chamber for purposes of approving the draft implementation plan and resolving contested issues*

### **(a) Relevant portion of the Impugned Decision**

229. In the Impugned Decision the Trial Chamber held as follows:

260. Reparations proceedings are an integral part of the overall trial process. Article 75 of the Statute provides that the Court may order reparations, although it does not specify the body that is to monitor and supervise this part of the proceedings. Pursuant to Article 64(2) and (3)(a) of the Statute, the Chamber is of the view that these tasks fall within the responsibilities and functions of the Judiciary.

261. The Chamber considers that it is unnecessary for the present judges of Trial Chamber I to remain seized throughout the reparations proceedings. Therefore, reparations in this case will be dealt with principally by the [Trust Fund], monitored and overseen by a differently composed Chamber.

262. During the implementation process, as indicated below, the Chamber will be in a position to resolve any contested issues arising out of the work and the decisions of the [Trust Fund].

[...]

267. As already indicated, the reparations phase is an integral part of the trial proceedings, but unlike the Article 74 or the sentencing stages when the principal focus is on the defence and the prosecution, the Court is mainly concerned at this juncture with the victims, even though the prosecution and the defence are also parties to the reparations proceedings.

[...]

286. In order for the Judiciary to exercise its monitoring and oversight functions, the newly constituted Chamber should be updated on this five-step implementation plan on a regular basis. In accordance with Article 64(2) and (3)(a) of the Statute, the Chamber may be seized of any contested issues arising out of the work and the decisions of the [Trust Fund].

[...]

289. The Chamber accordingly:

[...]

c. Remains seized of the reparations proceedings, in order to exercise any necessary monitoring and oversight functions in accordance with Article 64(2) and (3) (a) of the Statute (including considering the proposals for collective reparations that are to be developed in each locality, which are to be presented to the Chamber for its approval);<sup>292</sup>

**(b) Submissions of the parties and participants**

230. Mr Lubanga and the OPCV and the Legal Representatives of Victims V02 submit that the Trial Chamber erred in law by delegating judicial supervision to a newly constituted Trial Chamber since reparations proceedings are an integral part of the trial against Mr Lubanga and therefore the same bench is required to sit until completion of the case.<sup>293</sup> Mr Lubanga further submits that none of the exceptions under rule 38 (1) of the Rules of Procedure and Evidence, which allows the replacement of a judge, are applicable.<sup>294</sup>

231. The Legal Representatives for Victims V01 submit that the Statute does not prevent a differently composed Trial Chamber from handling the reparations proceedings.<sup>295</sup> Similarly, the Trust Fund submits that the Trial Chamber did not err as the reparation order was issued by the same Chamber conducting the case.<sup>296</sup> It further submits that the tasks of the differently composed Trial Chamber only relate to “oversight, monitoring and final approval functions”, which are not “part of the integral process that should and must be run by the same Chamber”.<sup>297</sup>

**(c) Determination of the Appeals Chamber**

232. For the reasons that follow, the Appeals Chamber finds that the Trial Chamber did not err in assigning the approval of the draft implementation plan and the hearing of any contested issues to a newly composed Trial Chamber.

233. At the outset, the Appeals Chamber notes that the Statute and the Rules of Procedure and Evidence do not provide express guidance on the composition of the

<sup>292</sup> [Impugned Decision](#), paras 260-262, 267, 286, 289.

<sup>293</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), paras 21-31; [OPCV and Legal Representatives of Victims V02’s Document in Support of the Appeal](#), paras 31-43. *See also* [OPCV and Legal Representatives of Victims V02’s Joint Response to Mr Lubanga’s Document in Support of the Appeal A3](#), para. 34.

<sup>294</sup> [Mr Lubanga’s Document in Support of the Appeal A3](#), para. 27.

<sup>295</sup> [Legal Representatives of Victims V01’s Response to Mr Lubanga’s Document in Support of the Appeal A3](#), para. 15.

<sup>296</sup> [Observations of the Trust Fund](#), para. 98.

<sup>297</sup> [Observations of the Trust Fund](#), para. 99.

Chamber for purposes of monitoring and oversight after an order for reparations has been issued. In this regard, the Appeals Chamber recalls that the Trial Chamber stated that article 75 of the Statute “does not specify the body that is to monitor and supervise [the reparations] proceedings. [...] [T]he [Trial] Chamber is of the view that these tasks fall within the responsibilities and functions of the Judiciary”.<sup>298</sup>

234. The Appeals Chamber also notes that the Presidency, in a different context, determined that “there is no requirement for reparations proceedings to constitute a stage of the ‘trial’ *stricto sensu*”. As such, reparations do not need to be addressed by the Trial Chamber that issued the conviction and sentence” (emphasis added).<sup>299</sup>

235. In the case at hand, the Appeals Chamber notes that the Impugned Decision, including the order for reparations subject to the above amendments, was issued by the same Trial Chamber that ruled on the conviction and the sentence. The Appeals Chamber further notes 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.

236. Accordingly, the Appeals Chamber finds no error in the Trial Chamber’s finding that a newly constituted Chamber could oversee the implementation stage of the reparation proceedings. The arguments of Mr Lubanga, the OPCV and the Legal Representatives of Victims V02 in this regard are therefore dismissed.

## 2. *Implications of imposing liability on Mr Lubanga at the appellate stage of proceedings*

237. At the outset, the Appeals Chamber stresses that the imposition of liability on a convicted person, including the precise scope of that liability, should be done by the Trial Chamber in the order for reparations. Indeed, the Appeals Chamber considers it to be beyond question that a person subject to an order of a court of law must know

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<sup>298</sup> [Impugned Decision](#), para. 260.

<sup>299</sup> [Katanga Decision replacing two judges in Trial Chamber II Annex](#), para. 8. In this Decision, the Presidency noted that: “The differences between reparations proceedings and criminal proceedings are numerous, spanning many aspects of substance and procedure. While the Court’s jurisprudence on reparations is limited, some differences, such as the participants and evidentiary standards, are evident. Notably, victims receive an enhanced procedural role in that they become parties to the proceedings, thereby altering the nature and focus of proceedings from punitive to reparative”. [Katanga Decision replacing two judges in Trial Chamber II Annex](#), para. 6. *See also* [Admissibility Decision](#), paras 67, 70.

the precise extent of his or her obligations arising from that court order, particularly in light of the corresponding right to effectively appeal such an order, and that the extent of those obligations must be determined by a court in a judicial process. Furthermore, the procedures regarding the imposition of liability and determination of its scope, detailed below, are equally of an exceptional nature in view of the particular circumstances of the present case. The Appeals Chamber emphasises that the role of the Trust Fund should not be understood in any way to suggest that Mr Lubanga's liability for awards for reparations can go beyond the harms resulting from the crimes for which he was convicted, as set out above.

238. In the present case, the Appeals Chamber notes that in order to give effect to the determinations in this judgment with respect to liability for the awards for reparations, it would need to, *inter alia*, specify the scope of Mr Lubanga's liability for reparations and include such specification in the amended order contained in Annex A to the present judgment. In order to make such a determination, the Appeals Chamber would need to be provided with relevant information, given that the Trial Chamber had only made limited enquiries previous to the issuance of the Impugned Decision. In the view of the Appeals Chamber, this would require it to engage in an activity for which a Trial Chamber is better placed.

239. The Appeals Chamber also notes that if it were to specify the scope of Mr Lubanga's liability in the amended reparation order appended to the present judgment, such a stipulation would be made for the first time in respect of Mr Lubanga. Accordingly, that stipulation would at the same time be final and, thus, not subject to appeal. The Appeals Chamber therefore considers that, in the circumstances of the present case, it is not appropriate for it to determine the scope of Mr Lubanga's liability for reparations.

240. Furthermore, the Appeals Chamber notes that, following this judgment, the Trust Fund will be seized of the amended reparation order for purposes of implementation and a newly constituted Chamber will have the authority to approve the draft implementation plan submitted by the Trust Fund. The Appeals Chamber considers that, in view of the foregoing considerations, it is 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 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. The Trust Fund should also include the monetary amount, if the Board of Directors so decides, that it will complement as an advance in order that the awards can be implemented.<sup>300</sup>

241. In order to ensure that the rights of Mr Lubanga and the interests of the victims are respected and duly considered in the process, the Appeals Chamber considers that the parties must be able to make submissions on the scope of Mr Lubanga's liability, in light of the information provided by the Trust Fund in its draft implementation plan, within a time limit to be set by the Trial Chamber. Prior to the Trial Chamber setting the amount of Mr Lubanga's liability, the parties shall have the opportunity to appear before the Trial Chamber or make submissions in writing on the scope of Mr Lubanga's liability, in light of the information provided by the Trust Fund in its draft implementation plan, within a time limit to be set by the Trial Chamber.

242. Furthermore, the Appeals Chamber holds that the Trial Chamber's determination of the amount of Mr Lubanga's liability for the awards for reparations constitutes a part of the order for reparations within the meaning of article 75 (2) of the Statute and is therefore appealable, pursuant to article 82 (4) of the Statute. Having regard to the rights and interests discussed above, the Appeals Chamber considers it appropriate to set a time limit for the submission of the draft implementation plan by the Trust Fund. In the particular circumstances of the present case, the Trust Fund is directed to prepare the draft implementation plan and submit it to the newly constituted Trial Chamber within six months of the issuance of this judgment. The Trust Fund may be granted an extension of this time limit by the newly composed Chamber, if good cause for such an extension is shown.

243. Finally, the Appeals Chamber considers that, after the submission of the Trust Fund's draft implementation plan to the new Chamber, it is appropriate for the parties to have the opportunity to submit observations regarding those aspects affecting their interests and rights. Other interested parties may request leave of the Chamber to submit observations.

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<sup>300</sup> *Supra* para. 116.

## G. Decision on the *amici curiae* requests

### 1. Background

244. In its Admissibility Decision, the Appeals Chamber invited those organisations which were granted leave to submit observations before the Trial Chamber to request, pursuant to rule 103 (1) of the Rules of Procedure and Evidence, leave to submit observations before the Appeals Chamber.<sup>301</sup>

245. On 8 March 2013, Women's Initiatives for Gender Justice filed a request to submit observations on certain issues arising out of the appeals,<sup>302</sup> wherein it emphasized its expertise on gender issues and its involvement with the Court, which it argues make it "uniquely placed" to assist the Appeals Chamber.<sup>303</sup> Also on 8 March 2013, the NGOs *Justice Plus*, *Terres des Enfants*, *Fédération des Jeunes pour la Paix Mondiale* and *ASF* filed a joint application, requesting leave to submit observations on the following issues: 1) the scope of beneficiaries of the reparation award and 2) whether the individual victims' applications should be examined.<sup>304</sup>

246. On 8 April 2013, the Legal Representatives of Victims V01 filed their Response to Applications to Intervene as *Amici Curiae*, stating that they do not object to the requests.<sup>305</sup> On 9 April 2013, Mr Lubanga filed his observations on the requests,<sup>306</sup> opposing the participation of all the requesting organisations on the grounds of a lack of impartiality and relevant legal expertise.<sup>307</sup>

### 2. Determination of the Appeals Chamber

247. The Appeals Chamber recalls that the legal basis for *amicus curiae* and other forms of submissions is rule 103 of the Rules of Procedure and Evidence, which provides in relevant part, that, "at any stage of the proceedings, a Chamber may, if it considers it desirable *for the proper determination of the case*, invite or grant leave to a State, organization or person to submit, in writing or orally, any observations on any

<sup>301</sup> [Admissibility Decision](#), para. 77.

<sup>302</sup> [Women's Initiatives' Request for Leave to Intervene as Amicus Curiae](#), para. 11.

<sup>303</sup> [Women's Initiatives Request for Leave to Intervene as Amicus Curiae](#), para. 17.

<sup>304</sup> [NGOs' Applications for Leave to Intervene as Amici Curiae](#), pp. 4-5.

<sup>305</sup> [Legal Representatives of Victims V01's Response to Applications to Intervene as Amici Curiae](#), para. 5.

<sup>306</sup> [Mr Lubanga's Observations on the Requests to Intervene as Amici Curiae](#).

<sup>307</sup> [Mr Lubanga's Observations on the Requests to Intervene as Amici Curiae](#), paras 9, 21-48.

issue that the Chamber deems *appropriate*.” [Emphasis added.] Thus, rule 103 of the Rules of Procedure and Evidence provides that the Chamber shall evaluate whether the observations are “desirable for the proper determination of the case” and relate to “any issue that the Chamber deems appropriate”.

248. In this regard, the Appeals Chamber recalls that Pre-Trial Chamber I held that the rationale for admitting *amicus curiae* is to have “the opportunity to get experts’ information on relevant issues of legal interest for the proceedings”.<sup>308</sup> The Appeals Chamber also recalls that, in the Decision on Child Soldiers International’s Request to Intervene as *Amici Curiae*, it rejected a request to submit observations on three issues because those issues were “of an essentially legal nature, whereas Child Soldiers International is a ‘research and advocacy organisation’”.<sup>309</sup>

249. With respect to the request of the Women’s Initiatives for Gender Justice, the Appeals Chamber notes that this organisation mainly highlighted its expertise in gender justice and its long experience with the Court. The Appeals Chamber considers, however, that even if Women’s Initiatives for Gender Justice may offer a relevant contribution to the issue of whether victims of sexual and gender-based crimes are eligible for reparations, it has become clear that this aspect is not relevant for the determination of the appeals regarding these matters.

250. With regard to the other organisations’ joint request, the Appeals Chamber notes that these organisations filed their request “for the purpose of contributing to the proper administration of justice”.<sup>310</sup> However, they do not give any further details as to how their observations would assist the proper determination of the specific issues at hand, nor is this apparent from their submissions.

251. The Appeals Chamber therefore does not consider that it is desirable for the proper determination of the case to grant leave to *Justice Plus*, *Terre des Enfants*, *Fédération des Jeunes pour la Paix Mondiales* and *Avocats Sans Frontières* pursuant to rule 103 (1) of the Rules of Procedure and Evidence.

<sup>308</sup> [Pre-Trial Decision of 17 August 2007](#), para. 4.

<sup>309</sup> [Decision on Child Soldiers International’s Request to Intervene as \*Amici Curiae\*](#), para. 11.

<sup>310</sup> [NGOs’ Applications for Leave to Intervene as \*Amici Curiae\*](#), p. 4.




## H. APPROPRIATE RELIEF

252. Pursuant to rule 153 (1) of the Rules of Procedure and Evidence, the Appeals Chamber may “confirm, reverse or amend a reparation order made under article 75”. In the present appeals, the Appeals Chamber considers that it is appropriate to amend the Impugned Decision and, accordingly, to instruct the Trust Fund to implement the amended order for reparations in accordance with this judgment and the attached Annex A.

In her dissent to the *Lubanga* Conviction Judgment, Judge Anita Ušacka dissented with respect to the majority’s decision to confirm Mr Lubanga’s conviction and accordingly dissents with respect to this judgment.

Done in both English and French, the English version being authoritative.

  
**Judge Erkki Kourula**  
**Presiding Judge**

Dated this 3rd day of March 2015

At The Hague, The Netherlands